



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 238 OF 2011

PEMBE FLOUR MILLS LTD.....PLAINTIFF

VERSUS

BRITISH AMERICAN INSURANCE CO. LIMITED.....DEFENDANT

RULING

1. For determination in this Ruling is the Notice of Motion application dated 30th July 2018. It is filed by Pembe Flour Mills Ltd, the Plaintiff herein. The Plaintiff by that application seeks for orders:

a) That the consent order dated 16th November 2015 be vacated unconditionally.

b) That the Court be pleased to order the release of monies held in African banking corporation (ABC Bank) fixed deposit account number 001300001015619 in the name of Gichuki King'ara & Company Advocates and Anne W. Kimani and Co. Advocates in full to Gichuki King'ara & Company Advocates.

2. That application is premised on the grounds that: judgment was entered in favour of the Plaintiff on 2nd October 2015 for Kshs. 9,083,713 with interest at Court rate from 4th March 2008 until payment in full; on 13th October 2015 the Defendant, British American Insurance Company, filed a Notice of Appeal against the judgment; the said Defendant also filed an application for stay of execution pending appeal and a consent was entered between the parties and adopted by the Court on 16th November 2015 whereby the Plaintiff received some of the decretal sum and the balance was to be banked in the joint account of the respective advocates.

3. The Plaintiff has stated that the Defendant is not keen to file the appeal and has sought the consent order be vacated and that the Court Order the release of the money held in the joint account, as prayed in the present application.

4. It is important to state that the Plaintiff did file a similar application, as the one before me, dated 14th June 2016. This Court by its Ruling dated 19th December 2016 dismissed that application as the main ground that the deposit of part of the decretal sum was as a result of the parties consent. That consent did not fix a time frame within which the Defendant could file its appeal. That the filing of the appeal had been hampered by the lack of typed proceedings.

5. In the present application, the Plaintiff has argued that the Defendant failed to file its appeal even though the typed proceedings were available at the Court registry. The Plaintiff argued that the time for filing the appeal had lapsed.

DISCUSSION AND DETERMINATION

6. As correctly stated in the Ruling dated 19th December 2016, the parties entered into a consent which did not limit the period within which the Defendant should file its appeal. Indeed, it would seem that the consent to deposit the money into a joint account of the advocate was not conditional on the happening of anything. That being the consent the parties entered into this Court cannot derogate from it in anyway.

7. It is important to state that if the Plaintiff is of the view that the Defendant's appeal has lapsed such an issue can only be raised before the Court of Appeal where the appeal lies.

8. On the whole, the application is without merit and is dismissed. Although it is dismissed but because the Defendant has failed to prove it has moved without delay to file the record of appeal there shall be no order as to cost.

9. In the end, the Notice of Motion dated 30th July 2018 is dismissed with no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 15TH day of MAY, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

.....FOR THE DEFENDANT