



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

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**Kericho Technical Institute v Finmax Community Based Group & 3 others
(Civil Suit 20 of 2013) [2025] KEHC 1121 (KLR) (26 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1121 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL SUIT 20 OF 2013
JK SERGON, J
FEBRUARY 26, 2025**

BETWEEN

KERICHO TECHNICAL INSTITUTE PLAINTIFF

AND

FINMAX COMMUNITY BASED GROUP 1ST DEFENDANT

CHAIRMAN 2ND DEFENDANT

TREASURER 3RD DEFENDANT

SECRETARY 4TH DEFENDANT

RULING

1. The application coming up for determination is a notice of motion dated 22nd January, 2025 seeking the following orders;
 - (i) Spent
 - (ii) That this Honorable Court be pleased to order the Respondent to release that sum of Kshs. 15,000,000/= (Kenya Shillings Fifteen Million) Only, paid to her through her Proprietor, Mr. Samwel Kiprono Sang as security for Costs awaiting determination of that Appeal in Nakuru Court of Appeal Case No. 120 of 2017; to the firm of M/S Mwita & Co. Advocates on behalf of the Applicants herein through the following account details for their onward transmission to the Applicants;.

Account Name:- M/s Mwita & Co. Advocates

Bank:- DTB Bank of Kenya

Branch:- Kericho



- (iii) That the costs of this application be provided.
 - (iv) That the necessary directions do issue.
2. The application is supported by the grounds on the face of it and the supporting affidavit of Evelyne Ngeno - Koko the 1st Applicant's Legal Services Manager with the authority of the co applicants to swear the affidavit on their behalf.
 3. She avers that vide a judgment of this court delivered on the 24th March, 2015 and amended on 22nd April, 2015, the Honourable Court entered judgment for the Plaintiff/Respondent for the Sum of Kshs. 11,261,901.28/= together with interests and costs of the case.
 4. She avers that she was aware that upon tabulation, the total decretal sum due to the Plaintiff/Respondent became Kshs. 15,000,000/=, she annexed a copy of the decree dated 24th April, 2015.
 5. She avers that upon delivery of the said judgment, the Applicants, vide an application dated 27th April, 2015 sought for stay of execution of the judgment of this Court and that this Court, did, on the 16th June, 2015 grant a stay of execution of the judgment pending appeal, on two conditions;
 - (i) That the Applicants herein shall deposit a sum of Kshs. 5,000,000/= (Five Million in Court) within 30(Thirty) days of 16th June 2015
 - (ii) That the Applicants shall deposit a Bank Guarantee of Kshs. 10,000,000/= (Ten Million) within 7 (Seven) days of 16th June 2015. She attached a copy of the certified ruling delivered on the 16th June 2015.
 6. She avers that in compliance with the said orders, the applicants did deposit the sum of Kshs.5,000,000/= (Kenya Shillings Five Million) in court on the 15th July, 2015 and were issued that Receipt No. 0286387 whose original copy they still possess todate.
 7. She avers that noting that compliance with the second limb of the conditions set for the stay of execution was almost impossible due to the numerous bank authentication processes, the applicants approached court on the 25th June, 2015 seeking more time to comply with the second limb of the stay conditions and the court allowed them more time to deposit the bank guarantee.
 8. She avers that on 1st July 2015, a bank guarantee was deposited and parties directed to fast-track the Appeal before the Court of Appeal. She annexed a copy of the bank guarantee.
 9. She avers that the Deputy Registrar of this Court did on the 6th July, 2016 order the release of both the amount of Kenya Shillings Five Million deposited in Court and Ten Million deposited by Bank Guarantee to the Plaintiff/Respondent however that order of the Deputy Registrar was stayed by an order of this Court issued on the 3rd August, 2016.
 10. She avers that in total disregard to the orders of this Court, the Plaintiff/Respondent deceitfully had the entire decretal sum released to him pending the hearing and determination of the Appeal filed in Nakuru Court of Appeal No. 120 of 2017. She further avers that the Court of Appeal matter has now been concluded in favor of the Applicants, and this being a money decree, it is paramount that the funds released to the Respondent be refunded in restituting the Applicants in line with the provisions of Section 91 of the *Civil Procedure Act*, 2010, she annexed copies of the Judgment of the Court of Appeal and the accompanying Court Order.



