



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 296 OF 2012

ERINE CAMPBELL COMPANY LIMITED.....APPELLANT/RESPONDENT

-VERSUS-

GIGHUGU HOUSING CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT/APPLICANT

RULING

1. The respondent/applicant herein filed the Notice of Motion dated 8th June, 2018 seeking an order for the release of the monies deposited in account number [xxxx] in Consolidated Bank of Kenya Limited, Koinange Street Branch together with the accrued interest to the firm of Munene Wambugu & Kiplagat Advocates, plus costs of the application. The Motion is supported by the affidavit sworn by *C.K. Kiplagat*.
2. The appellant/respondent filed the replying affidavit of *Gopal Vagjiani* in response to the Motion.
3. The respondent/applicant rejoined with the further affidavit sworn by *C.K. Kiplagat*, following which *Christine Mumbua Mbithuka* swore a separate further affidavit on behalf of the appellant/respondent.
4. The parties argued the application orally before this court. *Mr. Onyango* learned counsel for the appellant/respondent contended that the application ought not to be allowed at this point in time for the reason that there is need to have a reconciliation of the accounts undertaken first since the amount sought to be released is being disputed by his client.
5. He went on to argue that there appears to be an unexplained shortfall in the amount deposited as security for the due performance of the decree in the account in question.
6. *Mr. Kiplagat* advocate for the respondent/applicant retorted by largely submitting that there is no need to have the accounts reconciled since the relevant account speaks for itself.
7. I have considered the grounds presented on the face of the Motion; the various affidavits supporting and resisting the Motion; and the rival oral submissions brought forth by the parties' respective advocates.
8. The subject matter in question relates to a subsisting landlord- tenant relationship between the parties. The appellant/ respondent lodged the complaint at the Business Premises and Rent Tribunal under Tribunal Case No. 570 of 2010. Upon hearing the parties, the tribunal entered its judgment on 7th October, 2011 requiring the appellant/respondent to pay to the respondent/applicant the sum of Kshs.150,000/ as the new rent.
9. Being dissatisfied with the above decision, the appellant/ respondent applied for a review of the same but its application was dismissed vide the tribunal's ruling delivered on 10th May, 2012.
10. The appellant/respondent was certainly aggrieved by the aforesaid ruling, for it opted to challenge the same by way of the appeal lodged with the High Court. To that effect, it filed the application dated 5th July, 2012 seeking an order for stay of execution pending the hearing and conclusion of the appeal.
11. I have perused the record which shows that on 7th December, 2012 the parties agreed by consent to have the application seeking an order for stay of execution allowed on a number of conditions.

12. For one, the appellant/respondent was ordered to deposit the sum of Kshs.2,464,800/ in an interest earning account in the joint names of the parties within 60 days therefrom. Secondly, the appellant/respondent was ordered to pay the sum of Kshs.70,000/ constituting monthly rent directly to the respondent's/applicant's advocates with effect from 1st December, 2012 until determination of the appeal. Further to this, the appellant/respondent was ordered to deposit Kshs.57,800/ being the difference between the original and reviewed rent amounts in a joint interest earning account to be opened by the parties within 15 days from the date of the consent order.

13. It is not disputed that soon thereafter, the parties' respective advocates opened a joint interest earning account with Consolidated Bank of Kenya Limited. It is also not disputed that the appellant/respondent vacated the respondent's/applicant's premises sometime in June, 2015. In my understanding, the real issue has to do with whether a reconciliation of the accounts ought to precede a granting of the order for release of the sums being sought from Account Number 513439.

14. To begin with, the respondent/applicant on the one hand averred that the appeal was dismissed with costs on 29th September, 2017; while on the other hand, the appellant/ respondent stated that the appeal was compromised or collapsed in June, 2015 when it vacated the suit premises.

15. In answering the above, I turn to the record which shows that the appeal was dismissed on 29th September, 2017 for failure by the appellant/respondent to show cause as to why such order should not be made, thereby confirming that the appeal terminated on the said date.

16. Be that as it may, the appellant/respondent asserted that there has been an overpayment of the sums ordered by the court.

17. It also contended that following the consent order, the parties opened two (2) separate joint accounts with Consolidated Bank of Kenya Limited, that is Account Numbers [xxxx] and [xxxx]; and that the sum of Kshs.2,464,800/ was deposited into the former account whereas the sum of Kshs.1,791,800/ which the respondent/applicant is currently claiming was deposited into the latter account.

18. In contrast, the respondent/applicant stated that there is no such issue on overpayment and that the only excess funds would be the accrued interest on the deposited amount, which it is lawfully entitled to. It is equally contested that the deposit of Kshs.2,464,800/ was not made, contrary to the assertions made by the appellant/respondent.

19. From the foregoing, I have gathered that no clear evidence has been availed to ascertain whether the appellant/respondent did in fact comply with the court order requiring it to deposit the sum of Kshs.2,464,800/. The document marked "CMM-2" and annexed to the further affidavit of *Christine Mumbua Mbithuka* does not constitute a true statement of account issued by Consolidated Bank of Kenya Limited hence I am unable to rely on its contents.

20. Moreover, the specific amount being held in Account Numbers [xxxx and [xxxx have not been clarified by way of evidence and the statement of accounts annexed to the further affidavit of *C.K. Kiplagat* does not appear to shed light on the position since they do not indicate which between the two (2) above-referenced accounts holds the amounts set out in the statement.

21. In addition, the statement of accounts appear to show that even after the dismissal of the appeal in 2017, deposits continued to be made in the account indicated therein.

22. In my view, it is therefore apparent that there is a need to have the amounts in the Account Numbers [xxxx and [xxxx ascertained and proper accounts availed on the same before an order for release of any monies can be made.

23. For the foregoing reasons, I am unable to grant the order being sought in the Motion at this stage. The Motion is premature, the same is hereby struck out with no order as to costs. However, the parties are at liberty to move the court appropriately in respect to the question of accounts.

Dated, signed and delivered at Nairobi this 22nd day of November, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Respondent

..... for the Respondent/Applicant