



**Rading v Waomba (Civil Appeal E167 of 2024)
[2024] KEHC 15822 (KLR) (16 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15822 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E167 OF 2024
RE ABURILI, J
DECEMBER 16, 2024**

BETWEEN

JOHN RADING APPELLANT

AND

KEVIN NYONGESA WAOMBA RESPONDENT

(An appeal arising out of the Judgement and Decree of the Honourable G.C. Serem (RM/ Adjudicator) delivered on 25th July 2024 pursuant to the leave granted on 30th September 2024)

RULING

1. This court did receive a Certificate of Urgency when it was away attending the High Court Human Rights Summit. The Court gave directions which had the effect of staying execution of decree in the lower court in the matter which it had already dealt with.
2. The Certificate of Urgency was dealt with exparte in the absence of both parties. The Respondent has not filed any response yet. The Applicant’s counsel urges the court to have the sums retained in the joint interest earning account while the Respondent’s counsel urges the court to have the orders of 28th November 2024 take effect.
3. I have considered the two positions advanced by both parties’ counsel. I note that indeed, this court had heard both parties and by consent entered on 11th November 2024, the parties agreed to have the decretal sum deposited in a joint interest earning account within 14 days as a condition for stay.
4. Come 28th November 2024 which was the date for mention to confirm compliance, the Applicant had not complied and the court was informed by Ms. Musando, in the full proceedings recorded in HCCA No. E166 of 2024 that they were unable to comply with the consent because of the issue of the client’s system. That is when this court, after hearing both parties orally, allowed a conditional stay upon the Applicant paying to the Respondent half of the decretal sum and the balance to be deposited in a joint



interest earning account of both parties' counsel because the Applicant had twice not complied with the conditional stay orders.

5. The court did observe that the insurer would suffer prejudice if the order were not made.
6. Now the Applicant has an application saying that the earlier conditional stay orders were complied with, making it impossible to comply with the orders of 28th November, 2024.
7. The Applicant filed a certificate of urgency when the court was away and did not have the benefit of the orders made on 28th November 2024 and it gave a stay until 22nd January 2025 based on the facts given in the application. The court did not have the proceedings of 28th November 2024.
8. In my view, although the Applicant has since complied with the order of 11th November 2024, the compliance came after the orders of 28th November 2024. What the Applicant should have sought would be to have an order issued and served on the bank which has received the money in the joint interest account to comply with the order of 28th November 2024.
9. I find the Applicant to be entrapping this court to issue conflicting orders which is an abuse of court process as the discretion of the court albeit unfettered, can only be exercised up to a certain extent and not in perpetuity.
10. There is no indication that the orders of 28th November 2024 are incapable of being enforced and no prejudice will be occasioned to the Applicant if the said orders are enforced.
11. Accordingly, I order that although the whole decretal sum was deposited in the joint interest earning account which was post the period given for compliance, the only orders that were on record for compliance were those of 28th November 2024.
12. Consequently, the orders of 13th December 2024 issued exparte, under certificate of urgency, without having the benefit of the history of this matter were issued in error and therefore, on this court's own motion, I proceed to set aside the said orders and vacate the same.
13. I order that out of the monies deposited in the joint interest of both parties' counsel, half thereof shall be paid to the Respondent through his counsel Rakewa Otieno & Company Advocates upon this order being served on the Equity Bank. That is the only premise upon which the stay will remain in force as initially granted.
14. Mention date remain 22nd January 2025 before High Court 2. The orders apply to HCCA No. E166 of 2024.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 16TH DAY OF DECEMBER, 2024

R. E. ABURILI

JUDGE

