



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KWACH, SHAH & BOSIRE, J.J.A

CIVIL APPLICATION NO. NAI. 56 OF 2001 (33/2001 UR)

BETWEEN

WILDERNESS TRAILS (K)LIMITED.....APPLICANT

AND

THOMAS NKUBITU.....RESPONDENT

(An application for injunction an/or stay of any further proceedings in an intended appeal from the judgment of the High Court of Kenya at Meru (Omwitsa, Esq. Commissioner of Assize) dated 21st September, 2000
in

H.C.C.A. NO. 25 OF 1998)

RULING OF THE COURT

On 22nd day of April, 1998 the Resident Magistrate at Meru, N.H. Oundu Esq. entered judgment against the present applicant, **Wilderness Trails Limited**, in the sum of Shs.193,500/= plus costs. That was in **Meru C.M.C.C. No. 223 of 1997** wherein the present respondent, Thomas Nkubitu was the plaintiff and the present applicant and one Delia Craig were the defendants. The said defendants appealed against the judgment and decree of the Resident Magistrate. The appeal was heard by Commissioner of Assize, G.A. Omwitsa Esq., That was **Civil Appeal No. 25 of 1998** in the High Court at Nyeri. On 21st day of September, 2000 the learned Commissioner of Assize dismissed the appeal. On that day Mr. Mahan for the appellants applied for stay of execution pending an intended appeal to this Court. A temporary stay for 14 days was granted pending a formal application for stay. Such formal application was filed and came up for hearing on 11th October, 2000 when the learned Commissioner made the following order:

"By consent application dated 27/9/2000 is hereby allowed. There will be stay of execution pending appeal to court of appeal. Costs in the cause."

Mr. Mahan had, on behalf of the present applicant, filed a notice of appeal against the decision of the learned Commissioner, on the 21st day of September, 2000. A copy of that notice of appeal was served on M/s Ayub K. Anampiu & Company advocates for the respondent.

It must be mentioned, at this stage, that the learned Commissioner would not have granted an order for stay of execution unless there was a notice of appeal as provided for by Order 41 rule 4(4) of the Civil Procedure Rules.

By his letter of 22nd September, 2000 Mr. Mahan had sought copies of proceedings before the learned Commissioner and a copy of his judgment to enable him to lodge his client's intended appeal. That letter was copied to M/s Ayub K. Anampiu & Company, Advocates, so that the proviso to rule 81(1) enured to the benefit of the intended appellant.

Such was the scenario in the matter when Mr. Anampiu applied, on the 6th day of February, 2001, to the Resident Magistrate, who first heard the case, for the following orders:

"(a) That this Hon. Court be pleased to order that the money deposited to (sic) the joint names of R.M. Machage & company Advocates and Ayub K. Anampiu & Company Advocates be released to the firm of M/s Ayub K. Anampiu & Company Advocates.

(b) That costs of this application be paid by the defendants/res pondents."

The application lodged by M/s Ayub K. Anampiu & Company was titled "***Notice of Motion***" without mention of what provision of law or procedure it was based on. The grounds upon which that application was based were:

"(a) That there has been no appeal filed against the judgment in H.C.C.C (sic) No. 25/98.

(b) That no notice of appeal has been served on us.

(c) No appeal from the court of Appeal has been served on the firm of Ayub K. Anampiu & Company Advocates since the date of judgment in HCCA NO.25/98."

In support of that application Mr. Anampiu swore an affidavit in which he deponed that Mr. Mahan had never served a notice of appeal on him or the plaintiff (the present respondent). That statement under oath was clearly false. Mr. Anampiu admitted before this Court that he had been served with a copy of the notice of appeal. He could not have denied it in the face of proof of service deponed to by Mr. Mahan.

Mr. Mahan opposed the application for release of the moneys in question. In an affidavit sworn to oppose that application Mr. Mahan swore to the fact that his office had served a copy of the notice of appeal on Mr. Anampiu's office on 21st September, 2000. He also deponed to the fact that he had complied with the requirement for obtaining copies of proceedings and judgment which had not yet been supplied. The learned Magistrate's jurisdiction to make the orders sought was also challenged.

Despite all that was before him, the learned Magistrate, N.H. Oundu Esq., on the 28th day of February, 2001, ordered as follows:-

"1. That the money deposited in Account No.61422/652601/00 - Standard Chartered Bank Meru Branch in the joint names of Richard Marangia Machge and Ayub K. Anampiu Advocates be released to the firm of M/s Ayub K. Anumpiu & Company Advocates forthwith.

PENAL CLAUSE: TAKE NOTICE that any party served with this order and disobeys the same shall be liable to contempt of court."

It must be noted that the aforesaid "PENAL CLAUSE" was inserted despite the fact that no such order had been prayed for. It is also noted that the sum as ordered to be released stood at Shs.243,000/= when released to Mr. Anampiu, who on 2nd March, 2001 promptly paid a sum of Shs.169,546/= to his client Thomas Nkubitu.

What has caused us much anxiety is the manner and speed with which the sum was ordered released

when there was more than ample evidence before the learned Magistrate that the time for lodging an appeal had not expired. The matter had been dealt with by the superior Court. There was no jurisdiction in the Resident Magistrate's court to order such release. Once a matter had gone to the High Court the Magistrate had no jurisdiction to entertain any further applications in connection therewith. We are also concerned about the Penal Clause inserted by the Magistrate. Why did he do it? Is it possible that he had personal interest in seeing to it that the money was released to Mr. Anampiu?

The sum total of all what we have said so far is that the application before us must succeed. Mr. Anampiu left the matter to us instead of even attempting to justify what he did. What is sought before us is a mandatory injunction, under rule 5(2)(b) of the Rules of this Court, seeking orders to the effect that the respondent and his advocate do personally re-deposit the sum in question in another banking account. We are aware that a mandatory injunction is not usually granted under a rule 5(2)(b) application; but if circumstances so warrant we can grant it. The facts before us warrant the granting of such a far-reaching order in the interest of justice.

We order, therefore, that Mr. Anampiu personally shall within 7 days from the date of this order pay to Ms. Bali- Sharma & Bali-sharma Advocates the sum of Shs.243,000/= which sum the said advocates will deposit in an interest bearing account with Housing Finance Company of Kenya Ltd, Nyeri Branch in the joint names of Bali-Sharma & Bali-Sharma Advocates and the Deputy Registrar, High Court, Nyeri. We would normally order that costs of such an application be costs in the intended appeal but in this instance we order that the respondent and Mr. Anampiu pay in equal shares costs of this application to the applicant and we assess these costs at Shs.15,000/= which must be paid within 7 days and in default execution to issue.

Dated and delivered at Nairobi this 30th day of March, 2001.

R.O. KWACH

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JUDGE OF APPEAL

A.B. SHAH

.....

JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

I certify that this is
a true copy of the original.

DEPUTY REGISTRAR.