

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 144 OF 2017

PETER MULEI SAMMY.....APPLICANT

VERSUS

CANON ASSURANCE CO LTD.....RESPONDENT

RULING

1. The applicant vide application dated 30.7.2020 is seeking for the following orders:-

a. That court be pleased to order for the release of the sum of Kshs 534,322/- (five hundred and thirty-four thousand, three hundred and twenty-two shillings only) deposited by the appellant/respondent herein in Civil Suit No. 729 of 2014, Machakos on 18.12.2017 to the respondent/ applicant's advocates M/s Mulu & Co. Advocates.

b. That the costs of this application be provided for.

2. The grounds of the application are that the respondent's appeal was dismissed with costs to the applicant and it is necessary to release the amount deposited as security in the instant appeal pursuant to an order of the trial court.

3. The application is supported by the affidavit of Francis Mulu deponed on 30.7.2020 that reiterated the grounds contained on the face of the notice of motion. A copy of the cheque indicative of the deposit was annexed to the affidavit.

4. In opposition to the application was an affidavit deponed by Martha Mutoro on 5.10.2020. She opposed the application on the grounds that if the security is released, then there will be no security for the appeal that has been filed in the Court of Appeal and that the applicant will not be interested in the said appeal.

5. The history of the matter is that the applicant, who is the respondent in the appeal, had a dispute in the magistrate's court where a decision was rendered against the appellant who is the respondent in this application. Aggrieved, the respondent filed an appeal in this court as well as an application for stay in the trial court. The trial court vide ruling that was delivered on 5th March, 2018 ordered that the sum of Kshs 534,233/- already deposited in court do remain in court until the appeal is heard and determined. The appellant who was the defendant in the trial court was ordered also to pay Kshs 744,333/- to the applicant herein. The appeal was heard and dismissed vide a judgment delivered by this court on 29th July, 2020.

6. Through this application, the applicant now wants an order to have the money that was deposited in the trial court to be released to him.

7. I have noted that this court did not make any order to have the money deposited in court; the order was made by the trial court and this court cannot handle any questions relating to an order that it did not make. Secondly, whereas the court record indicates that the amount deposited was Kshs 534,233/-, the applicant's claim in the application is for an amount of Kshs 534,322/-. In my view, the questions relating to release of the amount deposited would be better handled by the court that passed the order and/or the court where the money was deposited and not this court. It therefore follows that the instant application is improperly before this court. It is directed that the applicant approaches the trial court that made the order seeking a release of the amount deposited by the respondent in the court on the ground that the appeal has been concluded in favour of the Applicant/Respondent.

8. In view of the foregoing observations, the application dated 30.7.2020 lacks merit. The same is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 2ND DAY OF JUNE, 2021

D. K. KEMEI

JUDGE