



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 447 OF 2010

STANDARD CHARTERED BANK OF KENYA LTDAPPELLANT/APPLICANT

VERSUS

DAVID HUDSON NJUGUNA 1ST RESPONDENT

MIU ELECTRONICS CO LTD 2ND RESPONDENT

The appellant/applicant has moved the court by way of a notice of motion dated 10th November, 2016 seeking orders that the decretal amount of KShs.136,367/- deposited by the appellant in lower court CMCC NO. 8836 of 2007 on 18th March, 2009 be released to it.

The application is premised on the grounds set out on the body of the same and it is supported by the affidavit sworn by Peris Karanja on 10th November, 2016. The deponent who is the advocate acting for the appellant depones that the amount of KShs.136,367/- was deposited in court pursuant to a ruling delivered on 4th March, 2009 by Hon Keiwua, Mr [RM] in which he set aside an *ex parte* judgment which had been obtained on 15th October, 2008 in CMCC NO. 8836/2007 which is the subject of this appeal.

That the suit was heard and judgment was delivered on 11th October, 2010 by Hon AK Ndungu [*as he then was*] and the appellant being dissatisfied with the judgment of the lower court filed this appeal.

That the appeal was heard and determined vide a judgment delivered on 19th October, 2015 and it was dismissed. That in absence of stay orders the appellant wishes to have the decretal sum released to it.

The respondents have opposed the application by way of a replying affidavit sworn by Migwi Mungai on 7th December, 2016 wherein she avers that pursuant to the judgment delivered on 19th October, 2015, the respondents filed a notice of appeal on 2nd November, 2015 which appeal has high chances of success.

That by a letter dated 30th October, 2015 they applied for a certified copy of the proceedings and judgment and a reminder was done on 5th January, 2006 but todate, they have not been furnished with the proceedings despite having made several visits to the registry to follow up the same. That the delay in filing the record of appeal has been caused by administrative procedures and has not been caused by respondents and that if the orders sought herein are granted, the respondents will suffer prejudice as the appeal has high chances of success.

The court has considered the material before it and the submissions by learned counsel. I have keenly perused the court order issued on 10th November, 2011 pursuant to which the money was deposited. The order was given by Hon Lady Justice Ang'awa [*as she then was*] on 5th July, 2011. The said order is

very clear and for avoidance of doubt, I would like to quote the same verbatim and especially the first and third limbs of the same that reads:

“1.That the decretal amount of KShs.136,367/- deposited in court on 18th March, 2009 by the appellant/applicant should not be released and/or withdrawn by the respondents herein as the same constitutes sufficient security for the appeal lodged on 27th October, 2010 by the appellant/applicant pending the hearing and determination of the appellant’s appeal filed herein.

3.That the sum already deposited be used as a security costs till the finalization of the appeal.”

What I understand the order to mean, is that the said amount was deposited as security pending the hearing and determination of the appeal lodged on 26th October, 2010 by the appellant/applicant. Though the appeal herein was lodged on 26th October, 2010, the date indicated in the order as 27th October, 2010 must have been by error as parties are in agreement that there was only one appeal involving them. The record is very clear that the appeal was heard and determined in favour of the appellant in a judgment delivered on 19th October, 2015 by Hon Mr Justice Mbogholi. Though the respondents have filed a notice of appeal against the judgment it is trite that an appeal does not operate as a stay of execution.

In my view, the stay that the respondents had obtained was granted pending the hearing and determination of appeal herein and the amount of KShs.136,367/- was to be held as security for this appeal and Judge Ang’awa’s order are very specific that the money was to be held as security for the appeal lodged on 27th October, 2010. The appeal having been heard and finalized, the reason for which the aforesaid sum is being held has been spent.

In the result, I find and hold that the application dated 10th November, 2016 has merits and it is hereby allowed as prayed. Costs are awarded to the appellant/applicant.

Dated, signed and delivered at Nairobi this 27th day of April, 2017.

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L. NJUGUNA

JUDGE

In the presence of:

.....**for the Applicant**

..... **for the Respondent**