



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 238 OF 2011

PEMBE FLOUR MILLS.....PLAINTIFF

- VERSUS -

BRITISH AMERICAN INSURANCE COMPANY LTD....DEFENDANT

RULING

1. The Plaintiff has asked the court to order the release of the money held at **AFRICAN BANKING CORPORATION**.
2. Currently, the said money is held in a joint account, which is in the name of the Law firms representing the parties herein.
3. It is common ground that on 2nd October 2015 the court entered judgment in favour of the Plaintiff for Ksh. 9,083,713/-
4. Being dissatisfied with the judgment, the Defendant filed a Notice of Appeal on 29th October 2015.
5. The Defendant also filed an application for stay of execution pending the appeal.
6. On its part, the Plaintiff filed an application on 9th November 2015, seeking leave to execute the Decree before the taxation of its Bill of costs.
7. When the application by the Plaintiff came up for hearing on 16th November 2015, the parties recorded a consent order, to have the application withdrawn with no order as to costs.
8. However, the withdrawal was on the understanding that Ksh. 10,000,000 be paid to the Plaintiff's advocates within 14 days, whilst the balance of Ksh.7,800,000/- would be deposited in an interest-earning account. The said account would be in the joint names of the advocates representing the parties to the case.
9. The Plaintiff contends that because there was no stay of execution, and because the Defendant has not yet filed an appeal in the last 11 months, the money in the joint account ought to be released to it.
10. As far as the Plaintiff was concerned, there was no reason why the Defendant should have applied to

the court for the issuance of the Judgment and proceedings when both documents were immediately available on the court file.

11. In answer to the application, the Defendant pointed out that the balance of the decretal amount was to be held in the joint interest-earning account pending the determination of the appeal.

12. The Defendant denied the contention that the proceedings were in the court file. Indeed, the Defendant demonstrated to this court that it had even notified the learned Deputy Registrar that it would be happy to type the record of the proceedings, if the court made available to him, a copy of the handwritten record.

13. I perused the court file and established that it did not have a typed record of the proceedings.

14. It was therefore very baffling that the Plaintiff's advocate had chosen to state an untruth.

15. In my considered opinion, the delay in the lodging of the Defendant's appeal was wholly attributable to the absence of a typed record of the proceedings.

16. Secondly, although there was no express order that there would be a stay of execution, I find that the consent order recorded on 16th November 2015 must be appreciated within context.

17. The Plaintiff had applied for leave to execute the Decree before taxation, on the grounds it would be greatly prejudiced if the process of execution had to wait for taxation. The Plaintiff had intimated that there were no dates available in the court's diary for taxation in the year 2015.

18. Of course, it would be most unlikely that in the month of October or November of any calendar year, the court diary could still have available dates for taxation of Bills of Costs.

19. In the face of the Plaintiff's desire to seek leave to execute the Decree before taxation, the parties agreed that the Plaintiff be paid Ksh.10,000,000/- within 14 days. The parties also agreed that the balance be deposited in a joint account.

20. In my considered view, the compromise must be deemed to constitute a satisfactory solution to the attempts by the Plaintiff to execute the Decree without any further delay.

21. Had the parties intended to pressurize the Defendant to file the appeal within a limited period of time, from the date of the consent order, they could have expressly said so. In other words, they could have given a time-frame for the filing of the appeal.

22. As no time-frame was agreed upon, there is no basis for asserting that the delay in filing the appeal was inordinate.

23. In any event, the delay cannot be deemed inordinate when, in law, the respondent would be entitled to obtain a Certificate of Delay from the court, in respect to the period which the court requires to prepare the typed record of the proceedings.

24. The money is already secure in the joint account. Therefore, as soon as the appeal is determined, the successful party would be able to access it without any delay.

25. In the result, I find no reason in law, or in fact for ordering that the money be paid out forthwith, from the joint account, to the Plaintiff. Therefore, the application dated 14th June 2016 is dismissed.

26. The costs of the application are awarded to the Defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 19th day of December 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Kimere for the Plaintiff

Miss Kamau for the Defendant

Collins Odhiambo– Court clerk.