



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 53 OF 2016

BLUE AVIATION LIMITED.....APPELLANT

VERSUS

MSI AIRCRAFT MAINTENANCE SERVICES

INTERNATION GMBH AND CO. KG.....RESPONDENT

RULING

The respondent filed the suit in the lower court as the plaintiff being CMCC No. 1486 of 2014 against the appellant as the defendant. The suit was for a claim of Kshs. 7,303,895.40/=. After service of summons to enter appearance and file a defence, the appellant did not comply and therefore the respondent applied and obtained Judgment in the said sum.

This was followed by an application by the appellant for leave to set aside the interlocutory judgment and file a defence. That application was dismissed by the lower court resulting in civil Appeal No. 53 of 2016. The appellant then filed an application for an order to stay execution of the lower court judgment pending the hearing and determination of the appeal.

On 20th May, 2016 Serگون J allowed the application on condition that the appellant deposited the decretal sum aforesaid in an interest earning account in the joint names of the advocates for the parties. This order was complied with on 16th June, 2016.

The appeal was subsequently heard and in a Judgment dated 21st November, 2019 this court allowed the appeal and ordered that the appellant pays the costs thereof and the lower court file be remitted for hearing before another magistrate provided that the defence was regularised by payment of filing fees, service upon the respondent and compliance with Order 11 of the Civil Procedure Rules.

There are now two applications before the court the first of which is dated 13th May, 2020 by the respondent for an order that pending the hearing and determination of the lower court suit cited above, the court do direct the sum deposited with bank of Africa Kenya Limited Monrovia street in Nairobi in the joint names of the advocates or any such portion thereof as may be sufficient to satisfy the decree be held as security for that reason.

The application is supported by grounds set out on the face thereof and an affidavit sworn by one Jackline Wanjiku Ndungu. The application is opposed and there is a replying affidavit sworn by one Hussein Yunshur Mohamed a Director of the plaintiff.

The 2nd application is dated 29th July, 2020 by the appellant seeking an order that the funds held by the parties advocates in the joint account aforesaid be released to the appellant. The grounds in support of the application are set out on the face thereof, alongside the supporting affidavit sworn by Hussein Mohamed Yunshur. The application is opposed and there is a replying affidavit to that effect sworn by Patricia Muthoni Ndungu.

Following directions of this court, parties have filed their respective submissions and cited several authorities.

The deposit of the sum of Kshs. 7,303,895.40 was ordered following an application by the appellant for stay of execution under Order 42 Rule 6 of the Civil Procedure Rules. Under the said provisions it is clearly stated any security ordered is intended **“for the due performance of such decree or order as may ultimately be binding on”** the applicant.

As at the time of making that application there was a decree in favour of the respondent. After the appeal was allowed, and an order made for a retrial in the lower court, that decree must have been vacated. At that point no other proceedings were pending before the high court. Any subsequent proceedings would not have conferred any jurisdiction upon the High Court. What this means is that it is the lower court

that was seized of the matter and any applications would either be made before that court or following an order of that court.

I shall first address the application by the respondent dated 13th May, 2020. Order 39 Rule 5 of the Civil Procedure Rules provides as follows,

“5. (1) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—

(a) is about to dispose of the whole or any part of his property;

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.”

It is clear that an order for security for cost may only be ordered by the court seized of the matter but which has not issued any decree. I am of the view that “the court” refers to in this provisions relates or refers to the trial court.

In the circumstances, this court declares it has no jurisdiction to order security for costs and the respondent is at liberty to pursue such an issue before the trial court.

The question that follows is the status of the security that was posted by the appellant. It is logical to conclude that once the appeal was allowed and upon which security was posted, then that security must be surrendered to the appellant. The respondent would not have any claim upon that deposit of security because no decree has been issued by any court at that stage.

It is logical to conclude therefore that the sum deposited as security should be surrendered to the appellant. There is however an application by the respondent to retain the said or part thereof as security for the satisfaction of the decree. I have already observed that the respondent does not hold any decree. I have also referred to the Judgment of this court which ordered the trial to be conducted by the lower court.

In the circumstances therefore the respondent’s application dated 13th May, 2020 is dismissed while the appellant’s application dated 29th July, 2020 is allowed. Each party shall bear their own costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MAY, 2021.

A. MBOGHOLI MSAGHA

JUDGE

In the presence of:

.....For the appellant

..... For the respondent