



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CIVIL APPEAL NO. 55 OF 2018**

**INVESCO ASSURANCE**

**COMPANY LIMITED.....APPELLANT/APPLICANT**

**-VERSUS-**

**DAVID KIPLIMO MUGE (Suing as the**

**Legal Representative of the Estate**

**of the Late ANN ASEYO.....RESPONDENT**

**(Being an appeal against part of the ruling of Hon. B. Mararo, Principal Magistrate dated 25<sup>th</sup> April 2018 in Nakuru CMCC No. 252 of 2017)**

**RULING**

1. On the 25<sup>th</sup> April 2018 in Nakuru CMCC No. 252 of 2017 the trial court imposed terms and conditions upon the Applicant Invesco Assurance Co. Ltd for setting aside an *ex parte* judgment entered in the case against itself thus to deposit the entire decretal sum of Kshs.1,742,546/= in a joint account in the parties advocates names within 14 days from the 25<sup>th</sup> April 2018 pending hearing and determination of the Appeal.

2. The applicant was dissatisfied with the above order. It is the subject of the Appeal.

3. It is submitted that the order for the deposit of the decretal sum had no basis in law as the *Ex parte* judgment had already been set aside, and that the only requirement was to order payment of throw away costs to the Respondent. The applicant therefore seeks an order of stay of execution of the decree pending the hearing and determination of the appeal.

The legal officer of the Applicant Nelson Adongo swore the affidavit in support of the application on the 15<sup>th</sup> June 2018.

4. In opposing the Application the Respondent swore a replying affidavit on the 13<sup>th</sup> July 2018.

I have considered the application and the grounds of opposition.

I agree with the appellant that the *Ex parte* judgment having been set aside, no security in terms of deposit of the decree sum ought to have been ordered because once the judgment is set aside, there is no judgment upon which security for due performance in terms of **Order 42 rule 6 CPR** exists.

5. I have noted that the *Ex parte* judgment was upon a declaratory suit against the applicant. In the circumstances an order to secure a non existing judgment is baseless and punitive. It negates the very essence of setting aside an *ex parte* judgment in the first place.

6. The court's discretion is intended to be exercised to avoid injustice or hardship to the parties-**Esther Wamaitha Njihia –vs- Safaricom Ltd (2014) e KLR.**

There are many factors as to why an *ex parte* judgment is entered in the first place.

It is upon consideration of such factors that the trial court set aside the *ex parte* judgment.

7. It was not submitted that the Respondent does not reside in Kenya or was about to abscond which would have necessitated not the decretal sum as none exists, but the sum claimed in the plaint into court or Bank – Order 39 rule 1 CPR Oscar Juma –vs- Telkom Kenya Ltd & 2 Others (2019) e KLR.

8. In **Shah –vs- Shah (1982) KLR** the court held

That

*The general rule is that security is normally required from the plaintiff resident outside jurisdiction....*

9. What ought to have been ordered to vindicate the Applicant is an order to pay throw away costs to the Respondent. The court under its discretion could have assessed the costs or let parties to tax or agree - **Pravichandra Jamnadas Kakad –vs- Lucas Oluoch Mumia (2015) e KLR.**

10. In the application before me I find that the trial court erred in law in requiring the applicant to deposit the decretal sum for a non-existing judgment in a bank pending the hearing of the suit.

I therefore allow the application set aside the trial court's ruling dated 25<sup>th</sup> April 2017 and substitute it with an order that the Applicant do pay throw away costs to the Respondent assessed at Kshs.50,000/= within 30 days of this ruling.

In default the Respondent shall be at liberty to execute for the costs.

It is so ordered.

**Dated, signed and delivered this 13<sup>th</sup> day of March 2019.**

**J.N. MULWA**

**JUDGE**