

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 72 OF 2003

SOTIK TEA COMPANY APPELLANT/APPLICANT

VERSUS

MATHEW KORIR SANG RESPONDENT

RULING:

Applicant prays for orders of stay of execution in Kisii CMCCC No.464 of 2001 pending the hearing of and determination of the appeal. He also prays that the sum deposited in court in joint names of counsels for both parties be deemed duly deposited.

On 14th April 2003 judgment was delivered in the lower court in favour of the respondent for the sum of shs.300,000/= less 20% contribution together with costs. The applicant/appellant filed this appeal on 13th May 2004. The applicant made an application in a lower court seeking for stay of execution. The stay was granted but it was ordered that the decretal sum be deposited in a joint interest earning account of both counsels within 14 days. That was on 17th July 2003. Apparently the account was not opened until late August and shs.242,000/= was deposited. Counsel for the respondent was however not informed. On 24th October 2003 he applied for execution of the decree and hence this application.

Mr. Bosire for the applicant explained that they complied with the court order though it was after the expiry of the 14 days given. He said the court's order was signed on 31/7/04 the day the 14 days were expiring. They sent forms to open the account to Mr. Lebu. He signed them but it was on a Friday and they could not open the account. The account was opened the following Monday.

Mr. Lebu opposed the application. He admitted signing the forms but counsel for the applicant kept him in the dark as to what happened after that. He wrote to him on 15/9/03 but there was no response. Eventually he had to apply for execution.

Further he said the amount deposited on 5/8/03 was shs.242,000/=. This was not the full decretal amount which was shs.266,890/=. He therefore submitted that the applicant did not comply with the court's order of 17/7/03. In fact the applicant had made a similar application to this one in the lower court but it was dismissed.

I have carefully considered the application. It is not in dispute that the account was opened on 5/8/03 and shs.242,000/= deposited. That was about 5 days after the expiry of the 14 days. The applicant therefore did not comply with the court's order of 17th July 2003. However Mr. Bosire explained the predicament they were in which led to their being late in depositing the money as ordered. I am satisfied with the explanation given. The delay was only for 5 days.

Also there was the issue of the amount to be deposited. Shs.242,000/= was deposited while the respondent submits that it should have been shs.266,890/= due to costs. The discrepancy perhaps is in computation, which can be easily sorted out after the appeal has been heard. The bulk of the money is already deposited and that is good enough security.

In the circumstances I allow the application and order stay of execution of decree in Kisii CMCCC 464 of 2001 until the appeal is heard and determined. The amount already deposited is hereby deemed duly deposited.

The applicant will however pay the cost of this application and auctioneers fees if any.

KABURI BAUNI

JUDGE

27/7/04

Dated and delivered on 27th July 2004.

KABURU BAUNI

JUDGE

Court: Delivered in presence of Mr. Lebu for Respondent.

KABURU BAUNI

JUDGE