



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 1085 OF 2006**

**BOLI FESTUS ANDREW SIO.....PLAINTIFF**

**VERSUS**

**BOARD OF GOVERNORS, ST. MARY'S SCHOOL.....DEFENDANT**

**RULING**

1. The application dated 22 June, 2020 and the application dated 20<sup>th</sup> July, 2020 together with the Preliminary Objection dated 18<sup>th</sup> August, 2020 were heard contemporaneously. This ruling is therefore in respect of both applications and the Preliminary Objection.

2. The application dated 22<sup>nd</sup> June, 2020 filed by the Defendant seeks orders that:

**1. Spent**

**2. That this honourable court be pleased to order the release of Kshs.8,859,985.50 plus interest held in joint account No.xxxxxxxxxxxx at Stanbic Bank Kenya Ltd International Life House Branch in the joint names of Nyiha Mukoma & Company Advocates and S. M. Righa & Company Advocates to the firm of Nyiha Mukoma & Company Advocates for onward transmission to the Defendant/Applicant.**

**3. That this honourable court be pleased to order that the Plaintiff/Respondent herein refunds the Defendant/ Applicant the sum of Ksh.2,786,231.00 paid to him by the Defendant/Applicant through his Advocate on 3<sup>rd</sup> May, 2017.**

**4. That this honourable court be pleased to order that the firm of S.M. Righa & Company Advocates reimburses the Defendant/Applicant Ksh.167,097.50 paid on 27<sup>th</sup> June 2017 by the Defendant/Applicant as costs of the suit.**

**5. That the costs of this Application be provided for.**

3. It is stated in the grounds set out in the application and the affidavit in support thereof that judgment was entered herein on 14<sup>th</sup> September, 2016 in favour of the Plaintiff/Respondent for the sum of Ksh.11,144,924/= plus costs. That the Defendant/Applicant was aggrieved by the said judgment and filed an Appeal. That the Defendant also filed before this court an application for stay of execution which was allowed on conditions upon which the application herein is based.

4. It is further stated that the Court of Appeal has delivered its judgment and overturned the decision of this court, hence the application at hand.

5. The application is opposed. It is contended in the replying affidavit that 25% of the decretal sum was released to the Plaintiff's Advocate and the balance deposited in a joint interest earning account of the Advocates for the parties. It is further stated that the Plaintiff is dissatisfied with the Court of Appeal Judgment and has filed a Notice of Appeal and applied for the copies of the proceedings and judgment to enable him lodge an application for leave to Appeal to the Supreme Court of Kenya. It is further averred that the Plaintiff stands to suffer substantial loss if the application is allowed. It is further stated that the intended Appeal is meritorious and has high chances of success.

6. The application dated 20<sup>th</sup> July, 2020 filed by the Plaintiff principally seeks orders that pending the hearing and determination of the Plaintiff/Applicant's application dated 7<sup>th</sup> February, 2020 pending before the Court of Appeal at Nairobi, a conservatory order do issue maintaining the *status quo* between the parties herein. It is stated in the grounds and the affidavit in support of the application that the

Plaintiff is dissatisfied with the Court of Appeal Judgment and has filed a Notice of Appeal and an application for stay of execution and for leave to appeal to the Supreme Court of Kenya. That the said applications are pending before the Court of Appeal. The court was urged to preserve the money deposited in a joint account pending the hearing and determination of the applications before the Court of Appeal as the Applicant stands to suffer irreparable loss.

7. In a replying affidavit filed in opposition to the application, it is stated that the application is misconceived as it assumes that this court has the requisite jurisdiction to entertain the same. It is stated that following the delivery of the judgment herein, this court became *functus officio*. That the Appeal has been determined in favour of the Defendant and therefore the orders of conditional stay of execution issued herein have been discharged. That consequently this court's administrative function is to release the said funds to the Defendant. That trying to conserve the deposited money would amount to issuing orders contrary to the Judgment of the Court of Appeal.

8. The Defendant also filed the Notice of Preliminary Objection dated 18<sup>th</sup> August, 2020 essentially on the grounds that this court lacks the requisite jurisdiction to hear and the application dated 20<sup>th</sup> July, 2020 as the Court of Appeal has made it's determination.

9. I have considered the two applications, the Preliminary Objection and the written submissions filed by the respective counsel for the parties.

10. It is abundantly clear from both parties herein that the Court of Appeal determined the Appeal on 24<sup>th</sup> January, 2020. The orders of stay of execution herein were allowed on condition that 25% of the decretal sum be released to the Plaintiff and the balance deposited in a joint interest earning bank account of the parties pending the hearing and determination of the Appeal. The Court of Appeal has now spoken. Consequently, I agree with the Defendant's submissions that this court became *functus officio* upon the determination of the Application for stay of Execution pending Appeal.

11. The orders issued herein came to an end when the Judgment of the Court of Appeal was delivered. In the premises, the Defendant is entitled to the 25% of the money released to the Plaintiff and the balance deposited in a joint account. This court did not make any orders in respect of any payment of Ksh.167,097.50 to the firm of S.M. Righa & Co. Advocates.

12. The application dated 20<sup>th</sup> July, 2020 seeks conservatory orders to maintain the *status quo* between the parties pending the hearing of the applications pending before the Court of Appeal. The application dated 7<sup>th</sup> February, 2020 filed before the Court of Appeal has been exhibited herein. The same seeks *inter alia*, a conservatory order to preserve the money deposited herein as security. That is exactly the same orders sought herein. The application herein is in breach of the *sub-judice* rule contrary to Section 6 of the Civil Procedure Act.

13. With the foregoing, I allow the application dated 22<sup>nd</sup> June 2020 in terms of prayer No. 2 and for the refund of the 25% of the decretal sum released to the Plaintiff. The Preliminary Objection is sustained and the application dated 20<sup>th</sup> July, 2020 is dismissed. Each party to bear own costs.

**Dated, signed and delivered at Nairobi this 25<sup>th</sup> day of Feb., 2021**

**B.THURANIRA JADEN**

**JUDGE**