



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**Civil Case 96 of 1999**

**ALFRED ODONGO MASINDE ..... APPLICANT/RESPONDENT**

**=VERSUS=**

**EATEC LTD ..... RESPONDENT/APPELLANT**

**RULING**

This is a Notice of Motion dated 5<sup>th</sup> March 2003 filed by M/S Ledisha Kittony & Company Advocates on behalf of Alfred Odongo Masinde the applicant. The application is purported to be brought under section 3 and 3A of the Civil Procedure Act. It seeks for orders that:-

1. This Honourable court be pleased to order that the decretal sum together with costs and interest deposited with Housing Finance Bank (sic) on 6/3/2000 be released to the applicant's advocate.
2. Costs of this application be borne by the respondent.

The application has grounds of the face Notice of Motion and is supported by the affidavit of Ledisha Jebichii Kipseii advocate sworn on 5<sup>th</sup> March 2003. The grounds of the application are that the monies were deposited pending the hearing and determination of the appeal, that this appeal has now been determined; and that it is necessary that the same be now released to the successful party the applicant herein.

The application is opposed and a replying affidavit sworn by Isaac Simiyu Kuloba advocate on 24<sup>th</sup> March 2003 was filed. The averments in the replying affidavit are that an earlier application dated 20/1/2003 had already been fixed for hearing on 2/5/2003; that the orders for deposit of the decretal sum in a joint account was made in the subordinate court; that there are stay orders pending appeal, which meant those orders would stand until the matters was determined by the Court of Appeal; that Notice of Appeal had already been filed and served; that by virtue of section 94 of the Civil Procedure Act, a decree could not be executed by way of release of the sum in the joint account, until costs in the appeal have been ascertained; that the applicant did not give particulars of the bank account and therefore if the court grants the orders requested, the same cannot be enforced.

When the application came for hearing on 7<sup>th</sup> July 2005, Mrs Kittony for the applicant submitted that the decretal sum was deposited with Housing Finance Company of Kenya (HFCK) pursuant to a ruling of the court, pending the hearing of the appeal before the High Court. That appeal was determined on 18/11/2002 in favour of the applicants, but the respondents have refused to release the money. She submitted that though there was an application by the respondent dated 20/1/2003, the same has not yet been fixed for hearing.

She further submitted that there was no Notice of Appeal, and even if same is there, there was no stay of

execution. She submitted that the High Court Civil Appeal No. 96 of 1999 was determined and the determination or assessment of costs cannot be a reason not to release the money deposited. She further stated that the particulars of the deposit given by the applicant was adequate to enforce the orders sought.

She also submitted that this court has jurisdiction to entertain the application, as the subordinate court became functus officio. She sought to rely on the case of Raymond Woolen Mills =vs= Peter Obonyo – Eldoret HCC civil Appeal No. 115 of 2000 (unreported).

Mr. Kuloba for the respondent submitted that the prayer sought was not specific. The amount of money and signatories to the account were not mentioned.

He also submitted that their application, which was filed earlier had not yet been heard; though it came to court 4 times. If the current application is determined it would render the application dated 20/1/2003 as nugatory.

He further submitted that Notice of Appeal to the Court of Appeal is on record. There was no need to annex other documents filed in the appeal. He also submitted that case cited was in relation to different circumstances and was merely of persuasive authority to this court.

I have considered the application and submissions of Counsel for the parties. I have also perused the record in the file.

In my understanding, it is not in dispute that the subordinate court entered judgment for the applicant (who was Plaintiff in the lower court). It is not in dispute that the respondent (who was the defendant in the lower court) appealed to the High court. It is not in dispute that the High Court on 18<sup>th</sup> November, 2002 determined the appeal in favour of the applicant. It is not in dispute that the subordinate court granted stay of execution pending hearing of appeal in the High Court, provided that the decretal amount and costs in the lower court be deposited in a joint interest earning account in the names of both Counsel for the parties. It is not in dispute that the amount was actually deposited in HFCK. It is not in dispute that that amount has not been released up to date. It is not in dispute that a Notice of Appeal to the Court of Appeal was filed by the respondent and served. The application raises a number of issues and I will deal with them the way I understand them.

