



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 164 OF 2016**

**CAPE SUPPLIES LIMITED.....APPELLANT**

**VERSUS**

**TREADSETTERS TYRES LIMITED.....RESPONDENT**

**RULING**

1. The respondent, *Treadsetters Tyres Limited*, has approached this court by way of a Notice of Motion dated 17<sup>th</sup> April 2019 seeking orders directing that the monies held in NIC Bank joint account number 100358279 operated by Mwaniki Gachoka & Company Advocates and Okatch & Partner Advocates be released to account number 1000431245 held by NIC Bank in the name of Mwaniki Gachoka & Company Advocates.

2. The application is premised on the grounds stated on its face and the depositions made in the supporting affidavit sworn by *Ms Jane Baiyu*, the applicant's Group Finance Manager. It is the applicant's case that it deposited KShs.1,331,059 into the aforesaid joint interest earning bank account pending the hearing and determination of the appellant's appeal in compliance with a court order issued on 6<sup>th</sup> April 2016; that the appeal was heard and determined on 27<sup>th</sup> March 2019 when it was dismissed with costs to the applicant; that thereafter, the respondent neglected or refused to sign a consent order authorizing the bank to release the money held in the joint account to the applicant's advocates; that it is in the interest of justice to have the money released to the applicant's advocates in order to settle the dispute between the parties which has been pending since year 2007 and that in any event, no prejudice will be occasioned to the respondent if the orders sought were granted.

3. The application is opposed through a replying affidavit sworn by the respondent's manager, one *Kinaro Kibanya*. The deponent avers that it is aggrieved by this court's decision to dismiss its application for review which sought a review of the court's decision to dismiss its appeal with costs to the applicant; that it intends to file an appeal to the Court of Appeal against the ruling dated 18<sup>th</sup> July 2019 and it could not have done so earlier since it had not been aware that the ruling which was to be delivered on notice had in fact been delivered; that in view of the intended appeal, the orders sought should not be granted.

4. The application was argued before me on 3<sup>rd</sup> December 2019. Learned counsel *Mr. Gachoka* represented the appellant while learned counsel *Mr. Okatch* appeared for the respondent. Both counsel in their submissions buttressed and expounded on the positions taken by their respective clients in support and in opposition to the motion as summarized hereinabove.

5. I have carefully considered the application and the rival submissions made by counsel on behalf of the parties. I have also perused the court record. I find that it is not disputed that KShs.1,331,059 was deposited in an interest earning joint account held at NIC Bank operated by both counsel on record as security for the due performance of the decree issued in the lower court pending hearing and determination of an appeal filed in this court by the respondent.

6. The court record shows that the respondent filed the appeal after it was aggrieved by the trial court's decision dated 2<sup>nd</sup> December 2015 in which judgment was entered in favour of the applicant against the respondent in the sum of KShs.576,114.37 with interests at the rate of 17% per annum from the date of filing suit until payment in full together with costs of the suit. The record also shows that this court (*Sergon J*) heard the appeal and dismissed it with costs to the applicant on 27<sup>th</sup> March 2019. An application filed by the respondent seeking a review of the court's judgment was also dismissed on 18<sup>th</sup> July 2019.

7. The respondent has urged this court to decline to grant the orders sought on grounds that it intends to file an appeal against this court's ruling dismissing its application for review but nothing has been availed to this court to substantiate this claim. There is no evidence to show that either a notice of appeal evidencing intention to appeal to the Court of Appeal has been filed or that any application seeking leave to file the intended appeal out of time has been filed in the Court of Appeal.

8. As matters now stand, there is no appeal pending in the Court of Appeal challenging the judgment in which the respondent's appeal was dismissed and in my view, no good reason has been advanced by the respondent to justify refusal of this court to deny the applicant the orders sought. The court cannot be expected to base its decision on mere speculation that the respondent will in an undisclosed future file an appeal against this court's decision. The applicant being the successful litigant in both the lower court and this court is entitled to the fruits of his judgment obtained in the lower court about four years ago now that the respondent's appeal against the trial court's decision has been dismissed and the validity of the court's decision dismissing the appeal has to date not been challenged on appeal.

9. In view of the foregoing, I find merit in the Notice of Motion dated 17<sup>th</sup> April 2019 and it is hereby allowed in terms of prayer 1 with no orders as to costs.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 19<sup>th</sup> day of December, 2019.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Muchiri holding brief for Mr. Gachoka for the applicant

No appearance for the respondent

Mr. Kibet: Court Assistant