



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 412 OF 2018

HENNER KENYA.....APPELLANT

VERSUS

GEORGINA BUNDI.....RESPONDENT

RULING

1. The applications dated 15th October, 2019 and 16th October, 2019 were canvassed simultaneously. This ruling is therefore in respect of both applications.
2. The application dated 15th October, 2019 principally seeks orders **that the sum of Kenya Shillings Two Million Eight Hundred and Ninety Nine thousand and Forty (Ksh.2,899,040/=) deposited in the joint account of A.N. Oeri & Co. Advocates and Gichamba & Co. Advocates at Development Bank of Kenya on the 1st day of September, 2019 be released to the Appellant herein.**
3. It is stated in the affidavit in support that the Appellant herein was aggrieved by the judgment of the Lower Court and filed the Appeal herein. That an application for stay of execution pending the hearing of the Appeal was allowed on condition that 50% of the decretal sum be deposited in a joint interest earning bank account of the parties herein and security furnished for the Balance of the 50% within 30 days. It is further stated that the said orders were not complied with as the bank deposit was not made in time and no security has yet been deposited in court.
4. The application is opposed. It is stated in the replying affidavit that the orders of this court in respect of the deposit of the 50% in a joint account have been complied with. That the orders for the deposit of security for the balance of 50% have also been complied with vide letter dated 2nd May, 2019 addressed to the Appellant's counsel. It is further averred that the account opening at Kenya Commercial Bank (hereinafter KCB) faced challenges and the parties sourced for other banks and eventually a joint account was opened at Development Bank of Kenya and the Respondent informed accordingly on 5th July, 2019.
5. The application dated 16th October, 2019 principally seeks order **that this honourable court be pleased to review/set aside the consequential orders on execution emanating from the orders issued on 3rd October, 2019.**
6. Secondly, **that this honourable court be pleased to stay the orders of execution issued on 3rd October, 2019 and reinstate the orders issued on 4th April, 2019.**
7. The application is premised on the grounds stated therein and is supported by the affidavit sworn by the Appellant's counsel. It is stated that following the dismissal of the application by the Appellant herein to have the Lower Court judgment set aside, the Appellant filed the Appeal herein. It is stated that following the orders of this court for the deposit of 50% of the decretal sum and the furnishing of security for the balance, the process of opening a joint account commenced at KCB but was faced with challenges.
8. That the advocates for the parties agreed to scout for another bank and the account was subsequently opened at Development Bank of Kenya and the deposit made and the Respondent informed accordingly on 6th May, 2019. That on 2nd May, 2019 a letter was dispatched to the Respondent's advocates informing them of the undertaking in respect of the balance of 50%.
9. The Appellant further stated that the typing of the proceedings in the Lower Court was being followed and was shocked by the complaint of non-compliance with the court's orders herein as they had fully complied and that the directions herein given on 3rd October, 2015 for execution to issue are not based on the correct position. That if the Applicant's counsel was in court on the dates the matter was mentioned in court a different conclusion would have been reached.

10. In opposition to the application, the Respondent filed a replying affidavit. It is stated that the counsels for the parties collaborated in the exercise to open a joint bank account save that she the Respondent was unaware of the challenges faced at KCB. That the Respondent was not informed of any compliance regarding the deposit of the 50% of the decretal sum in the bank account nor aware of the deposit of security for the balance in court. That if there was any such undertaking the same ought to have been taken to the Deputy Registrar for verification. That the Bank statement furnished to the Respondent reflects that the 50% decretal sum was deposited in the joint account on 1st September, 2019 after the lapse of the timelines stipulated by the court.

11. I have considered the two applications, the responses filed and the written submissions filed by the respective counsel for the parties.

12. The ruling dated 4th April, 2019 allowed the Appellant's application on condition that 50% of the decretal sum was deposited in a joint interest earning bank account of the counsels for the parties or in court and sufficient security given for the balance within 30 days of the said date. From the Appellant's own affidavit evidence, it is abundantly clear that the 50% of the decretal sum was made long after the lapse of the 30 days. If there were any challenges encountered in opening the Bank account, the Appellant could have come back to court for the extension of time or could have deposited the money in court within the timelines stipulated.

13. The deposit of the security for the balance of 50% ought to have been made in court through the Deputy Registrar. I have not seen any proceedings herein by the Deputy Registrar on the deposit of security. If the orders made herein on 4th April, 2019 were not clear to the Appellant, a clarification could have been sought from the court.

14. The Appellant was well represented in court on both the 24th September, 2019 and on 3rd October, 2019 when this case was mentioned in court. The court file was available and there was no evidence of any deposit made hence upon application by the Respondent the court gave the directions that the Respondent was in the circumstances at liberty to execute.

15. It is noted that the Record of Appeal is yet to be filed and it appears no steps have been taken to prosecute the Appeal. The deposit of 50% decretal sum was made late and the security for the balance is yet to be availed. It appears the Appellant has not been diligent. For the wider interests of justice, I allow the application dated 16th October, 2019 on condition that the security for the 50% balance of the decretal sum is deposited in court within 30 days from the date hereof. In default the application dated 15th October, 2019 to stand as allowed. Orders accordingly. The costs of the two applications to the Respondent.

Dated, signed and delivered in Nairobi this 28th day of Jan., 2021

B. THURANIRA JADEN

JUDGE