



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 84 OF 2015

ELIJAH MBATHA KITHIMBA.....PLAINTIFF/APPLICANT

VERSUS

MEDIVEST COMPANY LTD.....DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 9th July 2021, the Plaintiff/Applicant sought for the following orders;

(1) Spent

(2) **THAT** the firm of M/S Kyalo and Associates Advocate be made the sole signatory of Hekima Savings Account, Cooperative Bank, City Hall Branch Account No. 01103231033100 currently in the joint names of M/S Nzioki Mutua & Associates Advocates and M/S M'Limbiine & Mungai Advocates.

(3) **THAT** in the alternative, an order be issued directed at Cooperative Bank of Kenya (City Hall Branch) that the principal together with interest current held in Hekima Savings Account No. 0110xxxxxxx and held jointly by the firms of M/S Nzioki Mutua & Associates Advocates and M/S M'Limbiine & Mungai Advocates, be as follows:-

(a) M/S Nzioki Mutua & Associates Advocates

—Shs. 1,500,000.00

(b) M/S Kyalo & Associates Advocates —Shs. 220,750.00

(c) Elijah Mbatha Kithimba Total - Shs. 5,025,010.00

(4) That pursuant to disbursement as above, the said account be closed.

(5) That costs be in the cause.

2. The application is supported by the grounds on its face as well as the affidavit of **KYALO MBOBU**, advocate for the Plaintiff in this matter, where he has deposed that pursuant to the court's order of 24th April 2015, the plaintiff deposited Kshs. 4,000,000/- into an account in joint names of the then advocates for the Plaintiff and defendants; that subsequently the firm of M/S M'Limbiine & Mungai advocates was replaced by Onyango Ndolo & Co. advocates; that judgment was entered in favour of the Plaintiff on 25th May 2018; that the firm of Kyalo & Associates took over conduct of this matter from the Plaintiff's previous counsel M/S Nzioki Mutua & Associates advocates vide this court's ruling dated 31st January 2020; that hence none on the advocates who opened the joint account are on record for any of the parties; that a certificate of taxation has been issued in this matter; that the plaintiff recently suffered stroke and is in dire need of funds for further treatment; that no appeal was preferred in this matter and therefore the amount in the bank is the property of the Plaintiff.

3. It was further deposed for the Applicant that an Advocate-Client bill of costs between the Plaintiff herein and his former advocate was taxed in the sum of Kshs. 1,500,000/-.

4. The application is opposed. The Defendant/Respondent filed a replying affidavit sworn on 21st September 2021 and deposed that the Respondent filed the application dated 24th June 2019 which sought for stay and that the Defendant was aggrieved with the judgment delivered on 25th May 2018; that the Defendant has sought stay pending hearing and determination of the appeal as he is in the process of filing the record of appeal; that the decretal amount deposited in a joint account should remain in the account pending hearing and

determination of the appeal filed by the Defendant.

5. The application was canvassed by written submissions. On record are the Defendant's written submissions filed on 2nd November 2021.

SUBMISSIONS

6. The Defendant submitted that on 25th May 2018 the court entered judgment in favour of the Plaintiff/Applicant in the sum of Kshs. 2,675,000/-. Counsel for the Defendant submitted that the Defendant being aggrieved with the entire judgment, filed a Notice of Appeal dated 11th June 2019.

7. Counsel further submitted that the Defendant later filed an application for stay of execution of judgment vide his application dated 24th June 2019, which application is yet to be heard and determined.

8. Counsel contended that the Plaintiff/Applicant had not made out a case for granting the orders sought. Counsel emphasized that the money deposited in the joint account was in compliance with Order 26 Rule 1 of the Civil Procedure Rules whose purpose was security for costs, to protect the Defendant. Counsel argued that the intended purpose for the money held in joint account is extended to the appeal which has already been filed and hence releasing the same will put the Defendant in hardship should he succeed on appeal.

9. Counsel further submitted that since the Plaintiff was an individual, releasing the money will prejudice the Defendant. Counsel stated that the Defendant was unaware of the Plaintiff's assets and since he had been disposing off the suit land without the Defendant's knowledge, it is necessary that the money in issue is not released. Counsel relied on the case of *Jayesh Hasmukh Shah vs Narin Haira & Another [2015] eKLR* for the proposition that where the Respondent's assets are unknown, the court can order payment of security for costs.

10. Counsel further asserted that it is only the Court of Appeal that can determine the application for release of the money paid as security for costs in this case. Further, counsel argued that the Defendant's application for stay of execution should be granted. Counsel placed reliance on the case of *RWW vs EKW [2019] eKLR* for the proposition that orders for stay of execution pending appeal are meant to preserve the subject matter.

11. It was argued for the Defendant that the Defendant had an arguable appeal as the appeal was not only against the weight of evidence adduced but also the court's reasoning and that the learned judge arrived at a wrong decision, and unless stay is granted, the Respondent stands to lose millions of shillings to the Plaintiff whose source of income is unknown. Counsel placed reliance on the case of *Chris Munga N. Bichage vs Richard Nyagaka Tongi & 2 Others*, where the court restated principles for granting stay of execution pending appeal. Counsel also relied on the case of *Stanley Kangethe Kinjanjui vs Tony Keter & 5 Others [2013] eKLR*. Counsel argued that the Defendant will suffer substantial loss if stay order is not granted.

