



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 589 OF 2012**

**DR. JOHN RITHO KANOGO.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**DR. GEOFFREY AVUGWI RITHO.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**MARGARET RITHO.....3<sup>RD</sup> PLAINTIFF/RESPONDENT**

**-VERSUS-**

**JOSEPH NGUGI.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**THE STANDARD GROUP LIMITED...2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. The defendants/applicants have filed a Notice of Motion dated 7<sup>th</sup> February, 2019 seeking and which Motion stands supported by the averments made in the body thereof and affidavit of *Millicent Ng'etich*. The following orders are sought therein:

**(i) Spent.**

**(ii) Spent.**

**(iii) Spent.**

**(iv) THAT this Honourable Court be pleased to review its conditional order made to the effect that half the decretal sum be paid to the respondents pending the hearing and determination of the appeal.**

**(v) THAT the costs of the application be provided for.**

2. *Millicent Ng'etich*, the Company Secretary of the 2<sup>nd</sup> defendant/applicant, deponed that this court vide its judgment delivered on 6<sup>th</sup> December, 2017 awarded the plaintiffs/respondents a total decretal sum of Kshs.27,000,000/= together with costs. That thereafter, the defendants/applicants sought a stay of execution of the said judgment pending the lodging of an appeal and the same was granted on 20<sup>th</sup> December, 2018 on the condition that half of the decretal sum be paid to the plaintiffs/respondents while the remaining half be deposited in a joint interest earning account to be opened in the joint names of the respective firm of advocates.

3. The deponent stated that the defendants'/applicants' advocates have to date not received any communication from the plaintiffs'/respondent's counsels in a bid to facilitate compliance with the abovementioned court order, adding that since the plaintiffs/respondents are non-residents of Kenya or this court's jurisdiction, it will be difficult to recover the decretal sum that will be paid to them directly should the appeal succeed.

4. In retort, the plaintiffs/respondents have filed Grounds of Opposition dated 11<sup>th</sup> February, 2019 by and large arguing that the Motion is incurably defective, incompetent and intended to delay compliance with the court order of 20<sup>th</sup> December, 2018. It was their further argument that not only does this court lack the jurisdiction to review the order made, but that the application does not meet the required threshold.

5. The Motion was disposed of by way of oral arguments. *Mr. Gitonga* advocate for the defendants/applicants restated that his clients are apprehensive that they will be unable to recover the decretal sum from the plaintiffs/respondents once the same is paid since the said plaintiffs/respondents reside outside of the court's jurisdiction, adding that despite reassurances from the 1<sup>st</sup> plaintiff/respondent that he will be able to refund the decretal amount on his behalf and that of his counterparts, there is nothing to support his statement.

6. Mr. Gitonga took the view-point that depositing the entire decretal sum in a joint interest account would suffice and in turn guard all the parties, given the nature of the claim. It was also his submission that the plaintiffs/respondents will not be prejudiced in the process. The counsel reiterated that his clients have not been able to comply with the court order of 20<sup>th</sup> December, 2018 due to the fact that the plaintiffs/respondents have not been cooperative in the opening of a joint interest account. In the circumstances, Mr. Gitonga urged this court to extend the time required for compliance.

7. Mr. Machira advocate for the plaintiffs/respondents on his part contended that the application is an abuse of the court process and that there is no basis on which to review the aforementioned court order, adding that this court in its earlier ruling had taken into account the fact that the plaintiffs/respondents do not reside in the country.

8. On the issue raised concerning the opening of the joint interest account, the counsel submitted that the defendants/applicants were misleading this court as to the facts. That the plaintiffs'/respondents' advocates did indicate to the defendants/applicants through their counsels that they ought to first ensure payment of half the decretal sum to his clients, being careful to include the argument that his clients are entitled to the fruits of their judgment.

9. I have considered the grounds set out in the application and its supporting affidavit, together with the Grounds of Opposition and respective oral arguments by the counsels.

10. I choose to first address the issue raised by the plaintiffs/respondents that this court lacks the jurisdiction to review its order and that the application is framed as an appeal and not a review. In answer thereto, I turn the parties' attention to *Order 45, Rule 1 (1) of the Civil Procedure Rules, 2010* which expressly provides as follows:

***“Any person considering himself aggrieved—***

***(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***

***(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”***

11. A reading of the above provision illustrates that a party can opt to either appeal against a decision or seek a review of the same. The defendants/applicants herein chose to take the route of a review before the court that made the order. That being the case, the Motion is properly before this court.

12. Having settled the fact that this court is bestowed with the requisite jurisdiction to entertain the application, I will now address the merits of the said application. It is clear that the defendants/applicants are merely seeking a review of the condition that half the decretal sum be paid to the plaintiffs/respondents. However, I have noted that the defendants/applicants have not specifically indicated the ground of review being relied upon.

13. Suffice it to say, I recall that a similar issue was raised before me in the previous application and which issue I took into account in drafting my ruling. In actual fact, I made a detailed analysis on the subject hand in hand with the facts as presented to me by the respective parties.

14. Further to the above, it is well noted from my ruling that on the one hand, the defendants/applicants only asserted that it is unlikely that the plaintiffs/respondents will be in a position to refund the decretal sum but adduced no evidence in support of their assertion. The 1<sup>st</sup> plaintiff/respondent on the other hand swore an affidavit on behalf of the other respondents to the effect that their ability to refund the decretal sum. In the circumstances, I am not convinced that the defendants/applicants have given me cause to review my order in that regard. All of the above issues were raised before me and analyzed.

15. In support of my reasoning made both in my previous ruling and presently, I make reference to the High Court's rendition in *Praxades Okutoyi v Medical Practitioners and Dentists Board [2008] eKLR* whose analysis was drawn from *Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018* in this way:

***“...there is in my judgment no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects.”***

16. Before I pen off, I took note of the defendants'/applicants' argument that they are yet to comply with my order for the reasons stipulated above which I need not belabor. It is also well observed that a letter to that effect has been annexed to the Motion. On their part, the plaintiffs/respondents have not given any evidence to indicate their cooperation. In the premises, I am inclined to believe the applicants' version of events and find their explanation to be reasonable.

17. In the end, I find no merit in the Motion and move to dismiss the same. Nonetheless, I will grant the applicants a further 30 days to comply with my order of 20<sup>th</sup> December, 2018, failure to which the stay order shall lapse. In addition, I order the respondents to liaise accordingly. Parties shall bear their own costs.

**Dated, Signed and Delivered at Nairobi this 7<sup>th</sup> day of March, 2019.**

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**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Defendants/Applicants

.....for the Plaintiffs/Respondents