11. She avers that the Respondent having averred that they are an institution of means, and further noting that the decree in question is a monetary decree, then it serves no prejudice to any party if the application herein is allowed as presented.
12. She further avers that she is aware that any monies deposited as security for costs pending any appeal ought to be released back to the successful litigant and in the event that the decree being appealed against is a monetary decree then the successful party ought to be restituted back upon successfully defending his appeal; and therefore the Plaintiff/Respondent, holding any monetary awards after a successful appeal is extremely prejudicial to the Applicants given the amount of money in question.
13. She avers that the advocates on record have on several occasions requested the Plaintiff/Respondent to refund the amount in compliance with the provisions of the law, however, all efforts have been rendered fruitless hence necessitating this application.
14. The matter came up for inter partes hearing and Mr. Mwita for Defendants/Applicants stated that the instant application was filed and served upon the Plaintiff/Respondent and that there was no response, he therefore urged this court to allow the application.
15. Having considered the instant application, the sole issue for determination is whether to order the release of Kshs. 15,000,000/= paid to the Plaintiff/Respondent as security for costs awaiting determination of that Appeal in Nakuru Court of Appeal Case No. 120 of 2017 to the firm of m/s Mwita & Co. Advocates on behalf of the Applicants.
16. This court has carefully perused the attachments by the Applicants and appraised itself on the chronology of events preceding the instant application. This court wishes to reproduce the chronology of the events as the same informs the ruling.
17. This court entered judgment in favour of Plaintiff/Respondent for the sum of Kshs. 11,261,901.28/= together with interest and costs of the suit, on the 24th March, 2015 and that the judgment was amended on 22nd April, 2015, a tabulation of the decretal sum, interest and costs of the suit, culminated in the sum of Kshs. 15,000,000/=.
18. The Defendants/Applicants filed an application dated 27th April, 2015 for stay of execution of the judgment of this court and that this court on the 16th June, 2015 granted a stay of execution of the judgment pending appeal, on two conditions; That the Defendants/Applicants deposit a sum of Kshs. 5,000,000/= in Court within 30 days of 16th June 2015 and the balance of the decretal sum should be deposited in Court in form of a bank guarantee from a reputable bank within 7 days and parties ordered to expedite the appeal.
19. The then Deputy Registrar of this Court on the 6th July, 2016 ordered the release of both the amount of Kenya Shillings Five Million deposited in Court and Ten Million deposited by Bank Guarantee to the Plaintiff/Respondent, however, this order of the Deputy Registrar was stayed by an order of this Court issued on the 3rd August, 2016. However, contrary to the orders of this Court, the Plaintiff/Respondent deceitfully had the entire decretal sum released to him pending the hearing and determination of the Appeal filed in Nakuru Court of Appeal No. 120 of 2017.
20. The Court of Appeal matter was concluded in favor of the Defendants/Applicants, the Court of Appeal set aside the judgment and orders of this court dated 24th March, 2015 and amended on 22nd April, 2015 and substituted it with an order dismissing the Plaintiff/Respondent's suit. The Defendants/Applicants have on several occasions requested the Plaintiff/Respondent to refund the amount in compliance with the provisions of the law, however, all efforts have been rendered fruitless hence necessitating the instant application.



21. The Defendants/Applicants have anchored the instant application under the Section 91(1) of the Civil Procedure Act which provides that; “Where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.”
22. It is therefore the finding of this court that the crux of the matter at hand is a money decree, which money was released to the Plaintiff/Respondent as security pending the hearing and determination of the Appeal filed in Nakuru Court of Appeal No. 120 of 2017, the appeal having been heard and determined in favour of the Defendants/Applicants, it is therefore paramount that the funds released to the Plaintiff/Respondent be refunded in restituting the Defendants/Applicants in line with the provisions of Section 91 of the Civil Procedure Act, 2010.
23. Consequently the notice of motion dated 22nd January, 2025 is hereby allowed in its entirety and the costs of this application be borne by the Plaintiff/Respondent.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 26TH DAY OF FEBRUARY, 2025.

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

Mwita for the Applicant

No Appearance for the Respondent

