



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 88 OF 2011

BETWEEN

BENARD OLWENY AGUTU.....APPELLANT

AND

SHEM ODUOR ADIEDO.....RESPONDENT

RULING

Background

1. This appeal arises from **MASENO SPMCC 33 of 2010** where the appellant who was the defendant was ordered to pay the plaintiff (respondent in this case) and 4 others damages arising out of injuries they suffered in a road accident.
2. Applications dated 20th February, 2012 for stay of execution pending appeal in the 5 cases were allowed by consent on condition that the Appellant pays half of the decretal sum to the plaintiffs/respondents and the balance thereof be deposited in an interest earning account in the names of advocates for both parties. The consent order was complied with.
3. The appeals were subsequently heard and **CIVIL APPEAL NOS. 88; 89 and 90 OF 2011** were dismissed whereas the sums of Kshs. 200,000/- and Kshs. 250,000/- which were the subject of **CIVIL APPEAL NOS. 91 and 92 OF 2011** were reduced to Kshs. 100,000/- in each.
3. By an application dated 3rd October, 2018, the Applicant seeks orders that that the amount paid in excess in **CIVIL APPEAL NO. 92 OF 2011** be offset from the amount held in the joint account which the respondent opposes.
4. I have considered the notice of motion in the light of the supporting affidavit, annexures thereto and the replying affidavit.
5. It is not disputed that the respondent and the minors for whom he sued in **CIVIL APPEAL NOS. 88, 89, 90 and 91 OF 2011** are not parties to **CIVIL APPEAL NO. 92 OF 2011**.
6. Consequently, I find that the applicant's claim for refund of amount paid in excess in **CIVIL APPEAL NO. 92 OF 2011** lies against **BENEDICT OTIENO**, the respondent in that case and not against the respondent herein.
7. In the result, the notice of motion dated 3rd October, 2018 has no merit and it is disallowed with costs to the respondent.

DATED AND SIGNED IN KISUMU THIS 28TH DAY OF MARCH 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For the Applicant -N/A

For the Respondent -N/A