

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 601 OF 2009

KLM ROYAL DUTCH AIRLINES.....APPELLANT

VERSUS

DOMITILLA ICHA SIMIYU.....RESPONDENT

RULING

1. The application dated 28th February, 2017 seeks orders that:

1. There be a stay of execution of the judgment of 22nd November, 2016 pending the hearing and determination of this application.

2. The sum of Kshs.339,389/= deposited in an interest earning account number [...] at Standard Chartered Bank on Kenyatta Avenue branch in the joint names of Hamilton Harrison & Mathews and W. G. Wambugu names be released to the Applicant's advocates.

3. The costs of this application be provided for.

2. It is stated that the sum of Ksh.339,389/= was deposited in a joint interest earning bank account of the counsels for the parties herein pursuant to the orders of this court made on 1st December, 2009 following an application for stay of execution of the judgment entered in CMCC Nbi. No 2517/06.

3. It is further stated that the Appeal herein was determined by this court on 22nd November, 2016. That the judgment of the Lower Court was set aside save for the sum Ksh.46,500/=, costs and interest. That the Applicant wishes to have the deposit released but Respondent has failed to facilitate the release.

4. The application is opposed. It is stated in the replying affidavit that an appeal has been filed against the judgment of this court and that the money deposited cannot be released as the appeal, if successful, will be rendered nugatory.

5. The application was canvassed by way of written submissions which have I considered.

6. The facts herein are not in dispute. The central issue to be determined by this court is whether the money deposited should be released to the Applicant. It is argued by the Applicant's counsel that the appeal herein has been allowed and that the condition upon which the deposit was made has therefore been fulfilled. On the other hand, it was contended on behalf of the Respondent that if the orders sought are granted, the appeal if successful will be rendered nugatory. It is further submitted that the Respondent should be given an opportunity to ventilate her case before the Court of Appeal.

7. The orders for the deposit of the security the subject of the application were granted by this court. Although the appeal before this court has been heard and determined, the Respondent has appealed against the judgment of this court. The circumstances of this case are therefore distinguishable from the facts in the case of **Eastland Hotel Ltd v Wafula Simiyu & Co. Advocates [2015] eKLR** and **Mohamed Mohamud v Mohamed Aden Ali & 2 others [2012]eKLR** which have been cited by the Applicant's counsel. In the **Eastland Hotel Ltd case (Supra)** the appeal process in the Court of Appeal

had been completed. In the persuasive decision in the **Mohamed Mohamud Kassim case (supra)** there was no pending appeal.

8. With the foregoing, I am persuaded that the overriding objective of the Civil Procedure Act will be achieved by dismissing the application to pave way for the hearing of the matters before the Court of Appeal. Consequently, I dismiss the application with costs to the Respondent.

Date, signed and delivered at Nairobi this 19th day of Dec., 2017

B. THURANIRA JADEN

JUDGE