



Safari Image Limited v Freight in Time Limited & another (Civil Appeal 142 of 2016) [2023] KEHC 2927 (KLR) (Civ) (28 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2927 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 142 OF 2016

JK SERGON, J

MARCH 28, 2023

BETWEEN

SAFARI IMAGE LIMITED APPELLANT

AND

FREIGHT IN TIME LIMITED 1ST RESPONDENT

IMAGE APPARELS LIMITED 2ND RESPONDENT

RULING

1. This ruling is the outcome of two applications. The first application is the motion dated September 28, 2021 taken out by the appellant/applicant whereof it sought for the following orders:
 - a) That the Honourable court be pleased to order the release of Kshs 2,507,063/= to NO Sumba & Company Advocates together with interest accrued thereof, the amount having been deposited on May 14, 2016 in the joint account names of NO Sumba & Company Advocates and Otieno Arum & Company Advocates in standard chartered Bank account No xxxxxxxxxxxxxx, Harambee Avenue, Nairobi pursuant to the Honourable Court's order of April 4, 2016.
 - b) That the respondents herein be condemned to pay the costs of this application.
2. The second application is the motion dated October 18, 2021 also taken out by the 2nd respondent/applicant whereof it sought for the following orders:
 - a) That the Honourable Court be pleased to order the release of Kshs 2,507,063/= to Otieno Arum & Company Advocates together with interest accrued thereof, the amount having been deposited on May 14, 2016 in the joint



account names of Otieno Arum & Co Advocates and NO Sumba & Company Advocates in the standard chartered Bank account No xxxxxxxxxxxxxx, Harambee Avenue, Nairobi pursuant to a consent order recorded and adopted by the Honourable court's order of April 4, 2016.

- b) That the Respondents herein be condemned to pay the costs of this application.
3. The appellant filed the affidavit sworn by Sarita R M Shah in support of the motion. The respondent filed the replying affidavit dated October 18, 2021, sworn by Jignesh Desai the director of the respondent company, to oppose the motion.
 4. I have considered the grounds stated on the face of the two motions and the facts deponed in the rival affidavits. I have further considered the rival submissions of learned counsels.
 5. It is the appellant's submissions that the security should be released back to them as they had made deposits in regards to its appeal Civil appeal No 142 of 2016 which was eventually successful.
 6. The appellant further submitted that had their property listed in a purported execution of a judgment to realize Kshs 2,507,063/=. The court overruled their objection to the proclamation, and the appellant asked for a stay pending appeal. They had to deposit the decretal sum, which was the amount the erroneous proclamation attempted to recover, in order for the stay to be granted.
 7. The appellant contended that in light of the fact that the appeal was successful and the sum was meant to serve as security for the effective execution of the ruling dismissing the appellant's objection and allowing its property to be proclaimed, the appellant is entitled to a reimbursement of the deposited sum.
 8. The appellant relied on the case of *Fred Kiprop v Ambrose Kimutai* [2021] eKLR the appellant had deposited security as a condition for its appeal against the lower court judgment that found him together with the AG liable to the respondent. On appeal the appellate court upheld the judgment but only as against the AG. The appellant was absolved from liability. On application for the release of the deposited funds, the respondent objected. It was held that the appellant was entitled to the same and the said funds released to him. The court noted that the stay orders were only in respect to execution against the appellant and not against the AG hence nothing had stopped the respondent from execution as against the AG during the pendency of the appeal. The stated as follows:

“It is noteworthy that the court was explicit that stay was only applicable in the case of the 1st defendant, who is the appellant herein; and not the Attorney General; and therefore the respondent would not be prejudiced at all should those funds be released, for nothing stopped him from levying execution against the Attorney General during the pendency of the appeal. That option is still available to him.”
 9. The appellant submitted that they were not party to the suit that gave rise to the decretal sum and that it is trite law that a party who is not the person against whom a decree is issued is not liable in respect to that decree.
 10. The appellant further submitted that while they were not a party to the lawsuit, it would be against the standards of fairness and justice to allow the amount placed by the appellant while execution should be against the 2nd respondent.
 11. The respondent opposed the application arguing that objection proceedings herein have been initiated to deny them their rightful fruits and that the directors of the two companies have formed and



incorporated the same to defraud innocent companies and individuals and use technicalities such as the current application without any merit.

12. The respondent urged the court to order the money to be released to the respondent's attorneys based on the deed of acknowledgment and the post-dated checks issued in settlement of the decree because there is a relationship between the two companies. They also argued that it is untrue that the appellant/applicant is not a party to Civil suit No 185 of 2015 that was dismissed because the deponent is also a director of the appellant therein, which is not at all denied, and that he respondent can execute against both directors who are husband and wife.
13. There is no question that the appellant requested a stay pending the appeal's hearing and decision when they filed the appeal. The record attests that the application in question was heard and decided on April 4, 2016 upon the appellant herein deposited the decretal sum of Kshs 2,507.063/= in a joint interest earning account of the advocates on record which was the condition set for grant of the stay.
14. Since the appellant herein was not party to the suit that gave rise to the decretal sum, the record confirms that the said application was heard and determined on August 26, 2021 pronounced itself in the judgment as follows:

“I have re-evaluated the arguments and the affidavit evidence presented before the trial court and it is clear that the objector (now appellant) presented evidence showing the goods proclaimed belonged to the objector. It is clear from the affidavit evidence that the objector is a company which is separate and distinct from Image Apparels Ltd. It is also not in dispute that Safari Image was not a party to the suit.”

15. In the end I find merit in the appellant's application dated September 28, 2021 and dismiss the respondent's application dated October 18, 2021.
16. In the result, having found that there is no valid reason for staying the release of the subject funds, the appellant's application dated September 28, 2021 is hereby allowed and orders granted as hereunder:
 - i. That the funds of Kshs 2,507,063/= deposited on May 14, 2016 pursuant to the honourable court's order of April 4, 2016 and currently being held in the joint account names of NO Sumba & Company Advocates and Otieno Arum & Company Advocates in standard chartered Bank account No xxxxxxxxxxxxxx, Harambee Avenue, Nairobi be released to NO Sumba & Company Advocates together with interest earned therefrom.
 - ii. That each party shall bear their own costs of the application.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 28TH DAY OF MARCH, 2023.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the 1st Respondent

..... for the 2nd Respondent

