

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 597 OF 2008

SAJ CERAMIC LIMITED.....APPELLANT

VERSUS

ROBINSON MONGARERESPONDENT

(An Appeal from the original judgment and ruling of Hon. Miss. Ireri in Milimani RMCC No. 4738 of 2007 on 2nd October, 2008)

RULING

1. Saj Ceramics Ltd, the Appellant/Applicant took out the motion dated 1st July 2015 and sought for inter alia:

THAT an order do issue directing the Deputy Registrar of the High Court of Kenya, Civil Appeals Division, Milimani Law Courts to release to the Appellant/Applicant the sum of kshs.118,350/= that was deposited in court as security for the respondent's claim.

2. The motion is supported by the affidavit of Gad Gathu sworn on 1st July 2015. The motion was served but the same did not elicit any response from the respondent hence this court gave the appellant leave to prosecute the motion *exparte*.
3. The appellant argued that it deposited in court kshs.118,350 as a security for the due performance of the decree before the commencement of its appeal. The appeal was heard and determined on 22nd May 2015. The appellant applied for the amount of deposit to be released to it so that it can be utilized to offset the amount that is due to the respondent. The appellant stated that it is apprehensive that the respondent may execute the decree any time.
4. The history behind this motion is that Robinson Mongare, the respondent herein filed a compensatory suit before the chief Magistrate's Court, Milimani for the injuries he sustained from an industrial accident while working for the appellant. The suit was heard and the appellant was found 90% liable with the respondent shouldering 10% contribution. The appellant being dissatisfied with the decision preferred this appeal.
5. The appellant were granted an order for stay of execution pending appeal on condition that it deposits in court the decretal amount in the sum ksh.118,350/=. The appeal was heard and determined by Justice Mabeya. The honourable judge set aside the order directing the appellant to shoulder 90% liability and substituted it with an order directing the appellant to instead shoulder 70% contribution while the respondent shouldered 30%. The learned judge also interfered with the award of damages and further applied the new ratio on liability contribution leaving the net amount available to be paid to the respondent at kshs.92,050 plus costs and interest. The amount deposited in court as security for the due performance of the decree was to last until the appeal is heard and determined. The appeal has now been determined. The question remaining to be answered is whether the objective of the deposit has been met? The objective of the deposit was that at the end of the appeal the amount deposited should be utilized to satisfy the decree. In this appeal, the amount which has been ascertained on appeal as payable to the respondent is kshs.92,050. The appellate court also awarded the respondent costs of the suit plus interest. It is clear to me that costs and interest is yet to be determined. The amount may be way above the

principal sum of the decree.

6. The appellant has urged this court to make an order to release the amount deposited in court. The appellant has failed to present evidence to show that it has satisfied the decree. In other words the due performance of the decree has not been fulfilled. In the end I find no merit in the motion. It is dismissed with no order as to costs.

Dated and delivered in open court this 13th day of November, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent