REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO. 110 OF 1996

THOMAS ADONG ONUKO

KISUMU EXPERT TAILORING HOUSE …..... PLAINTIFF/APPLICANT

VERSUS

SMALL ENTERPRISING FINANCE CO. LIMITED …..... DEFENDANT/RESPONDENT

RULING

By the Notice of Motion dated 23rd May 2016 but filed herein on 9th June 2016 the Plaintiff/Decree Holder/Applicant seeks an order for accounts to be taken to determine the amount of interest earned in the account opened at in the joint names of the Advocates for the parties at Diamond Trust Bank and that upon taking accounts the Defendant/Respondent/Judgment Debtor be ordered to pay the balance to the Plaintiff/Decree Holder/Applicant within 30 days.

The grounds for the application is that whereas the amount deposited of 1,080,000/- earned interest at 20% per annum what was released to the Plaintiff/Decree Holder/Applicant upon conclusion of the matter was only the principle but not the interest. That it is therefore necessary to do accounts to establish the exact amount of interest earned.

The application is opposed on grounds that firstly, it is an afterthought, is misconceived, mischievous, in bad faith, frivolous and vexatious and secondly, that the prayers sought offend the provisions of Sections 4(3) and 4(4) of the Limitation of Actions Act.

At the hearing Mr. Mwamu, Advocate for the Plaintiff/Decree Holder/Applicant submitted that their application cannot be time barred as the Defendant/Judgment1

Debtor/Respondent appealed the judgment and the appeal was dismissed in 2014. He contended that once the appeal was dismissed the Defendant/Judgment Debtor/ Respondent's Advocate had a responsibility to release the entire amount. He urged this Court to allow the application.

Mr. Mwaisigua, for the Defendant/Judgment Debtor/Respondent maintained that the application is time barred. He relied on Sections 4(3) and 4(4) of the Limitation of Actions Act as well as the decision of Mugo J in **Velji Narshi Jetha Shah Versus Kantilal Narshi Shah and Another [2011]eKLR.**

I have considered the application, the grounds of opposition and the rival submissions of the Advocates carefully and I am persuaded that the application has merit. I do agree with Mr. Mwamu's submissions that this was not an ordinary account like the one in **Jetha Shah V. Kantilal Narshi Shah and Another** (Suppra). This was a decretal sum deposited in an interest earning account in the joint names of the Advocates for the parties in this case as security for costs following an application by the

Defendant/Judgment Debtor/Respondent for stay of execution. The record shows that the Defendant/Judgment Debtor/Respondent sought a stay of execution so that it could appeal the judgment. It is on record that its first appeal was struck out on 19th June 2008. A notice to lodge a new appeal was then filed on 24th June 2008. According to Mr. Mwamu and this is not controverted, the appeal was heard and dismissed in 2014. Whereas Section 4(3) of the Limitation of Actions Act provides that an action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action it clearly does not apply to this case. Secondly in this case time cannot be said to have started running after the judgment. This is because there was a stay of execution which was discharged only upon conclusion of the appeal. In my view time could only have started running from the date of the judgment of the Court of Appeal. We are not told exactly when in 2014 that judgment was delivered but clearly the twelve years limitation period provided in

Section 4(4) of the Limitation of Actions Act has not lapsed. Even had the Plaintiff/Decree Holder/Applicant intended to recover the decretal sum from the defendant/Judgment Debtor/Respondent he could not do so as there was a stay of execution. The defendant/Judgment Debtor/Respondent has not told this Court how that could have been possible.

On the merits I am satisfied that there is necessity for taking of accounts in this matter. There is a reason why it is ordered that decretal sums be deposited in joint interest earning accounts the most important one being so that the decree holder does not suffer any prejudice were the decretal sum not paid to him and the appeal dismissed as happened in this case. The record shows that on 16th October 2008 when the Advocates for the parties were canvassing the application for stay of execution Counsel for the Defendant/Judgment Debtor/Respondent intimated to the Court that the amount in the account at that time was Kshs.1,203,772/=. It is also on record that while granting the stay Mwera J ordered a sum of Kshs.400,000/= released to the Plaintiff/Decree Holder/Applicant. We do not know if that was done. The sum in the account also continued to earn interest and yet none of the Advocates seems to be sure how much interest was earned. It is thus in the interest of justice that accounts be taken. Accordingly the Notice of Motion dated 23rd May 2016 is allowed in terms of prayer 2 and 4. The accounts to be taken by the Deputy Registrar of this Court. The costs of this application be borne by the Defendant/Judgment Debtor/Respondent.

Signed, dated and delivered at Kisumu this 16th day of March 2017

E. N. MAINA

JUDGE

<u>In the presence of</u>:-

N/A for the Plaintiff/Applicant

Mr. Mwaisigua for the Defendant/Respondent

Court Assistant – Serah Sidera