12. In placing reliance in the cases of *National Industrial Credit Bank Limited vs Aquinas Francis Wasike & Another (UR) Nairobi Civil Application No. 238 of 2005* and *Consolidated Marine vs Nampija & Another Civil Application No. 93 of 1989*, Counsel argued that an order for stay of execution ensures that the subject matter of the suit is preserved. Counsel concluded that the application was made without unreasonable delay.

ANALYSIS AND DETERMINATION

13. I have considered the application, the affidavit in support, the replying affidavit and the submissions. The issue that arise for determination is whether the prayers sought by the Applicant are merited. The orders sought are discretionary and this court's discretion ought to be exercised judiciously and not whimsically or capriciously.

14. From the record, I note that by a Notice of Motion dated 11th March 2015, the Plaintiff sought for removal of a caution placed by the Defendant on the Plaintiff's parcel of Land L.R No. Donyo Sabuk/Komarock Block 1/135. In the same application, the Plaintiff gave an undertaking to provide security for costs. On 24th April 2015, this court granted the prayer for removal of the caution on the Plaintiff's land aforesaid and ordered the Plaintiff to deposit in a joint account of the parties' advocates on record, a sum of Kshs. 4,000,000/- within 21 days and in default execution to issue. The said sum was to take care of the deposit and costs. The Plaintiff complied and deposited the sum of Kshs. 4,000,000/- as seen from the bank statements. Upon hearing this matter the court by a decree dated 25th May 2018, dismissed the Defendant's counterclaim and allowed the Plaintiff's claim by ordering the Defendant to forfeit to the Plaintiff a sum of Kshs. 2,675,000/- being 10% of the purchase price. As the Defendant had already paid to the Plaintiff a sum of Kshs. 2,000,000/- as deposit this court ordered them to pay the Plaintiff the balance of Kshs. 675,000/-. By a Notice of Appeal dated 4th June 2018, the Defendant demonstrated his intention to appeal against the decision of this court dated 25th May 2018. No memorandum or record of appeal has been filed since then to date.

15. The Applicant has argued that since he was successful in this matter and the bill of costs between him and his former counsel Nzioki Mutua & Associates having been taxed, it is only fair that the amount deposited in the joint account as security for costs be released to him because he is unwell and needs the money for further treatment. The Defendant has responded to this argument by stating that the said amount extends to the appeal, as security for costs thereof.

16. It is my considered view that an amount paid as security for costs is only in respect of the suit where the costs were ordered and it does not extend to the appeal. Order 26 Rule 1 provides as follows;

“In any suit the court may order that security for the whole or any part of the costs of any Defendant or third or subsequent party be given by any other party.”

17. As I understand it, Order 26 Rule 1 of the Civil Procedure Rules refers only to costs of the Defendant in a suit and does not mention that costs of the appeal ought to be included. In any event it is the appellant in the Court of Appeal who is duty bound to pay security for costs as provided for in Rule 82(1) (d) of the Court of Appeal Rules. Therefore it is absurd for the Defendant to require security from the Plaintiff on account of his appeal to the Court of Appeal.

18. I also note that though on 5th June 2018, the Appellant filed a Notice of Appeal, which is essentially an intention to file an appeal, he has not filed the memorandum of appeal and or the record of appeal within 60 days as provided for in Rule 82 (1) of the Court of Appeal Rules. In the replying affidavit the Defendant conceded that he has not filed a record of appeal. Under Rule 83 of the Court of Appeal Rules, where a party who has lodged a notice of appeal fails to institute an appeal, within the prescribed period, he/she is deemed to have withdrawn his/her notice of appeal. It therefore follows that no appeal has been filed by the Defendant as alleged or at all.

19. As the Plaintiff is the successful party in this suit, there is no hurdle that would stop the release of the money deposited in the joint account to him. In addition the Plaintiff has annexed a copy of the certificate of taxation showing that his former advocate is entitled to Kshs. 1,500,000/-. In view of the ruling of this court made on 31st January 2020, it is reasonable that the Plaintiff's former advocate is able to recover his legal fees.

20. In the premises therefore, I find and hold that the Plaintiff/Applicant's application dated 9th July 2021 is merited and the same is allowed in the following terms;

(a) An order be and is hereby issued directed at Cooperative Bank of Kenya (City Hall Branch) that the principal together with interest currently held in Hekima Savings Account No. 0110xxxxxxxxx and held jointly by the firms of M/S Nzioki Mutua & Associates and M/S M'Limbiine & Mungai Advocates be as follows:-

(i) M/S Nzioki Mutua Associates Advocates

Kshs. 1,500,000/-

(ii) M/S Kyalo & Associates Advocates Kshs. 220,750/-

(iii) Elijah Mbatha Kithimba the balance.

(b) That pursuant to disbursement as above, the said account be closed.

(c) That costs be in the cause

21. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 23RD DAY OF FEBRUARY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Ms Gichuki holding brief for Mr. Kyalo

Mbobu for the Plaintiff/Applicant

No appearance for the Respondent

Ms Josephine Misigo – Court Assistant