



REPUBLIC OF KENYA



**Njamumo v Wanjohi & another (Civil Appeal E022 of 2022)
[2024] KEHC 1424 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1424 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E022 OF 2022
RM MWONGO, J
FEBRUARY 14, 2024**

BETWEEN

DUNCAN GICHOBI NJAMUMO APPLICANT

AND

CHRISTOPHER JOE WANJOHI 1ST RESPONDENT

MWANGI MWANIKI HENRY 2ND RESPONDENT

RULING

1. Following an appeal in this court, Judgment was entered on 3rd November, 2023, against the Appellant by Njuguna, J for Kshs 1, 653,230.
2. On 14th November, 2023, the Applicant filed notice of motion of even date seeking release of the decretal sum to him. The application seeks orders as follows:
 1. Spent.
 2. That the Honourable Court be pleased to order the release of Kshs 1,159,501/= plus interest thereon being the total amount held in the joint Interest earning Account Number 1296XXXXXX at Kenya Commercial Bank to the Firm of Muthike & Makworo Advocates Kenya Commercial Bank Account Number 1302XXXXXX Kerugoya Branch on behalf of the 1st Respondent/Applicant.
 3. That the Honourable Court be pleased to order that upon the release of Kshs 1,159,501/=plus interest the said account be closed.
 4. That the costs of this Application be provided for.
3. The application is based on the following grounds:
 1. That the appellant filed the appeal and Judgment was delivered on 3rd November, 2023.



2. That stay of execution pending Appeal had been granted by the Court on condition that an amount of Kshs 1,159,501/= was deposited in a joint interest earning account in the names of the Advocate's for the Parties.
 3. That Judgment of the lower Court was delivered on 22nd March 2022 awarding the Respondent a total sum of Kshs 1,500,000/= as general damages and Kshs.156,430/= as special damages.
 4. That the Appeal having been dismissed the money held in the account ought to be released.
 5. That the Appellant has failed to comply to have the money released without necessitating this Application.
4. The application was accompanied by a supporting affidavit dated 14th November, 2023 to support his averments.
 5. On 16th November, 2023, a decree was issued by this Court for the decretal amount of Kshs 1,653,230 awarded to the respondents herein.
 6. On the same date, the Appellant/respondent filed a replying affidavit with the following major averments:
 - i. That he deposited the said decretal sum in an interest earning account jointly held by the Applicant's advocates and his advocates at KCB bank Thika Road Mall branch account number 1296383946 of Kshs.1,200,000/= only.
 - ii. That subsequent to the entry of the judgement herein on 3rd November, 2023, the respondent informed the insurer of his motor vehicle subject to the suit herein of the same.
 - iii. That the insurance company has not taken any action to settle the said decree and hence he has instituted a declaratory suit against the said Insurance company.
 - iv. That the Applicants herein cannot claim he is not privity to the insurance contract between the appellant and his insurer, since the said is a dictate of the law.
 - v. That whether or not to grant stay of execution pending the determination of a declaratory suit would be an exercise of the court's inherent jurisdiction.
 - vi. That the grant of the orders sought herein will occasion him great loss and prejudice.
 7. Essentially, the appellant has now introduced the insurance policy in the proceedings herein seeking that the declaratory suit he has filed should pend the execution off this Court's judgment of 3rd November 2023.
 8. In response, the applicant filed a Supplementary affidavit with the following major averments:
 1. That he is not privity to the Insurance contract between the Appellant and the Insurance Company.
 2. That whereas an insured may well be entitled to seek a declaration that its Insurer is entitled to settle the claims covered under the Insurance policy, that statutory right of action does not bar a person who was injured from executing the decree issued in his favour against the insured directly.
 3. That the amount of Kshs 1,159,501/= was deposited as security for the Appeal which had since been determined.



4. That the appellant has not indicated any loss or prejudice he will suffer if the amount deposited at the Bank is released.

