



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI
CIVIL CASE NO. 271 OF 2004

ASTRAL AVIATION LTD.....PLAINTIFF

VERSUS

TADIS TRAVEL & TOURS LTD.....1ST DEFENDANT

ERITREAN AIRLINES LTD.....2ND DEFENDANT

R U L I N G (I N T E R I M)

This is a ruling on prayer 3 in the application dated 5th July 2018. The Plaintiff/Applicant seeks stay of execution pending the hearing and determination of this application.

The background of this matter is that the main suit was filed on 17th June 2004. Judgment was issued against the Plaintiff/Respondent (herein) on 12th July 2009. The Defendant/Applicant appealed against judgment in the counterclaim in Civil Appeal No. 3 of 2008 but the appeal was dismissed on 6th November 2015. The Respondent in the Court of Appeal who is the Respondent herein filed a Bill of Costs dated 13th October 2015 and Certificate of Costs issued on 16th November 2015 for taxed amount of Kshs. 567,870.

The basis of this application is the costs awarded to the Respondent herein in the cost of Appeal.

The Respondent herein filed an application in this Court for reconstruction of Court file as the original Court file was not available for execution of costs certified and orders for reconstruction of the file were issued on 31st May 2018.

The 1st Defendant filed application dated 5th July 2018 seeking in the first instance to have the matter certified urgent and stay of execution pending hearing of the application. The application was certified urgent. Counsels argued orally on 7th July 2018.

Counsel for the Plaintiff submitted that the Applicant had a meeting with Counsel for the Respondent where they discussed on settling the Bill of Costs. He annexed to the Supporting Affidavit a letter in which the Applicant agreed to pay Kshs. 100,000 agreed as final settlement of this matter. He submitted that as of that date the Applicant was aware that she had paid Advocates costs particularly that judgment was issued jointly or severally as the amount of Kshs. 433,242.50 would be retrieved from the 2nd Defendant. He submitted that the Applicant never received a response of the letter that he sent to the Respondents Advocate denying the amount indicated in the letter dated 9th February 2018. He submitted that the Plaintiffs/Respondents Advocate is not being truthful in pursuit of Bill of Costs.

Counsel for the Applicant further submitted that he has perused the Court file and he cannot see decree issued on 28th June 2018; that Counsel for the Plaintiff was required to approach this Court to execute orders of the Court of appeal.

Counsel for the Respondent opposed the application. He relied on Replying Affidavit filed on 7th July 2018. He submitted that Counsel for the Defendant acknowledges owing Plaintiff Kshs. 533,242.50. He submitted that Certificate of Cost was issued on 18/12/2017 and having informed the Defendant she paid Kshs. 100,000 and negotiated for more time. He said that the first time he saw the Defendant's cheque is when he saw the term full and final settlement. He submitted that if there was to be any consent, it's the Defendant's Lawyers who should have been involved in the consent. He submitted that he accepted the cheque and indicated that the balance was Kshs. 433,242. He submitted that he also sent a letter to the 2nd Defendant through the airline he works for but added that sending a letter to the 2nd Defendant did not mean they would stop pursuing the 1st Defendant for costs.

Counsel for Respondent submitted that the Applicant has not shown an agreement indicating the Respondent agreed to forego Kshs. 433,242. He submitted that the 2nd Defendant was out of the country; out of the Respondents reach.

I have considered arguments by both Counsels. There is no dispute that the 1st Defendant/Applicant and the 2nd Defendants were ordered by Court of Appeal to pay costs to the Respondent herein. It is not also in dispute that the order for payment of costs was issued against the 1st and 2nd Defendant jointly or severally. It is further not disputed that Kshs. 100,000 has been paid by the Applicant to the Respondent.

What is in dispute is whether the payment of Kshs. 100,000 was agreed between Counsel for Respondent and the 1st Defendant that the payment of Kshs. 100,000 was meant to be full and a final settlement of the costs.

No agreement has been annexed to confirm any consent between parties herein on payment of costs other than the costs certified by Court.

It is not disputed that the order was issued against the Defendants jointly or severally. That require no interpretation; in such circumstance the decree holder can pursue either both or any of the parties for recovery of the decretal amount.

I however find appropriate to stay execution pending determination of the remaining prayers in the application on condition that the balance of the decretal amount being Kshs. 433,242 be deposited in Court within 30 days.

Failure to comply with the above condition, execution to proceed.

Dated and Delivered at Nairobi this 10th day of July, 2018

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

..... COURT ASSISTANT

.....COUNSEL FOR APPLICANT/1ST DEFENDANT

.....COUNSEL FOR RESPONDENT/PLAINTIFF

..... COUNSEL FOR 2ND DEFENDANT