



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 138 OF 2005

MN1ST APPELLANT

MA T/A THE RM SCHOOL2ND APPELLANT

VERSUS

I B thro' her father and next friend B E.....ESPONDENT

RULING

1. In the Notice of Motion dated 11th March 2013, the applicant who was the 2nd appellant in the appeal herein sought the following orders;

(i) This Honorable court be pleased to order the release to Omwenga & Company Advocates the 2nd appellant's advocate on record the sum of Kshs. 199,800/- being refund of sum deposited at Housing Finance Company of Kenya Ltd A/c No. TD 300-0007263 as security of the lower court decree pending the hearing determination of the appeal since the appeal has been decided on merit and the 2nd appellant was absolved from any liability in this matter.

(ii) That such other orders be made as may be just and expedient in the circumstances of this matter and the issue in question.

(iii) Costs of this application to be in the cause.

2. The application is expressed to be brought under *Section 2, 3 A and 63 (e) of the Civil Procedure Act; Order 51 Rule 1 of the Civil Procedure Rules* and all other enabling provisions of the law. The applicant contends that he is the one who deposited a sum of Kshs.199,800 in a joint interest earning account No. TD 300-000 7263 held in the names of both counsel on record namely *Ms Omwenga & Co. Advocates* and *Ms. Buluma & Co. Advocates* being the decretal amount and assessed costs in Eldoret Children's case No. 29 of 2005.

3. From the record, the amount was deposited in compliance with the orders made by this court dated 20th February, 2006 following an application for stay of execution pending appeal. It is the applicant's case that he is entitled to the release of the money so deposited and any accrued interests as the appeal was determined on 22nd May, 2012 and he was absolved of any liability; that the respondent has not filed any appeal against this court's decision to the Court of Appeal and that it is in the interest of justice that the application be allowed.

4. By consent of the parties, the application was prosecuted by way of written submissions. Those of the appellants were filed on 22nd March, 2016 while those of the respondents were filed on 12th April 2016.

5. In the applicant's submissions, it is indicated that the application was opposed through the respondent's affidavit dated 21st June, 2013. I have meticulously combed through the entire court record and I have not come across such an affidavit. The respondent in his submissions did not make any reference to an affidavit filed in response to the application. It is therefore not clear whether the respondent filed any response to the application though it is clear from her submissions that the application is opposed. I will therefore proceed to determine the application on the basis of the submissions filed by the parties and the material available in the court record.

6. Having considered the application, the applicant's supporting affidavit and the annexures thereto; the party's submissions ; the authorities cited by the applicant and the court record, I find that in her decision, the learned trial magistrate *Hon. B.N Mosiria (RM)* in a judgment delivered on 14th December, 2005 in Eldoret Children's Civil suit No. 29 of 2005 entered judgment in favour of the respondent (then the plaintiff) against both the appellants (then the defendants) jointly and severally in the sum of Kshs. 180,000 together with costs of the suit.

7. The appellants were aggrieved by the trial court's decision. They both filed an appeal contesting the said decision. While the appeal was pending hearing, their advocate *Ms. Omwenga & Co. Advocates* filed an application dated 19th December, 2005 seeking stay of execution of the trial court's judgment and further proceedings in Eldoret Children's Case NO. 29 of 2005 pending the hearing and determination of the appeal.

8. On 14th February, 2006 Ibrahim J (as he then was) by consent of the parties allowed the application on terms that the appellant (who was not disclosed) was to deposit the decretal sum of Kshs. 180,000 in a joint interest earning bank account in the names of both counsel on record within 7 days of that date and that the amount together with accrued interest was to continue being held in that account pending the final determination of the appeal and further court orders.

9. The court record reveals that the appeal was determined by the High Court on 7th May, 2012 by *Hon. Mwilu J* (as she then was). The Hon. Judge partially allowed the appeal on both liability and quantum. She found the 1st appellant *Moses Njenga* solely liable to the respondent and absolved the 2nd appellant from any liability. She also reduced the award of damages awarded by the trial court from Kshs. 180,000 to Kshs.40,000 which were to be paid by the 1st appellant together with costs of the suit in the lower court and of the appeal.

10. It is not disputed that following the court order of 14th February, 2006, a sum of Kshs. 199,800 was deposited in a fixed deposit account held at Housing Finance Company of Kenya Limited in the joint names of the advocates on record for the parties. This is the money together with accrued interest that the applicant (2nd appellant) wants to have released exclusively to him on grounds that he was the successful party in the appeal and that he is the one who had deposited the money.

11. A perusal of the fixed deposit receipt and the deposit receipts annexed as exhibits D and exhibits E1 and E 2 respectively do not prove the applicant's contention that he is the one who had as a matter of fact deposited the said money. The three documents do not show who among the appellants deposited the money. They do not bear the name of the depositor. The deposit receipts for Kshs.10,000 and Kshs. 9,800 only have the depositors signature.

12. In view of the foregoing, it is impossible for this court to tell who among the appellants deposited the said money. Consequently, it is my finding that the applicant has failed to prove his claim that he is the one who had deposited the money. In the absence of such proof, there is no basis upon which this court can order that the money and its accrued interest be released exclusively to him even though he was the successful party in the appeal.

13. The above finding would have been sufficient for me to dispose of the application and dismiss it with costs for want of merit. But since the applicant in one of his prayers invited the court to make such other orders that may be just and expedient in this case, I will proceed to make the orders which in my view would be in the interest of all the parties in this case and which will put the matter to rest.

14. It is my opinion that as the High Court found the 1st appellant exclusively liable to the respondent in the sum of Kshs. 40,000 and awarded the respondent costs both in the lower court and on appeal and considering that there is no evidence of who between the appellants made the deposit in question, I order that the entire amount payable to the respondent by the 1st appellant be paid from the money held in the Housing Finance Company of Kenya fixed deposit account No. TD 300 000 7263. Once the decretal amount is satisfied, the balance of the funds therein should be released to the appellant's advocates on record for onward transmission to the appellants.

15. The Applicant shall bear the costs of this application.

16. There shall be orders accordingly.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 16th day of November, 2016.

In the presence of:-

Mr. Marube holding brief for Mr. Okara G.K for the Respondent

No appearance for the Applicant

Miss Naomi Chonde court clerk