



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: P. KIHARA KARIUKI, (P.C.A), KOOME & MWILU, JJ.A) CIVIL APPLICATION
NO. NAI 24 OF 2011 (UR 17/2011)

BETWEEN

DUNCAN NDURACHA
APPLICANT

AND

FAUD M. MOHAMMED 1ST RESPONDENT

MARIAM MOHAMMED..... 2ND RESPONDENT

SENIOR RESIDENT MAGISTRATE'S

COURT MOMBASA 3RD RESPONDENT

(Being an application for release of the deposit held pursuant to the order of court dated 6th May, 2011 in the Appeal from the Judgment and Decree of the Honourable Mr. Justice Mohamed Ibrahim at the High Court of Kenya at Mombasa on 31st January, 2011) in HC Miscellaneous Application No. 1 OF 2011)

RULING OF THE COURT

1. This is an application by way of a Motion on Notice dated the 28th April 2015 by **FAUD M. MOHAMMED**, the 1st respondent, applicant, under **sections 3A and 3B** of the Appellate Jurisdiction Act, **rules 42, 43(1) and 43(1)** of the Rules of this Court seeking the release of the sum of Kshs.1,440,000/= plus interest in *mesne* profits deposited by the applicant in joint names of the advocates for the applicant and **DUNCAN NDURACHA**, the applicant, respondent. The application is based on the grounds on the face of it and supported by an affidavit by the applicant.
2. The applicant argues that the said deposit was made pursuant to this court's earlier decision of 6th May 2011 pending the determination of Civil Appeal No.203 of 2011 (hereinafter the Appeal) also before this court. The Appeal was determined and dismissed through a Judgment delivered on 12th March 2015 without making an order regarding the disposal of the said deposit.
3. The application is opposed vide the replying affidavit by **Duncan Nduracha**, the respondent. The main ground of opposition is that though the appeal has been heard and determined against the

respondent, the respondent has since filed Mombasa ELC No.76 of 2015 in which the issue of the deposit featured. In addition, the respondent contends that the application is incompetent as it ought to have been made before the High Court and further that the applicant has come to court with unclean hands.

4. Without going into the historical and factual background of the dispute between the parties, we note that the deposit by the applicant was instigated by this Court's decision of 6th May, 2011. The only condition imposed through the said ruling was that the *mesne* profit was to be deposited by the applicant pending the hearing and determination of civil appeal no. 203 of 2011. It is not in contention that the appeal was eventually heard and dismissed in favour of the applicant, the merits of the dismissal being a factor beyond our determination at this juncture. The appeal having been dismissed, we did not find it necessary to determine how much was deposited or ought to have been deposited in the account, the underlying factor being that any deposits were to be and were in fact made by the 1st applicant. We are of the view that the question of how much was actually deposited and into which account has now been overtaken by events. The court order in respect of the deposit did not specify the bank where the joint account was to be deposited, the decision having been left to the parties.
5. The respondent has not addressed us on the constitutional or legal basis upon which we are denied jurisdiction to determine this matter. The respondent has merely alleged that the matter is subject of other proceedings before the high court. With respect, we do of course have jurisdiction to entertain this application under sections 3A and 3B of the Appellate Jurisdiction Act, the application having been made in accordance with rules 42, 43(1) and 47 of the rules of this court. The basis for the opening of the joint account emanated from this Court's orders. Moreover, from the hierarchy of courts under the Constitution, this Court ranks higher than the High Court.
6. As to whether or not the applicant has come to court with unclean hands, we are of the view that this matter can be handled in the appropriate forum through which the applicant is pursuing the execution of lawful orders issued by Court. We do not want to embarrass the Court seized of that matter by commenting on the compliance or otherwise of such orders. The respondent is not precluded from ventilating his case at the High Court within the confines of the law in the circumstances.
7. The upshot of our finding is that the applicant has not afforded us any compelling reasons to prevent the release of the deposit to the applicant. Accordingly, we order that the Notice of Motion dated 28th April, 2015 be and is allowed in terms of prayer 1 therefore with costs to the applicant against the respondent.

Dated and delivered at Nairobi this 2nd October, 2015.

P. KIHARA KARIUKI, P.C.A.

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR