

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 711 OF 2003

DAVID M. MEREKAAPPELLANT

- V E R S U S -

MUKAMI MUTHEERESPONDENT

RULING

1) David Mereka T/a M/s Mereka & Co. Advocates, the appellant/applicant herein, took out the motion dated 20.11.2015 in which he sought for the following orders interalia:

1. THAT the honourable court be pleased to vary, review and/or set aside its judgment issued on 13th November 2015 in so far as it relates to the stay of execution and replace it with an order for release of the deposit made by the appellant/applicant herein together with interest and in full and final settlement of the decretal amount except for costs.

2. THAT the costs of this application be provided for.

2) The motion is supported by the supporting and further affidavits of David Mukii Mereka. When served, Mukami Muthee, the respondent herein, filed a replying affidavit to oppose the motion.

3) When the motion came up for hearing the applicant's counsel was the only party who appeared to argue the application. Though the respondent's advocate was absent from court, this court is enjoined by law to consider the replying affidavit filed against the motion. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have further taken into account the oral submissions of the applicant's learned counsel.

4) It is the submission of the applicant that on 13th November 2015, this court dismissed this appeal and proceeded to grant an order for stay to last for 15 days as sought by Miss Abok, learned advocate for the appellant. It is argued that since the decretal sum in the sum of kshs.82,442/= had already been paid into an interest earning account by the appellant hence the order for stay of execution was given in error. The appellant/applicant urged this court to review the order by setting it aside and substitute it with an order directing the release of the deposit together with interest in full and final settlement of the decretal amount except costs.

5) The respondent urged this court to dismiss motion on the basis that the same does not meet the requirements of an application for review. It is said that the appellant's application is an attempt to appeal through the back door camouflaged as an application for review. It was also pointed out that there was no error apparent on the face record to warrant issuance of an order for review. In response to the averments in the replying affidavit, the applicant filed a further affidavit which is referred to as 'replying affidavit' in which he averred that the motion satisfies the conditions required in an application for review. He pointed out the fact that this court had failed to take into account part of the appellant's submissions before determining the application. It is said that had this court considered those submissions it would have made an order directing the release of the said deposit together with interest to the respondent.

6) After a careful consideration of the material placed before this court, it is clear in my mind that the

applicant's complaint is that this court should have made an order directing the release of the deposit plus interest to the respondent instead of issuing an order for stay of execution to last for 15 days. It is argued that this court had not taken into account part of the submissions dated 05.02.2013 in which the appellant had stated that should the appeal succeed then the decretal amount be released to the respondent in full and final settlement of the matter. With great respect to the appellant, there is no error apparent on the face of record. It is apparent that Miss Abok, the learned advocate who appeared for the appellant had orally applied for an order for stay of execution to last for 30 days. This court instead gave an order for stay of execution to last for 15 days. There is indication from the learned advocate that the appellant wanted to use the period requested to consider the next move in the appeal. There was therefore no error. Secondly, this court deliberately did want to make the order directing the release of the deposit with interest to the respondent because by then the court was not made aware of the accrued interest on the deposit and on the decretal sum. It would therefore be unjustified and presumptuous to make an order directing the release of the deposit plus interest as full and final settlement yet the actual sums have not been ascertained.

7) In the end, I find no merit in the motion dated 20.11.2015. The same is dismissed with costs to the respondent.

Dated, Signed and Delivered in open court this 11th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent