

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

**AT MACHAKOS
CIVIL CASE NO.102 OF 1997**

INTERLAND DISTRIBUTORS LTD:.....PLAINTIFF

VERSUS

P. N. MASHRU LTD. & JOSEPH MULATYA KIMANI:..... DEFENDANT

Coram: R. Nambuye – Judge.

Mr. Masika – Advocate for Applicant

Mr. Ngolya – Advocate for Respondents

Court Clerk – Mr. Muli

R U L I N G

The plaintiff herein sued the defendants seeking various reliefs. Judgement was given in their favour for Kshs.604,350.00 less 20% conceded contribution. The defendant/applicant was aggrieved by that assessment and filed notice of appeal intending to appeal against the decree but before that could be done the court made an order that Kshs.361, 111.00 be paid out to the plaintiff together with costs of Kshs.129, 685.00 which was deposited in court vide receipt No.B139644. When the applicant wanted to have the decree approved for purposes of appeal is when they were told that the decree could not be approved as no costs had been paid for the suit either at the time of filing or the time of judgement.

Efforts to get the respondent either produce the receipt for paying the court fees has been fruitless hence this application. The grounds in support of the application are that fees have not been paid and in the absence of an order of court to the effect that fees are not to be paid the proceedings are a nullity and the respondent should be ordered to pay back what has already been paid to them and also pay the auctioneer's fees. That they rely on the fact that there is no receipt on the court file and non has been exhibited by the respondent and a letter from the Deputy Registrar of 14th November, 2000 confirms the same thing.

The respondent opposed the application on the grounds that it is for the court to show that fees was not paid. That they duly paid for the court fees, that the letter relied upon simply says that fees were either paid or not paid, it is the court which failed to put a receipt in the court file and so it is not the respondent's fault that no receipt has been availed to show payment.

In reply counsel for the applicant stated that it is for the plaintiff to show they paid court fees.

The court's assessment of the facts are that there is no court order that the suit be filed without payment of court fees and so the same has to be paid for. There is no certainty as to whether fees were paid or not as there is no documentary proof to that effect either from the court file oar from the plaintiff. For this reason the court has refused to approve the decree to enable the applicant process his appeal. Proof of payment is by exhibiting an original receipt issued to respondent a duplicate normally filed in the court record or a book copy. The court is informed that none is available.

If none is available then the responsibility falls on the plaintiff to satisfy that payment was either made at the time of filing or at the time of judgement as in the case of validated award like in this case. In the absence of proof to that effect the obligation falls on to the plaintiff/respondent to satisfy the same. In the premises I make the following orders in respect of the application dated 24th April, 2001 and filed on 26th April, 2001:

1. The plaintiff is given 30 days from the date of the reading of this Ruling to pay the court fees on the judgement sum of Kshs.30,580.00.

2. In default of No.1 above the judgement and the proceedings herein shall become null and void and the plaintiff shall be obligated to refund the amount paid to them by the defendant immediately upon default.

(b) The plaintiff shall also pay the auctioneer's fees in respect of the nullified proceedings, attachment to be agreed on as assessed as between the defendant and the auctioneers within 30 days from the date of their being notified to pay the same after such assessment on agreement.

(c) The plaintiff shall also be obligated to pay the defendant's advocate's fees in respect to those proceedings to be assessed or agreed also within 30 days from the date of notification to them to pay the same.

3. The plaintiff/respondent will pay the defendant/applicant's costs of this application.

Dated, read and delivered at Machakos this day of 2001.

R. Nambuye

Judge