

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 676 OF 2012

GOVINDA & SONS COMPANY. APPLICANT/APPELLANT

VERSUS

HASSAN ANAMANGE OCHAHIRU. RESPONDENT

RULING

The application before the court is the Notice of Motion dated 24th April, 2013. It seeks the following orders: -

1. *The leave be granted to the appellant to institute contempt proceedings against the counsel for the Respondent EDNNAH BOSIBORI ARATI.*
2. *That the said advocates be committed to civil jail for contempt of court for disobeying the court order dated 8th March, 2013 staying release of the decretal sum which had been deposited in court pending the determination of this appeal.*
3. *That the said advocate do refund the decretal sum aforesaid of Ksh.912,789/- which she collected from the court contrary to the court's stay order of 8th March, 2013.*
4. *Costs of this application be provided.*

The record shows that when this application came up for hearing on 9th March, 2015, the Applicant abandoned the 1st and 2nd prayers of the application. He decided to and pursued only the 3rd and 4th prayers. That is to say, the Applicant now only wanted that the advocate for the Respondent, do refund to the court the decretal sum deposit of Ksh.912,789/- and pay costs of this application.

I have carefully perused the record. I observe that the order of stay against the release of the said amount was sought and given in the interim on the 8th March, 2013. There is evidence on record, which is not contradicted, that the Advocate for the Respondent had applied to the lower court where the deposit lay and had obtained an order for the release of the amount on the 7th March, 2013.

It is not very clear when the amount was released to the Respondent's advocate but it would appear to be the 7th March, 2013, the same day the order for release was made by the lower court. It is also clear from the lower court record that although the order dated 7th March, 2013 for the release of the deposit was made on the same day, the process for release by the respondent had been started much earlier and that the order of release only crowned such process. For example, the pay-out voucher of the court had been prepared by 5th March, 2013 but could not be effected until the Chief Magistrate authorized the same by the Order of 7th March, 2013.

It is clear accordingly, that the application by the Appellant/applicant dated 8th March, 2013 and given by this court, came a day too late. The gate had already been opened a day earlier and the horse had already bolted.

Furthermore the said stay order of 8th March, 2013 was clearly made ex parte in the interim. There is no evidence to the effect that the Respondents advocate or any agent, were present in court to know that that

order had been made. The first time the Advocate appeared in court was the 15th March, 2013 and Miss Arati clearly indicated to the court that the deposit had indeed been released to her on 7th March, 2013 before this court's order of 8th March, 2013 was made.

There was a lot of dispute as to whether Miss Arati was served with the said order of this court of 8th March, 2013 after it was extracted. Allegations were made that she did not conduct herself professionally when service was effected or attempted to be effected. Whether that is true or not is neither here nor there in view of the fact that the order itself, whether informed or not, was obtained a little too late.

To that end this court finds no reasonable evidence upon which it can order Ms. Arati to refund the said sum forming the decretal deposit. Accordingly, this application has no merit and is hereby dismissed with costs. Orders accordingly.

Dated and delivered in Nairobi this 16th day of July, 2015.

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D A ONYANCHA

JUDGE