



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAIROBI

CIVIL APPLICATION NO. NAI. 170 OF 2000 (UR 76/2000)

MWENESI.....APPLICANT

VERSUS

SHIRLEY LUCKHURS.....1STRESPONDENT

K.H. OSMOND.....2NDRESPONDENT

(An application for stay of execution brought under Rules  
5(2)(b) of the Court of Appeal Rules in an intended  
appeal from the order of the High Court of Kenya at Nairobi  
(Githinji, J.) dated 17th May, 2000

in

H.C.C.C. NO. 3012 OF 1997)

\*\*\*\*\*

**RULING OF THE COURT:**

In her Originating Summons in the superior court taken out on 28th November, 1997 under **Order LII rule 4(1)(a) and (b), (2) and (3) of the Civil Procedure Rules**, the first respondent in this application sought orders that the second respondent and the applicant herein do deliver a cash account of all the money paid to them by her when she was their client; that they deliver up their bill of costs and tax the same in court in respect of High Court **Succession Cause NO. 272 of 1989 and High Court Civil Suit NO. 3077 of 1995** and refund to her all the money she had paid to them where (sic) services were never rendered together with interest at court rates and the costs occasioned by her Originating Summons. After the hearing of the said Summons, the learned superior court judge gave a ruling on 16th March, 2000 to the effect that a sum of K.Shs. 250,000/- was paid into the applicant's personal bank account NO. 233 - 688 - 010 at the Kenyatta Conference Centre Branch of the Kenya Commercial Bank. This sum of money was, according to the learned judge, paid to the applicant by the first respondent as a deposit for services to be rendered to her in the future. The learned judge then concluded:

"In the circumstances and in terms of prayer NO. 2 of the Originating Summons, I order Mr. Mwenesi to refund Shs. 250,000/- to the Applicant Shirley Luckhurst plus interest at court rates within 30 days in default execution to issue. Mr. Mwenesi to pay costs of the Originating summons."

Besides seeking a stay of execution of the order flowing from the aforesaid ruling, the applicant herein by a Notice of Motion filed in the superior court on 27th April, 2000 sought a review of that ruling so that the files, documents and records in **High Court Succession Cause NO. 272 of 1989 and High Court**

**Civil Suit No. 3077 of 1995** referred to in prayer NO. 2 of the first respondent's Originating Summons be ordered to be availed for inspection by the superior court and by the applicant herein so as to adequately determine the value of the professional services rendered to the first respondent or persons suing for or under her. This, according to the applicant's Notice of Motion, was the only way of facilitating a complete and effective determination of the value of the professional services rendered to the first respondent by the applicant and thus enable him meet the first respondent's claim against him.

In rejecting the applicant's Notice of Motion for review, the learned superior court judge in his ruling dated 17th May, 2000 had this to say:

"I have studied the supporting affidavit and read (the) affidavit sworn by Mr. Mwenesi on 16th March, 2000. All Mr. Mwenesi is saying is that he did some work for the applicant and which he cannot ascertain and that (the) matter should be re-opened and Mr. K.H. Osmond do produce the records so that (the) dispute can be heard and the amount of work done ascertained."

The learned judge then continued:

"I have considered the application, affidavits and counsel's submissions. I have also considered all the circumstances of this case. I do not find any sufficient cause or reason for reviewing the orders of March, 2000. It is only just that Mr. Mwenesi refunds the money to the applicant in the Originating Summons and then make a claim if any against K.H. Osmond for services he may have rendered."

From the foregoing brief *résumé* of what transpired before the learned superior court judge, there is a sense of injustice on the applicant as it would appear that he is being denied an opportunity to effectively meet the allegations made against him for even the order that he do refund the sum of K.Shs. 250,000/- to the first respondent in terms of prayer NO. 2 of the latter's Originating Summons runs counter to the said prayer which ex tenso seeks:

"An order that the Defendants deliver up their Bill of Costs and tax the same in court in respect to civil suits NO. Succession Cause NO. 272 of 1989 and High Court Civil Suit No. 3077 of 1995 and refund to the Plaintiff all the money paid to them where services were never rendered."

A court of justice has no jurisdiction to do injustice and where injustice on a party to a judicial proceeding is apparent, a stay of execution such as the one sought by the applicant herein under rule 5(2)(b) of the Court of Appeal Rules is irresistible. Consequently, we grant the applicant's application dated 27th June, 2000 and lodged in this Court on the same day so that the execution of the order of the superior court given on 16th March, 2000 is stayed pending the hearing and determination of the applicant's intended appeal against the order of the said court dated 17th May, 2000 refusing to review that earlier order. The costs occasioned by this application will be in the intended appeal.

**Dated and delivered at Nairobi this 14th day of July,**

**2000.**

**J.E. GICHERU**

.....

**JUDGE OF APPEAL**

**A.B. SHAH**

.....

**JUDGE OF APPEAL**

**M. KEIWUA**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**