



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 673 OF 2012

SUDHIR J. TRIVEDY.....APPELLANT

VERSUS

KISIMA DRILLING (EA) LIMITED.....RESPONDENT

RULING

1. The application for determination before me is the Notice of Motion dated 21st January 2020 in which the applicant who was the appellant in this appeal seeks that KShs.350,000 deposited with the *Bank of India* in the joint names of counsel for the parties namely *Wekesa & Simiyu Advocates* and *Mbugua & Mbugua Advocates* as a condition for filing the appeal be released together with all the accrued interest to the appellant's advocates as the appeal has already been determined in the applicant's favour.

2. The application is opposed through grounds of opposition filed by the respondent on 24th June 2020. While admitting deposit by the appellant of the aforesaid amount in the parties advocates' joint account described in prayer 1 and that the appeal had been determined in the applicant's favour, the respondent opposed the motion on grounds that it had filed an appeal to the court of appeal against this court's decision; that the appeal was still pending hearing and that consequently, the money should continue being held in the joint interest account until the appeal was determined.

3. The application was argued before me on 30th June 2020 by learned counsel *Mr. Mbugua* who represented the applicant and learned counsel *Mr. Wesonga* who appeared for the respondent. In his submissions, *Mr. Mbugua* clarified that the money was deposited as a condition for stay of execution pending determination of the appeal not as a condition for filing the appeal as stated in the application. He asserted that since the appeal has been concluded, there was no reason to retain the money in the bank and the same should be released to the applicant. He pointed out that no appeal can operate as a stay of execution and that in any event, the respondent had not demonstrated any interest in pursuing the appeal as more than a year later, no memorandum of appeal had been filed.

4. In his riposte, *Mr. Wesonga* argued that the application should be dismissed as releasing the money as proposed would defeat the purpose of the intended appeal; that the money should continue being held in the bank account because if the appeal failed, the applicant would have the money together with accrued interest. Counsel further submitted that the delay in filing the record of appeal in the Court of Appeal has been occasioned by this court's failure to supply the respondent with certified copies of the proceedings and judgment.

5. Having considered the parties' rival submissions, I find that it is not disputed that the money in question was deposited by the applicant as a condition for stay of execution pending disposal of the appeal. It is also not in dispute that the appeal has been determined by this court in favour of the applicant. The respondent has also not contested the applicant's claim that there is no order issued by the Court of Appeal staying execution of this court's judgment delivered on 1st July 2019.

6. Given the above undisputed facts and considering that it is trite law that the pendency of an appeal cannot by itself operate as a stay of the judgment or orders subject of the appeal, I find no good reason to justify the continued retention of the money in question in the bank since the purpose for which the money was deposited is now spent. I find no merit in the respondent's submission that the release of the money to the applicant will render its intended appeal nugatory. It has not been suggested or claimed that the applicant is a man of straw and he will be incapable of refunding KShs.350,000 in the event that the respondent's intended appeal is prosecuted with a positive outcome.

7. In the result, I am satisfied that the applicant's Notice of Motion dated 21st January 2020 is merited and it is hereby allowed in terms of prayer 1.

8. Though as a general rule costs follow the event, given the nature of the orders sought in the motion, I will not make any order as to costs.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of July 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Mbugua for the applicant

Mr. Wesonga for the respondent

Ms Mwinzi: Court Assistant