



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, J. MOHAMMED & OTIENO-ODEK, JJ.A.)

CIVIL APPLICATION NO. NAI. 13 of 2014 (UR 8/2014)

BETWEEN

EASTLAND HOTEL LIMITED.....APPELLANT

AND

WAFULA SIMUYU & CO. ADVOCATES.....RESPONDENT

(An application for release of money held in the joint account of Kenyariri & Associates Advocates and Wafula Simiyu & Co. Advocates as per the Ruling of this Court dated 21st March 2014

in

H.C.MISC. APPL. No. 713 of 2012)

RULING OF THE COURT

1. The dispute between the parties in this application arises from advocate client Bill of Costs lodged by the respondent against the applicant. The Deputy Registrar of the High Court taxed the Bill; the applicant was dissatisfied and moved by way of Reference to the High Court challenging the taxation. Its reference to the High Court was dismissed vide a Ruling dated 21st January 2014.
2. Subsequent to the dismissal of the reference by the High Court, the applicant moved this Court for an order to stay proceedings and execution of the taxed Bill of Costs. By a ruling dated 21st March 2014, this Court granted a conditional stay of execution of the High Court decree ensuing from the ruling dated 21st January 2014 and any consequential orders therefrom. The conditional terms of the stay order were as follows:

“(a) The applicant shall within 45 days from the date of delivery of this Ruling deposit the sum of Kshs.5,000,000/= (five million) in a joint interest earning account with the respondent in a reputable bank. That amount will be so held pending the hearing and determination of the intended appeal or until further orders.

(b) The amount of Kshs.5,000,000/= held in the joint account between the parties shall continue to be held pending the hearing and determination of the intended appeal or until further orders.”

3. The intended appeal referred to in the ruling dated 21st March 2014 was filed and lodged as **Civil Appeal No. 105 of 2014**. The said appeal was heard and determined by this Court and a judgment dated 24th October 2014 delivered. The final determination in the judgment was that the applicant's appeal was allowed with the result that the ruling of the High Court dated 21st January 2014 was set aside.
4. The applicant has filed the instant application by Notice of Motion dated 28th April 2015 seeking an order from this Court for the release of the sum deposited being Kshs. 5,000,000/= which money is held at KCB Milimani Branch in a joint account in the names of counsel for the applicant (i.e. Kenyariri & Associate Advocates) and the respondent. The grounds in support of the application as deposed in the supporting affidavit are that the said sum was ordered by this Court to be held in a joint account pending the hearing and determination of the intended appeal or until further orders; that the intended appeal was heard and determined and judgment delivered and that the respondent has refused to consent to the release of the money from the joint account.
5. The respondent filed a replying affidavit opposing the release of the said Kshs. 5,000,000/= to the applicant. The main reason urged by the respondent in opposition to the application is that this Court in its judgment delivered on 24th October 2014 ordered that the respondent's Bill of Costs be taxed afresh before a different taxing master; that the owner of the monies in the joint account would be determined on conclusion of the fresh taxation of the Bill of Costs in Misc. Application No. 713 of 2012 between the parties; that ordering the release of monies in the joint account will lead to miscarriage of justice as it will unfairly prejudice the respondent in the event that the final taxation finds legal fees owing to the respondent's law firm.
6. At the hearing of this application, learned counsel Mr. C. O. Kenyariri appeared for the applicant while learned counsel J. W. Simiyu appeared for the respondent.
7. Counsel for the applicant reiterated the grounds in support of the application stating that this Court ordered the sum of Kshs.5,000,000/= to be deposited in a joint account in the names of both counsel and the said sum to be held pending the hearing and determination of the intended appeal; that the intended appeal has been heard and determined; that the applicant was successful in its appeal; that the applicant having succeeded in its appeal, it is only logical that the sum of Kshs.5,000,000/= deposited by it should be released to it; that the respondent has refused and continues to refuse to sign a consent for the release of the money held in the joint names of the advocates at KCB Milimani Branch.
8. Counsel for the respondent relied upon his own replying affidavit dated 3rd June 2015.

He submitted that this Court's failure to order release of the Kshs. 5,000,000/= vide its judgment dated 24th October 2014 was not an oversight but in its wisdom preferred not to interfere with the said sum because a fresh taxation had been ordered; that this Court's judgment had re-opened litigation between the parties on taxation and the Ksh. 5,000,000/= in the joint account would stand as security. Counsel submitted that unless this Court is sufficiently moved to review the judgment delivered on 24th October 2014, then it is improper to issue the orders sought in the instant application as the present application seeks to review the judgment dated 24th October 2014 by disguise; that the continuation to hold the monies in the joint account will encourage both parties to ensure expeditious determination of the Bill of Costs in order for the ownership of the monies to be determined; that miscarriage of justice will ensue if this Court were to order release of the money.
9. We have considered the application before us and the grounds and affidavit in support thereof as well as the replying affidavit and submissions by both counsel.
10. Counsel for the respondent urged this Court to note that the sum deposited is security for the Bill of Costs which this Court ordered to be taxed afresh. We have considered this submission and it is our considered view that the sum deposited was conditional pending the hearing and determination

of the intended appeal and not as security for the Bill of Costs. The respondent correctly interpreted the judgment of this Court that taxation should be done afresh; the implication as correctly deposed by the respondent at paragraph 10 of his replying affidavit is that the whole taxation process will have to start all over again. We hold that as the taxation process is to start all over again, on record there are no interlocutory orders in existence.

11. It is explicit from the Ruling of this Court dated 24th March 2014 that the sum of Kshs. 5,000,000/= was deposited subject to the condition that the sum was to be held pending the hearing and determination of the intended appeal or until further orders. We now ask ourselves if this condition has been fulfilled. The answer is in the affirmative. The intended appeal was filed as Civil Appeal No. 105 of 2014; the said appeal was heard and determined by this Court and a judgment dated 24th October 2014 delivered. The condition upon which the deposit of Kshs. 5,000,000/= was made has been fulfilled. Civil Appeal No. 105 of 2014 having been heard and determined, it follows that the deposit of Kshs. 5,000,000/= cannot continue to be held. Further, Civil Appeal No. 105 of 2014 having been finalized, there is no pending appeal before this Court and no further orders that have been made in the substantive appeal which has been determined. It is our considered view that when an appeal is heard and determined, the effect of the judgment is to lapse any interlocutory orders that were made prior to the delivery of the final judgment. We find that the conditional stay of execution and the order directing the deposit of Kshs. 5,000,000/= in a joint account lapsed with the delivery of the judgment of this Court on 24th October 2014; a conditional deposit is discharged and becomes due and repayable upon fulfilment of the condition.

12. The upshot of the foregoing is that we hereby allow the Notice of Motion application dated 28th April 2015 and order that the amount of Kshs. 5,000,000/= plus the accrued interest thereon held in a joint account of Kenyariri & Associates Advocates and Wafula Simiyu & Co. Advocates at KCB Milimani Branch be released to the firm of Kenyariri & Associates Advocates for onward transmission to the Applicant. The respondent shall pay the costs of this application.

Dated and delivered at Nairobi this 31st day of July, 2015

ALNASHIR VISRAM

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

