



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**MISC. APPLICATION NO. 64 OF 2019**

**IN THE MATTER OF CA CIVIL APPLICATION NO. 31 OF 2016**

**IN THE MATTER OF CA CIVIL APPLICATION, NO 59 OF 2018 (UR 37 OF 2018)**

**JOSEPH MORARA OMOKE.....APPLICANT**

**VERSUS**

**GERALD KIMANGA.....1<sup>ST</sup> RESPONDENT**

**MOMANYI AUNGA.....2<sup>ND</sup> RESPONDENT**

**RULING.**

1. Joseph Morara Omoke the applicant herein seeks to have the Respondents cited for contempt of court vide his application dated the 24<sup>th</sup> May 2019. He also seeks an order that the court be pleased to order body execution of the respondents to be compelled to reveal the status and the whereabouts of the decretal sum deposited by the order of the Court of Appeal sitting on the 24<sup>th</sup> April 2016 at Eldoret in CA Civil Application no. 31 of 2016.

2. The respondents are Gerald Kimanga advocate and Momanyi Aunga. Mr. Aunga was excused from the proceedings on the 2/7/2019. The applicant proceeded with the matter against the 1<sup>st</sup> Respondent.

3. The background of this matter is that the applicant got judgment against Invesco Assurance Company Ltd (Invesco) for a sum of Kshs. 1,100,000/- at the Chief Magistrate's court here in Kisii. Invesco appealed against the award and obtained a stay vide Misc. application no. 59 of 2015 on condition that a sum of Kshs. 300,000/- was deposited in court as security for costs pending hearing and determination of the appeal. Invesco thereafter moved to the Court of Appeal seeking an order for stay of execution. The Court of Appeal sitting in Eldoret on the 25<sup>th</sup> April 2016, recorded a consent in Civil Application no. 31 of 2018 that, *the applicant (Invesco) having paid an amount of Kshs. 800,000/- to date in respect of the decretal sum vide the ruling of the High Court dated 23<sup>rd</sup> November 2015, will deposit the balance of an amount of Kshs. 1,100,000/- in an interest bearing account in the joint names of the parties advocates in a reputable and credible financial institution within 14 days from the date hereof.*

4. The applicant (Joseph) filed an application before the Court of Appeal dated the 2<sup>nd</sup> December 2016 against Invesco Assurance Company. In its Ruling dated the 7<sup>th</sup> June 2018, the Court of Appeal issued the following orders:

*i. In furtherance of the consent order dated the 25<sup>th</sup> April 2016, the respondent (Invesco) to file the intended appeal with 45 days from the date hereof.*

*ii. In default, the order of stay of execution granted by the said consent order shall lapse and the application dated 18<sup>th</sup> April 2016 shall stand dismissed with costs.*

*iii. In the event the order lapses pursuant to clause 9(i) above, the Kshs. 1,100,000/- deposited in the joint bank account shall be paid to the applicant together with the accrued interest.*

5. According to the applicant the appeal was not filed and that following the lapse of the stay orders the 1<sup>st</sup> respondent has declined to release the money to him, hence the current application.

6. The application was opposed by the 1<sup>st</sup> respondent.

7. I have read and considered the written submissions filed by the parties.

8. It is not in dispute that this court has the jurisdiction to hear an application citing a party for contempt and the powers to punish the said party if found to be in contempt.

9. However, in this matter an issue has been raised by the 1<sup>st</sup> Respondent on the court's jurisdiction. The order cited by the applicant were orders issued by the Court of Appeal in Civil Application No. 31 of 2016. The said orders were not issued by the High Court. The correct forum to pursue noncompliance of the said of the said orders is the Court of Appeal. This court therefore lacks the jurisdiction to determine the application filed by the applicant. On the 2<sup>nd</sup> limb it is my view that the correct forum to determine the issue is the Court of Appeal. Lastly the applicant admits that he filed a similar application before the Court of Appeal, why file a similar application before the High Court? I agree with Justice Ochieng's observation in his Ruling in Misc. Civil Application No.115 of 2019, "***that the co-existence of the multiplicity of applications, all which relate to the same subject matter is an invitation to divergent and possibly inconsistent determinations. And when the said applications are before courts at different levels, such as the High Court and the Court of Appeal, (as in this instance), the court has an obligation to immediately put on hold the proceedings.***"

10. Having found that this court lacks the jurisdiction to hear and determine the application, I strike out the applicant's application dated the 24<sup>th</sup> May 2019 with costs.

**DATED, SIGNED AND DELIVERED AT KISII THIS 7<sup>TH</sup> DAY OF JULY 2021.**

**R.E. OUGO**

**JUDGE**

**In the presence of:**

**Applicant in Person Present**

**Mr. Kipngetch h/b Kimanga For the 1<sup>st</sup> Respondent**

**Mr. Orwasa Court Assistant**