



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 7 OF 2015

JAMES KIMANI MAINA.....PLAINTIFF

- VERSUS -

ATHI WATER SERVICES BOARD.....DEFENDANT

BIRDI CIVIL ENGINEERS LIMITEDTHIRD PARTY

RULING

This court delivered its Judgment on 10th December, 2019 and awarded the Plaintiff a sum of Kshs. 44,720 plus interest. Initially, the court had entered a default Judgment against the defendant for failing to enter appearance in the sum of Kshs. 7,092,496/90. The defendant was allowed to defend the suit on condition that the decretal sum was deposited in a joint interest earning account of both advocates.

Since the court determined the case and delivered its Judgment, the defendant has now applied for the release of the money deposited in the joint account, vide application dated 6/2/2020. The application seeks the following prayers:-

1. THAT the Honourable Court be pleased to order the release of Kshs. 8,140,335/55 plus interest thereon until fully released, being the total amount held in the fixed joint interest-earning Account No. xxxxxx at KCB Bank Kenya Limited, Milimani Branch, as at 17th December, 2019, as follows:-

a. The sum of Kshs. 267,748/85 plus interest thereon until fully released, be released to the firm of Evans Thiga Gaturu Advocates on behalf of the Plaintiff in full and final settlement of the Decretal amount of Kshs. 44,750/= plus interest thereon and costs as awarded by the court vide its Judgment per the Honourable Lady Justice J. Kamau delivered on 10th December, 2019.

b. The balance of the sum of Kshs. 7,872,586/70 plus interest thereon until fully released, be released to the firm of Nyachae & Ashitiva advocates on behalf of the Defendant through the following account details:-

Account Name : Nyachae & Ashitiva Advocates

Bank : Credit Bank Limited

Branch Name : Koinange Street Branch

Bank Code : 025

Branch Code : 001

Account No : xxxxxx

Swift Code : CRBTKENA

2. THAT the costs of this Application be provided for.

3. THAT this Honourable Court be pleased to make any other or further orders as the circumstances and interests of justice herein may require.

The application is supported by the affidavit of **TAMARI KAIKZA KATANA**. The Plaintiff/Respondent filed a Notice of Preliminary Objection to the application dated 19/2/2021. The court dealt with the Preliminary Objection and delivered its ruling on 26th May, 2021 dismissing it. The Respondent also filed grounds of objection to the application and written submissions.

Mr. Ashitva, counsel for the Applicant submitted that the application seeks to enforce the Judgment of the court. The money was deposited by the defendant as a condition to defend the suit. It is argued that the court asked counsel for the plaintiff to file a formal application for stay of execution but this was not done. The filing of an appeal against the Judgment of the court cannot be the reason not to release the money. Counsel for the Applicant urged the court to apportion the accrued interest proportionally as per the court Judgment. The Defendant/Applicant cannot be asked to deposit money until the Plaintiff exhausts his appeal. Counsel further contend that there is no evidence that the Applicant will not be able to pay the amount deposited in the bank should the appeal succeed.

Mr. Gaturu appeared for the Respondent. Counsel relied on his written submissions. It is submitted that this court should keep the application on hold pending the hearing and final determination of the Plaintiff's appeal by the Court of Appeal. The appeal process has started and parties have been directed to file written submissions. Parties were given directions way back on 21st May, 2021. The Court of Appeal was boosted by the swearing in of seven (7) more Judges and the appeal is likely to be heard sooner than later. Counsel further submit that in compliance with the directions of the Court of Appeal, the Plaintiff has already filed his submissions. According to Mr. Gaturu, releasing the money would be tantamount to executing a Judgment of the High Court before the Court of Appeal has heard the Appeal. It would occasion a very serious miscarriage of justice to the Plaintiff if the court orders the escrow account which has Kshs. 8,140,335/55 as at 10th December, 2019 be retired and the proceeds be released to the Defendant. Should the appeal succeed, execution by the Plaintiff against the Defendant might become problematic. The money was deposited into the escrow account in April, 2015. The Applicant has waited for over six (6) years and should be able to wait for a further two (2) or so months. Such period of waiting cannot be held to be unreasonable or oppressive.

Mr. Gaturu further submit that the High Court decision cannot be held to be the final Judgment. It is the Court of Appeal decision that can be held to be the final Judgment. The trial court's decision can be overturned and if that happens and the money is released, the appeal will be rendered nugatory. The Plaintiff was granted a mere Kshs. 44,000 yet he had sued for Kshs. Seven (7) Million. Due to accumulation of interest, the claim can be in excess of Kshs. Nine (9) Million.

On 17/4/2015, Justice Onyancha made the following orders:-

1. Interim stay of execution of decree granted until 4/5/2015 on condition that the decretal sum of Kshs. 7,092,497 is deposited in court before 4/5/2015.

The money was subsequently by consent dated 28th May, 2015 transferred into the joint account of both advocates. The issue for determination is whether the money should continue being held in the joint escrow account pending the hearing and determination of the appeal. The money was deposited as directed by the court. It later became security for purposes of allowing the defendant the opportunity to defend the suit. In my view, the money was deposited as a condition to setting aside the default Judgment and allowing the Defendant defend the suit. Upon the hearing and determination of the suit before this court, the security lost its relevance. There is no requirement in law that a Respondent does provide security as a condition to the appeal being heard. A party who has lost before the trial court cannot give conditions to the successful party to provide security in case his appeal succeeds. Once the appeal succeeds that will totally be a different matter. The Court of Appeal has not requested the Respondent to provide security.

The Black's Law Dictionary (10th Edition); defines "security" as **collateral given or pledged to guarantee the fulfilment of an obligation.**

The money deposited in court was to be used as security so as to allow the Defendant defend the suit before the trial court. It was not meant to be utilized as security to enable the Plaintiff prosecute his appeal in case he was not successful at the High Court. To extend the security to cover the appeal would amount to holding the Defendant at ransom. The money was deposited way back in 2015 and it is prudent to have it released so that the Defendant can exercise the right to its property.

It is my considered view that the release of the money does not render the appeal nugatory. The Appellant cannot anticipate that it will be difficult to execute should the appeal succeed if the money is released. How many appellants have the comfort of security having been deposited by a successful respondent. The appeal will be heard and whatever is awarded will be pursued through the normal execution process. The Applicant was asked to deposit the money in court and quickly complied. I believe the Applicant is in a position to satisfy any decretal sum that will be awarded to the Appellant. There shall be no miscarriage of Justice if the money is released. The Respondent is a public institution which is capable of paying the Appellant in case the appeal is successful.

It is my further finding that the fact that an appeal can be heard and determined within a short time cannot be the reason to ask a respondent to provide security or to hold a security provided to the trial court whose decision is the subject of the Appeal. The superior court should be the one to call for the security if it finds that there is need for it. The provision of security in civil disputes should not be converted into punishing parties. Litigants should always be on an equal footing. The Appellant should pursue his appeal just like any other Appellant and should not be excited by the comfort of the security provided by the Defendant to a different court.

The upshot is that the application dated 6th February, 2020 is merited and is hereby granted as prayed. Parties shall meet their respective costs of the application.

DATED DELIVERED AND SIGNED AT NAIROBI THIS 12TH DAY OF OCTOBER, 2021

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S. CHITEMBWE

JUDGE