



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL 240 OF 2007

PAPERMART EASTAFRICA LTD..... APPELLANT

VERSUS

CONCORD INSURANCE COMPANY.....RESPONDENT

R U L I N G

On the 16th October, 2006, a consent order was recorded granting the appellant Papermart East African Limited an order for stay of execution pending appeal on the following condition:

“that the decretal sum is deposited in a joint interest earning account with any reputable financial institution in the joint names of the two advocates within the next 30 days failing which this order shall lapse.”

It is contended by the respondent that the appellant’s advocate forwarded the account opening forms to the respondent’s advocate on 14th November, 2006. The account opening forms were returned to the appellant’s advocate on 22nd November, 2006.

However, the decretal amount was not deposited with a financial institution until 15th November, 2007 i.e. about a year later. The respondent has now moved the court under Section 3A of the Civil Procedure Act to confirm that the order made on 16th October, 2006 for deposit of the decretal sum not having been complied with stands discharged for want of compliance. The respondent also seeks a further order to have the amount deposited by the appellant in the joint names of the parties’ advocates released to the appellant.

The application is opposed. A replying affidavit has been sworn by Visram Patel, a director of the appellant’s company, wherein it is deponed that the failure to open a joint interest earning account within the prescribed time, is attributable to the respondent’s advocate, for failing to return to the appellant’s advocate the duly executed account opening forms in time. It was submitted on behalf of the appellant that the conduct of the respondent in sending the documents to the appellants after the period for depositing the decretal sum, amounts to a waiver. In support of this contention counsel for the appellant cited *Halisbury’s laws of England 4th Edition Vol. 16 Paragraph 1609* which says as follows: -

“Parties to litigation who have continued the proceedings with knowledge of an irregularity of which they might have availed themselves are estopped from afterwards setting it up; and, a fortiori, on a somewhat different principles, such a party cannot take advantage of an error to which he has himself contributed.”

The following authorities were also relied upon: -

1. ***Central London Property Trust Limited vs High Trees House Ltd. (1956) 1 All ER 256.***
2. ***Lickiss vs Milestone Motor Policies at Lloyd’s [1996] 2 All ER 972.***
3. ***Githunguri vs Pan African Insurance Company Limited [1987] KLR 673.***

It was submitted that the appellant’s advocate was aware of the court order and the need for the advocate to open the account. The respondent cannot therefore take advantage of an irregularity which it was party to. It was further submitted that the decretal sum had already been deposited into an interest earning account and therefore the decree holder was not suffering any prejudice.

I have carefully considered this application. According to the consent order recorded on 16th October, 2006, the decretal amount was to be deposited into an account in the joint names of the parties’ advocates within 30 days. It is common ground that this was not done, but that the amount was in fact deposited about a year later. It is not disputed that the respondent’s advocate received the account opening forms from the appellant’s advocate on 14th November, 2006 and returned them on 22nd November, 2006 which was about 7 days after the period given to deposit the amount had expired. The question is whether in forwarding the forms after the expiry of the period for depositing the money, the respondent had waived that condition for deposit of the money within 30 days.

I have considered the authorities which were cited by the appellant’s advocate. While I concur with the proposition that parties to litigation who continue proceedings with knowledge of an irregularity of which they might have availed themselves are estopped from afterwards setting it up, the circumstances in this case, are a little bit different. It is evident that the appellant took his time before complying with the order for the deposit of the decretal sum. The appellant’s advocate forwarded the account opening forms to the respondent’s advocate just two days before the expiry of the required period. The respondent’s advocate having been assured that the money was available forwarded back the account opening forms about a week later.

In my considered opinion the period was not unreasonable. Had the appellant deposited the amount soon thereafter it would have been reasonable to conclude that the respondent had acquiesced to the amount being deposited outside the agreed period but within a reasonable time. However, the appellant did not deposit the money until about a year later. This was not reasonable.

Moreover, the appellant did not seek any extension of time nor has there been any explanation for the delay in depositing the money. The appellant having failed to comply with the consent order, he cannot take refuge in the conduct of the respondent which in any case did not provide any excuse for the one year delay. Indeed, the fact that the respondent forwarded the forms outside the stipulated period did not amount to the respondent continuing with proceedings with the knowledge of an irregularity as there were no proceedings as at that stage. In the circumstances, I find that the appellant having failed to comply with the order of 16th October, 2006, and having failed to seek an extension of the same, that order lapsed and the order for stay of execution was spent. The deposit of the decretal sum one year later was therefore of no consequence.

There being no order for stay of execution in force, I order that the amount deposited by the appellant in the joint names of the parties’ advocates be released to the respondent forthwith. The appellant shall pay costs of this application.

Those shall be the orders of this court.

Dated and delivered this 25th day of July, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Ms Migiro H/B for Odera for the appellant

Advocate for the respondent absent