



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL APPEAL NO 618 OF 2000

BARCLAYS BANK OF KENYA LIMITED.....APPELLANT

VERSUS

SPARKLE FOOD MANUFACTURERS LIMITED.....DEFENDANTS

R U L I N G

1. The Respondent herein obtained a decree for money from the lower court. The Appellant appealed against that decree.
2. On 8th December 2000 this court (Sheikh-Amin, J) granted stay of execution of decree pending disposal of the appeal upon two conditions -
 - (i) That the Appellant do pay to the Respondent KShs 200,000/00 towards the decretal sum.
 - (ii) That the Appellant do deposit the balance of the decretal sum (KShs 214,785/00) in a joint account to be opened in the names of the advocates for the parties.

The Appellant met both conditions.

3. The appeal was eventually heard. In a judgment dated and delivered on 16th May 2008 (Osiemo, J) the appeal was allowed and the judgment of the lower court set aside. The court further ordered that the suit be retried by the lower court.
5. The Appellant has now applied by notice of motion dated 28th July 2008 under **section 91(1)** of the **Civil Procedure Act, Cap 21** (the Act) for restitution. The restitution sought is two-fold -
 - (i) That the Respondent do refund to the Appellant the KShs 200,000/00 paid to it by order of court together with interest at 12 per cent per annum.
 - (ii) That the amount deposited in the joint account together with accrued interest be released to the Appellant.

The Appellant also seeks leave of the court to execute against the Respondent in the event of non-refund of the KShs 200,000/00. The application is supported by an affidavit sworn by one **David Swao**, a senior

legal counsel of the Appellant.

6. The Respondent has not opposed the application, notwithstanding service of the same upon it; there are no papers filed in response.
7. Ordinarily applications for restitution after appeal ought to be made in the court of first instance. However, as the sums sought to be recovered were paid and deposited by order of this court in this appeal, it was appropriate that the application be made here.
8. There is nothing to stand in the way of granting the orders sought, the appeal having been disposed of and the judgment of the lower having been set aside entirely. Section 91(1) aforesaid provides –

“91. (1) Where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.”

9. In the circumstances I will grant the application as prayed with no orders as to costs. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF JULY 2014

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 30TH DAY OF JULY 2014