



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 356 OF 2008

NDUNDA MUSAU.....1ST RESPONDENT
PETER LEMMY MUHURI.....2ND RESPONDENT
MRS CATHERINE M. KOLA.....3RD RESPONDENT
THE KENYA NATIONAL ASSOCIATION OF PARENTS(KNAP).....4TH RESPONDENT

- V E R S U S -

ACTION AID INTERNATIONAL.....1ST APPELLANT
OXFAM GB KENYA.....2ND APPELLANT
WILLIAM MIGWI.....3RD APPELLANT

RULING

- 1. Ndunda Musau, Peter Lemmy Muhurim, Mrs. Catherine M. Kola and Kenya National Association of Parents(KNAP), the 1st, 2nd, 3rd and 4th respondents herein respectively filed an action vide the plaint dated 23rd.04.2008 before the Chief Magistrates Court, Milimani against **Action Aid International, Kenya and Oxfam GB Kenya and William Migwi**, the 1st, 2nd and 3rd appellants herein respectively. In the aforesaid plaint the respondents sought for special damages in the sum of kshs.300,735 for breach of contract. The appellants filed a defence to resist the respondents' suit. The respondents took out the chamber summon dated 23rd April 2008 in which they applied for inter alia an order for mandatory injunction to compel the appellants to pay and or honour the terms of the contracts entered by the plaintiff on 17.4.2007. The appellants filed preliminary objection to oppose the summons. Hon. Ireri, learned Resident Magistrate, heard the application and in the end she allowed it.**
- 2. Being aggrieved, the appellants preferred this appeal. The respondents filed the application dated 10th September 2010 to have the appeal dismissed for want of prosecution. The aforesaid application was argued before Lady Justice Thuranira who eventually allowed the same thus dismissing the appeal for want of prosecution on 22nd September 2016.**
- 3. The respondents are now before this court vide the motion dated 10th October 2016 whereof they seek to have an order authorizing the release of kshs.300,735/= deposited in a joint interest earning account with H.F.C.K, Gill House Branch in the joint names of F.W. Njoroge & Co. Advocates and Osoro Juma & Co. Advocates to the respondent's advocates for onward transmission to the client. The motion is**

supported by the affidavit of Musau Ndunda. The appellants opposed the motion by filing the replying affidavit of Felistus Wanjiku Njoroge.

4. I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the motion. I have further considered the oral submissions of learned counsels. There is no dispute that this appeal was dismissed for want of prosecution. There is also no dispute that the sum of ksh.300,735/= was deposited in an interest earning account in the joint names of learned counsels. A careful reading of the facts deponed in the replying affidavit of Felistus Wanjiku Njoroge will reveal that the appellants are not seriously opposing the motion save that there is a suggestion that the cases pending before the lower court should not be left hanging but be determined together with the motion. M/S F. W. Njoroge learned advocate for the appellants stated before this court that Mr. Osoro, learned advocate for the respondents spoke to her on phone and both agreed that it was necessary to have both the appeal herein and C.M.C.C no. 356 of 2008. M/S Njoroge stated that she was taken aback when she found out that Mr. Osoro had written to H.F.C.K Bank directing it to release the funds deposited with the bank to the respondents advocate. The appellants' advocate stated that after she had a telephone conversation with Mr. Osoro, they agreed to execute a consent order to have the money deposit sum released on condition that the appeal should be marked as settled together with the suit before the trial court. The firm of Osoro Juma & Co. Advocates forwarded to the firm of F. W. Njoroge & Co. Advocates a consent order which the later firm of advocates amended the consent and sent back to the former firm of advocates. It is the submission of M/S Njoroge that she did not get a feed back from the firm of Osoro Juma & Co. Advocates but was instead served with the current motion. After a careful consideration of the rival submissions it is now clear to me that the money was to be retained in an interest earning account pending the hearing and determination of this appeal. The amount was kept as security for the due performance of the decree.

5. M/S Njoroge has put forward her concerns over the manner her Colleague, Mr. Osoro, has conducted himself. She has specifically stated that she is willing to have a discussion with her colleague amicably settle the matter but Mr. Osoro has instead turned the other way and opted to file the application. With respect, I agree with M/S Njoroge that this is a matter which can be sorted out by consent if the parties gave negotiation a chance.

6. In my view, this court cannot automatically issue the order as prayed by the respondents. There are a few issues which must be sorted out before making the order. The deposit must have attracted interest while lying in the bank. What will happen to the interest. Is it that the sum of kshs.300,735/= will settle the decretal sum of the suit in the court below? Is there any accrued interest or further costs and interest attached to the judgment appealed against.

7. The other question which has to be settled is whether the deposit and the accrued interest will settle both the suit and the appeal. The idea is, there must be an end to litigation over this dispute. With respect, I agree with M/S Njoroge that there is need for learned advocates to first settle the above questions before this court can issue the above orders.

8. In broad interest of justice, I defer my decision for 30 days and direct learned counsels appearing in this matter to meet and settle the questions this court has raised herein above.

9. This appeal to be mentioned on 21.11.2016, to settle the above questions and for this court to give further orders and directions.

Dated, Signed and Delivered in open court this 19th day of October 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent