



Editorial Summary

1. *Civil Appeal Miscellaneous*
2. *Civil Practice & Procedure*
3. *Subject of subordinate court case*

TORT

- a) *Running down cause*
- b) *Award ksh. 124,420/-*
General and special damages
Plus interests.

4. *Application for stay of execution*

28th January 2011

- 4.1 *Exparte orders granted*
Khaminwa J 21st February 2011
- 4.2 *Interparte hearing granted*
Ruling 30th June 2011 Angawa J
- 4.3 *Decretal sum plus interest be deposited*
in joint names of both advocates.

5. *Application of 15th November 2011*

5.1 *Leave to deposit decretal sum to court
as advocate declines to accept sum to be
deposited.*

5.2 *At interparties hearing on 13th December 2011
parties agree by consent to deposit decretal
sum in joint account.*

6. *Application 2nd February 2012*

6.1 *Application No. 2 to deposit sum to court as
advocate again declines to accept sum to be
deposited to court.*

7. *Submissions by applicant*

7.1 *Attempts to open a joint account and deposit
the decretal sum in an interest earning account
has proved fruitless.*

8. *Submissions by respondent*

8.1 *The first time the sum to be deposited was
Excluding interest.*

8.2 *The court's ruling confirmed sums are
Inclusive of interest.*

ii) *N. Kaburu instructed by Nelson Kaburu & Co Advocates for respondent/original plaintiff*

REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Civil Appeal 592 of 2010

LILIAN AKOTH OTIENO..... APPELLANT/ ORIGINAL DEFENDANT

VERSUS

JANE NDUKU KIVUVA RESPONDENT/ ORIGINAL PLAINTIFF

(Being an appeal from the Judgment of Hon. L Njora (Senior Resident Magistrate) in Case No. 13937 of 2006 dated 10th January 2008 at Milimani Commercial Courts)

R U L I N G

I. INTRODUCTION

1. The applicant had filed an appeal on the 23rd December 2010 on being dissatisfied with the judgment of the subordinate court.
2. An award of Ksh. 124,420/- for general and special damages plus interest had been made against the appellant in a running down cause.
3. By an application of 28th January 2011, the applicant appellant sought orders of stay of execution. This was granted by Khaminwa J on the 21st February 2011 exparte.
4. After an interparte hearing orders were then granted on 30th June 2011 (Ang'awa J). That there be a stay of execution pending appeal. That this be subject to the deposit of the decretal sum of Ksh. 124,420/- plus interest that is to be deposited in a joint interest earning account of both advocates.

5. The applicant returned to court by a 15th November 2011 application, seeking orders that the decretal sum be deposited to court on grounds that the advocate for the respondent had declined to accept the said sum to be deposited to court.
6. Before the interparte hearing commenced on 13th December 2011 the two parties agreed by consent to deposit the decretal sum in a joint account.
7. The applicant appellant returned for the third time with an application dated 2nd February 2012 whereby he sought the same prayers to deposit the sum again to court despite the consent orders recorded.
8. It is this application of 2nd February 2012 that is a subject of this application.

II SUBMISSION

9. The submissions put forward by the appellant is that the respondent has deliberately declined to sign requisite documents to open up an account to put the money, in a joint interest earning account.
10. This in fact was the second time of doing so.
11. The explanation given by the respondent was that the first time, the sum submitted to him was excluding the interest. It was only when they confirmed with the ruling by the court that it was found to have the element of interest that they both agreed to enter into a consent.
12. The sum that was to be deposited was to be done within 30 days of
13th December 2011. This was not done by the applicant until sometime in January 2012. The cheque ought to have been with him by
29th December 2011, instead this was forwarded on 3rd January 2012.
13. The application being opposed, argued the respondent, should be dismissed as consents do not apply to Christmas vacation.
14. The issue here is whether the decretal sum be deposited in court or the bank.
15. There was no delay in forwarding the requisite document and cheque to the respondent due to the Christmas vacation. Under Order 50 r 4, the Civil Procedure Rules, time does not run between 21st December of one year to 13th January of the next year. The argument that this rule does not apply to a consent order is not correct. That said rule exempts only applications in respect of a temporary injunction. That is, time will continue to run regardless where the application is for a temporary injunction. Anything outside this is exempted.
16. I would therefore find that the said documents were forwarded on time to the respondent.
17. As to the issue of a consent not being changed, the circumstances of this matter clearly shows that the inordinate delay has been caused to have the decretal sum deposited, in order that parties may pursue the main appeal.
18. To this end, I would allow the application. My orders of the court 30th June 2011 be and is hereby changed to read that the decretal sum and interest as of 30th June 2011 be deposited in court.
19. There will be costs to the applicant/appellant.

DATED THIS 23RD DAY OF MARCH 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

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Advocates :

i) *D M Wambua instructed by M/s B. Mbai & Co Advocates for appellant/applicant*

ii) *N. Kaburu instructed by Nelson Kaburu & Co Advocates for respondent/original plaintiff*