Parties' Submissions

9. The applicants submit that the amount that had been deposited as security for costs ought to be released since the Applicant was the successful party. The Appeal having been heard and determined there is no business pending before this Honourable Court save for the release of the security deposit.
10. On 23rd November, 2023 the Honourable Court on its own motion made an order for the amount to be deposited in Court. it is not clear whether that order was duly complied with.
11. Reliance was placed on the case of *Eastland Hotel Limited v Wafula Simiyu & Co Advocates* [2015] eKLR where the Court of Appeal Court allowed an application for release of money that had been held in a joint account after the Appeal was heard and determined. The Court stated "it is our considered view that sum deposited was conditional pending the hearing and determination of the intended appeal."
12. In this case the Appellant has declined to consent to the release of the money held despite Judgment having been delivered. The applicant urges the Court to take a similar position as that in the Eastland Hotel case.
13. The Respondent had not filed submissions by 29th January, 2021, but Counsel stated in court that he would file them that day. The same have not been filed to date.

Issue for Determination

14. The only issue for determination is whether the security of costs should be released to the applicant.

Analysis and Determination

15. It is not in dispute that an amount of 70% of the decretal sum of Kshs 1,159,501 was ordered on 25th April 2023, to be deposited by the judgment debtor/Appellant "as a security deposit" into a joint interest earning account. Failing such deposit, the orders were that the judgment creditor was entitled to execute. The amount was deposited in compliance, as confirmed in the proceedings of 26th May 2023.
16. Accordingly, on that day 26th May 2023, this court allowed the appellant to file the record of appeal.
17. On 3rd November, 2023 judgment was delivered in the appeal for a total award of Ksh.1,653,230/= plus costs of the Appeal and interest from the date of Judgment. The Applicant has sought for the release of the deposited amount of Ksh. 1,159,501/= since the Appeal has been concluded.
18. On 23rd November, 2023 the court ordered for the decretal sum to be removed from the joint account of the parties and the same be deposited in this Court. There is a deposit slip showing that this order was complied with by the appellant.
19. The appellant/respondent deposed that the insurance company has not taken any action to settle the said decree and hence has instituted a declaratory suit against the said Insurance company. Further, the appellant states that whether or not to grant stay of execution pending the determination of a declaratory suit would be an exercise of the court's inherent jurisdiction.
20. There is no doubt in my mind that the object of the deposit was to secure the judgment creditor's right to the fruit of the judgment debt/ decretal sum, in the event that the appellant lost the appeal. Equally,



the deposit was intended to ensure that the appellant does not lose the decretal monies in the event that the he succeeded on appeal.

21. The appeal was concluded and the appellant was unsuccessful. This court has no further jurisdiction in respect of the appeal, other than to ensure execution of the orders made on appeal. I see no basis for this court to deal with extraneous issues arising concerning the proposed declaratory suit. No evidence has been placed before the court of the said suit. In any event, such suit cannot be dealt with in these proceedings.
22. The position taken by the Court of Appeal in the *Eastland Hotel Case*; “that the sum deposited was conditional pending the hearing and determination of the intended appeal” applies squarely in this case. The principle to be drawn from that case is that where a deposit is made for a specific purpose, it should be applied to that purpose, and no other. In addition, there is nothing to prevent the appellant from pursuing his insurer for a declaration, as that is a matter of privity of contract between him and the insurance company.
23. Finally, as already noted, the Court ordered that the amount deposited in the joint account should be deposited into court. I have seen evidence of compliance showing the deposit in court.

Disposition

24. Ultimately, in light of all the foregoing, this Court exercises its discretion in favour of the applicant. The application dated 14th November, 2023 is therefore allowed and the amount deposited into court shall be released to the Applicant’s Counsel.
25. Costs of the application shall be borne by the Appellant/Respondent.
26. Orders accordingly.

DATED AT KERUGOYA THIS 14TH DAY OF FEBRUARY, 2024.

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R. MWONGO

JUDGE

Delivered in the presence of:

1. Makworo for the Applicant/Respondent
2. No representation for the Appellants
3. Murage, Court Assistant