The first issue is whether this application should not be determined before the application of the respondent dated 20<sup>th</sup> January 2003. Indeed there is an application by the respondent dated 20<sup>th</sup> January, 2003. It is a notice of motion that seeks for orders of stay of execution in Eldoret CMCC No. 1685 of 1997 and also an order that a sum of Kshs 175,395/= deposited with HFCK Eldoret together with interest do remain in the account as security pending hearing and determination of the intended appeal. The application was filed on 29<sup>th</sup> January, 2003, while the application before me was filed on 5<sup>th</sup> March 2003. Obviously if the orders sought herein are granted, the application dated 20<sup>th</sup> January, 2003 will be overtaken by events.

Though Mr. Kuloba has argued that this application should not be determined before his client's application dated 20<sup>th</sup> January, 2003, he has not cited any legal authority to back his contention. In my view, it is the responsibility of a party who has filed an application to proceed and prosecute the same. That application was filed way back in January, 2003. There is no evidence that the applicant herein has prevented the applicant in that application from prosecution of that application. The applicant herein has merely been vigilant in fixing his own application for hearing. I find no reason why this application cannot be determined before the application dated 20/01/2003.

The second issue is whether this court has jurisdiction to entertain this application, since the order for deposit of the decretal amount was made by the subordinate court. On this, I am fully in agreement with what was held by my sister Hon. Justice Gacheche in the case of Eldoret High Court Civil Appeal No. 115 of 2000 – Raymond Woolen Mills =vs= Peter O. Obonyo where the learned Judge stated:-

“In my humble opinion once an intending appellant files his appeal, the court which issued the contentious decision becomes functus officio and the matter can only be referred back to that court by the appellant court for specific action should it be necessary, such as in cases where damages would be assessed, otherwise the appellate court is mandated with the responsibility of adjudicating upon all matters arising after the appeal is filed”.

In our present case, an appeal was filed and actually heard and determined by the High Court. The current application was filed after the appeal was filed and even after same was determined. In my view, this court has jurisdiction to entertain the application.

The next issue is whether after filing a Notice of Appeal, the orders granted by the subordinate court on the deposit of the money are still valid until the intended appeal in the Court of Appeal is heard and determined. Mr. Kuloba has not cited any authority on this to me. The legal provisions for stay of execution are as contained under order XLI rule 4 of the Civil Procedure rules. Rule 4(1) provides:-

“ 4(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed may order, but the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such orders thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside”.

My understanding of the above provisions of the law is that it is only the court appealed from or the court appealed to that can order a stay. The deposit of the decretal sum and costs with HFCK was done pending the determination of the appeal in the High Court. Once the appeal was determined, those orders of stay became of no effect, unless the High court or Court of Appeal granted a stay. That must be the reason why Counsel for the respondent s filed the application dated 20/1/2003. Up to now, no stay of execution has been granted by the High Court or Court of Appeal. Therefore the respondent cannot hide under the guise that the orders made by the subordinate court are still effective, until the intended appeal is determined by the Court of Appeal.

The other issue is whether the orders sought are not specific and cannot be enforced. Mr. Kuloba submitted that the amount and signatories are not disclosed. I do not agree with him that the orders sought are not specific. In my view, the description by the applicant of a deposit made on 6/3/2000 with HFCK is adequate. It will be for HFCK to say whether or not they will not be able to effect the Court’s orders not the respondent herein.

The other issue is whether section 94 of the Civil Procedure Act (cap.21) would militate against the release of the amount deposited, when taxation of the costs of appeal has not been finalized. That section applies to a decree passed by the High Court in its original jurisdiction. In our present case, the High Court came in as an appellate court. Secondly the section does not bar the High Court from ordering execution even where costs have not been determined.

This application was brought under section 3 and 3A of the Civil Procedure Act (cap 21). In my view, the respondents are using technicalities to defeat the course of justice. In my view, this is a proper case in which I have to exercise the powers of the court under section 3A of the Civil Procedure Act (Cap 21) to meet the ends of justice.

For the above reasons, I allow the application and order that the decretal sum together with costs and interest deposited with Housing Finance Company of Kenya on the 6/3/2000 be released to the applicants’ advocates.

I award costs of the application to the applicants.

Dated at Eldoret this 15<sup>th</sup> Day of November 2005.

**GEORGE DULU,**

**Ag. Judge.**

**IN THE PRESENCE OF:-**