



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CIVIL APPEAL 27 OF 2007

HOTSUN ENTERPRISES LTD APPELLANT

-VERSUS-

JUDITH AWINO ONYANGO *suing as the Administrator of Estate of*
FREDRICK ONYANGO OKANO RESPONDENT

Coram

Mwera J.

Ms. Sewe for the appellant

Odongo for Ngala for the respondent

Raymond CC.

R U L I N G

The appellant company moved under O41 r. 4 (i) CPR and SS. 3, 3A CPA for orders that:

- (i) there be a stay of execution in regard to the respondent's seeking the release of Ksh 707,000/=, a decretal sum which was lying in a joint interest - earning account;**
- (ii) an order issue to release Ksh 250,000/= from that joint account to the applicant.**

These orders were sought on account of an intended appeal to the Court of Appeal against the judgment of Karanja J delivered on 27.1.2009. There were grounds Ms. Sewe put forth together with contents of a supporting affidavit. Mr. Odongo opposed the application on behalf of Mr. Ngala.

Ms. Sewe submitted that the respondent was awarded a total of Ksh 707,000/= in damages in the lower court at Winam. Her client preferred KSM HCCA 27/07 and Karanja J. lowered the decretal sum by Ksh 250,000/=. She thus asked this court to order that sum released to her client who had appealed against the same learned Judge's award of Ksh 420,000/= to the respondent. The court heard that the respondent had not indicated that she was cross – appealing and thus the release sought was warranted. It was added that although an oral application before Karanja J to release the amount was not allowed, that

aspect should be considered with favour now.

Further, the court heard that the appeal against the award, if it succeeded, would meet with difficulties to recover Ksh 420,000/= awarded on appeal, because the appellant was not aware of the respondent's means of income. Thus the court treated this as a mere claim which was not supported by an affidavit of means of the respondent. It was added that the sum was large and therefore it constituted substantial loss to the applicant, if the stay order was not granted. That this application had been made timeously and with the said Ksh 420,000/= remaining further in the joint interest – earning account, the respondent would not be prejudiced. It stood as security for due performance.

Mr. Odongo did not clearly articulate as to why the sum of money over and above Karanja J's decision should not be released to the applicant. His client had not cross – appealed. But he posited that the applicant had not made out a case of substantial loss that may befall it in the event that the stay order sought was not given. Counsel did not seem to oppose the suggestion that the total sum arising from Karanja J's decision be held as security in the joint account as before.

This court's short decision here is that much as Ms. Sewe did not seem to make out a clear case of what substantial loss waited to befall the applicant if the stay order is not granted, and also that Mr. Odongo did not appear strongly opposed to continuing with the joint account mode, this court orders that the sum said to be Ksh 250,000/= lowered by Karanja J's decision or such a sum that accrues therefrom, be released to the applicant. The intended appeal is against Karanja J's award of Ksh 420,000/= and no more. The respondent has not cross – appealed and so the sum over and above Karanja J's award lying in the joint account should, in all fairness, be released to the applicant. The account will then hold the sum (s) appealed against, earning interest until the intended appeal is finally determined or such other orders issue. Costs to the applicant.

Ruling accordingly.

Delivered on 11.5.2009.

J. W. MWERA

JUDGE

JWM/hao