



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CIVIL APPEAL NO. 29 OF 2018

APA INSURANCE CO. LTD.....APPELLANT

-VERSUS-

ESTHER KAVINDU MWONGO & JONATHAN MWATHI (*Sued as the*

legal representatives of) ISAAC WAMBUA MUTISYA...RESPONDENTS

RULING

1. The application for determination is dated 01/10/2019 and was filed under certificate of urgency. It is brought under sections 3, 3A & of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules 2010 and Article 159 (a) of the Constitution of Kenya. It seeks the following orders.

a. That, the court do find that the Appellant herein has fully satisfied the decretal amount both in this appeal and Kilungu PMCC No 15 of 2017 which in fact has been overpaid by Kshs.385,930/=.

b. That, the party and party costs taxed in favor of the Respondent be recovered from the overpaid amount.

c. That, the Respondent's advocates be ordered to refund to the Appellant's Advocate Kshs.385,930/= out of Kshs.4,470,647/= paid to them by CFC Stanbic bank pursuant to the court order of 11th June 2019.

d. That, the Respondent's advocate be ordered to refund to the Appellant's advocate the balance of Kshs.230,150/= for onward transmission to the Appellant's client.

e. That, cost of this application be awarded to the Appellant. .

2. The application is supported by the grounds on its the face and the undated affidavit of M/s Sarah Amondi Jumma advocate.

3. She deposes that after conclusion of the appeal in favor of the Respondents, an amount of Kshs.4,470,647/= in the joint interest account at Stanbic bank was released to them pursuant to their application. Further that the Appellant's plea for adjournment to respond to the application for release of funds was disallowed. A transfer form is exhibited as **SAJ-1**.

4. She deposes that at the time of the release order on 11/06/2019, the amount due to the Respondents was Kshs.4,037,279/= hence there was an overpayment of Kshs.385,930/=. That their letter to the Respondent's counsel, advising that the appeal costs would be recovered from the overpayment, elicited no response. The letter is exhibited as **SAJ-2**.

5. Further, she deposes that the Respondent's party and party costs for the appeal were taxed at Kshs.230,150/= hence there will still be a balance of Kshs.182,712/= after recovering the amount from the overpayment of Kshs.385,930/=. She avers that despite the extra amount, the Respondent's counsel threatened to commence execution with respect to the appeal party and party cost *vide* the letter dated 25/09/2019. The letter is exhibited as **SAJ-3**.

6. She deposes that it would be manifestly unjust for the Respondent's counsel to execute while in possession of an extra amount belonging to the Appellant. It is also her deposition that the Appellant lacked an opportunity to establish and raise these issues as their application for adjournment was disallowed.

7. The application is opposed through a replying affidavit sworn on 18/02/2019 by M/s Ann Thiong'o advocate. The gist of the opposition is that there is no overpayment and the Appellant is not entitled to any refund. She has also deposed that the Appellant's appeal was dismissed with costs and the Appellant is yet to pay the taxed costs. She has exhibited decrees and other documents marked **AT 1-9** showing a chronology of how the claimed amount accrued.

8. She deposes that it is unfathomable for the Appellant to claim that the interest accrued in the joint interest earning account is an overpayment to the Respondents. She avers that if the appeal had succeeded, the Appellant would also have been entitled to all the money in the account plus interest accrued and costs of the appeal.

9. The parties elected to rely on the filed affidavits which I have considered. The only issue for determination is whether there is an overpayment.

Analysis and determination

10. Judgment in the primary suit *to wit*; Kilungu PMCC No. 11 of 2016 was delivered on 07/09/2016 and the Respondents were awarded general damages of Kshs.3,074,400/= plus costs and interest. The decree (AT-1) shows that the interest was Kshs.107,600/= and costs were Kshs.195,755/= hence giving a total of Kshs.3,377,755/=.

11. The Respondents filed a declaratory suit *to wit*; Kilungu PMCC No. 5 of 2017. It was determined in their favour and they were also awarded costs and interest. The decree (AT-3) shows the principal amount as Kshs.3,377,755/=, the interest as Kshs.709,329/= and the costs as Kshs.168,685/=. The Respondents had also been issued with warrants of attachment at a cost of Kshs.2,450/= as evidenced by AT-4. The total at that juncture was Kshs.4,258,219/=.

12. The Appellant appealed against the judgment of the declaratory suit in this court and the appeal was accompanied by an application for stay of execution. As per the procedure in grant of stay, the Appellant furnished security in the sum of Kshs.4,255,769/= as evidenced by **AT-5, a, b & c**. The appeal was dismissed with costs after about one year and the amount in the joint interest earning account had earned an interest of Kshs.214, 878.15/=.

13. The Respondents applied to have all the money in the joint interest earning account released to them and the court granted the orders on 11/06/2019. Accordingly, the bank released Kshs.4,470,647/= as evidenced by **SAJ-1**. It is in this application that the Appellants are decrying being denied an opportunity to respond. Meanwhile, the appeal costs were taxed at Kshs.203,218/38/.

14. Evidently, the amount released by the bank to the Respondent's counsel constitutes the award in the primary suit, declaratory suit, costs and interest legitimately earned during the pendency of the litigation and the interest earned on the security. It is indeed unfathomable for the Appellant's counsel to claim that the interest on security is an overpayment. Had its appeal been successful the whole sum plus accrued interest would have been released to it.

15. The Appellant exercised its right to appeal and lost. That was essentially a confirmation that the money in the joint account belonged to the Respondent. It is the money in the account that earned interest hence the same also belongs to the Respondents. At this point, it is clear that even if the Appellant had been given an opportunity to oppose the release of the funds, the same would not have served any useful purpose.

16. The costs of appeal as taxed remain unpaid and it was only proper for the Respondents' counsel to give notice of execution.

17. I find no merit in this application which I dismiss with costs.

Delivered, signed & dated this 17th day of September 2020, in open court at Makueni.

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H. I. Ong'udi

Judge