



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 22 OF 2018**

**IN THE MATTER OF THE ADVOCATES-CLIENT BILL OF COSTS**

**BETWEEN**

**ATAKA, KIMORI & OKOTH ADVOCATES.....APPLICANT/ADVOCATE**

**AND**

**SURESTEP SYSTEMS AND SOLUTIONS LTD.....RESPONDENT/CLIENT**

**RULING NO 3**

**Introduction**

1. This Court on 24<sup>th</sup> July 2019 delivered a ruling on an application filed by Ataka, Kimori & Okoth Advocates (hereinafter “the Advocate”), in which *inter alia*, judgment was entered for the said Advocate against the Surestep Systems and Solutions Ltd (hereinafter “the Client”) Client for taxed costs of Kshs. 438,958/=. The Client thereafter moved this Court by way of a Notice of Motion dated 14<sup>th</sup> August 2019, seeking orders for leave to appeal against the said ruling and decree of this Court.

2. This Court delivered a ruling on the said Notice of Motion on 2<sup>nd</sup> December 2019 and allowed it to the extent of the following orders:

**I. The Applicant/Client is granted leave to appeal out of time against the ruling and decree of this Court delivered on 24<sup>th</sup> July 2019.**

**II. The Applicant/Client shall file and serve its Notice of Appeal within 14 days of the date of this ruling.**

**III. The Applicant/Client shall meet the costs of the Notice of Motion dated 14<sup>th</sup> August 2019.**

3. In the meantime, on 18<sup>th</sup> September 2019, the parties entered into a consent, which was adopted as an order of the Court, that there would be a stay of execution of the decree given on 24<sup>th</sup> July 2019 pending the hearing and determination of the Client’s application of leave to appeal dated 14<sup>th</sup> August 2019. Further, that the stay was conditional upon the Client depositing a security of Kshs 520,412/=, being the decretal sum and interest thereon into a joint interest earning account in the names of the counsel on record for the parties, within seven (7) days. After delivery of the ruling of 2<sup>nd</sup> December 2019, the said stay orders were extended for a further thirty days by consent of the parties, pending the application of a formal application for stay in the Court of Appeal.

4. The Advocate has now filed another application before this Court by way of a Notice of Motion dated 17<sup>th</sup> June 2020 in which it is seeking orders that:-

**a) The money held in the joint account no. 05459360000 at Bank of Africa in the joint names of TLO LAW & ATAKA KIMORI be released to the firm of Ataka, Kimori & Okoth Advocates.**

**b) That the costs of this Application be awarded to the Applicant.**

5. The application is supported by an affidavit sworn on 17<sup>th</sup> June, 2020 by Sheila Kaburu, an Advocate practicing in the firm of Ataka, Kimori & Okoth Advocates, who also filed submissions dated 6<sup>th</sup> August, 2020. The Client filed a replying affidavit sworn on 22<sup>nd</sup> July, 2020 by Jasper Lubeto an Advocate practicing as such in the firm of TLO Law Advocates Associates, who have the conduct of this matter on behalf of the Respondent. The parties' respective arguments are as follows.

#### **The Advocate's Case**

6. The Advocate averred that pursuant to the order given on 18<sup>th</sup> September, 2019, the Advocates opened a joint interest earning account with Bank of Africa being account number no. 05459360000 in the name of TLO LAW & ATAKA KIMORI and the security amount was deposited as ordered. Further, that the 30-day extension period granted as stay of execution had since lapsed and there was no order for stay of execution issued by the Court of Appeal. Therefore, that the stay has lapsed, and the money held in the joint account became payable to the Advocate.

7. It was further deponed that the Client has not even filed the Application for stay of execution at the Court of Appeal to date, and its indolent manner is orchestrated to deny the Advocate fruits of the judgment. Therefore, that in the circumstances, it is just and fair that the orders sought be granted.

8. The above arguments were reiterated in the Advocate's submissions, and it was contended that the Client deliberately and blatantly disregarded the directions of this Court, and that its reason for the failure to file the application for stay of execution could not excuse its failure to comply with directions of the court, and neither was it a basis to ignore court procedure. Further, that the Client could not be heard to blame the downscale of court operations due to Covid-19 for the failure to file the application for stay of execution as the orders were issued on 2<sup>nd</sup> December, 2019 and further the Client filed the record of Appeal on 4<sup>th</sup> February 2020, way before the down scale of court operations on 16<sup>th</sup> March, 2020.

9. In addition, that there is no basis for review of the Court orders of 2<sup>nd</sup> December, 2019, as the Client was already given an opportunity to file a formal application in the Court of Appeal which opportunity it wilfully chose not to pursue. In conclusion, it was submitted that taking into account the lapse of the 30day period and the failure by the Client to file the formal Application for stay at the Court of Appeal, there is no basis for continued holding of the money held in the joint account and the same should be released to the advocate.

#### **The Client's Case**

10. The Client on its part averred that it filed an appeal (Civil Appeal No. 37 of 2020) in the Court of Appeal arising from the decision of this Court delivered on 24<sup>th</sup> July, 2019, and annexed a copy of the front page of the its Record of Appeal filed in the Court of Appeal on 4<sup>th</sup> February, 2020. Further, that primarily due to the current circumstances at the Court of Appeal which is heavily understaffed in terms of Judges and the earlier downscaling of Courts due to the COVID-19 pandemic, the Respondent's appeal is yet to be allocated a date and heard on its merits. He stated that the Applicant's assertions that the Respondent is deliberately indolent so as to deny the Applicant the fruits of the Judgment is untrue and misguided.

11. The Client stated that as a show of good faith, it had at all material times complied with the orders of this e Court issued on 18<sup>th</sup> September, 2019 and to that effect, it opened a joint interest earning account with the Applicant's Advocates which bank account is held with the Bank of Africa under Account Number No. 05459360000 in the name of TLO LAW & ATAKA KIMORI wherein the security for the decretal amount was deposited. The Client admitted that the order issued on 18<sup>th</sup> September, 2019 technically lapsed on 4<sup>th</sup> January, 2020, and that it had declined to apply for stay in the Court of Appeal as this course of action would unnecessarily clog an already understaffed and under-resourced Court of Appeal. He stated that the least the Respondent expected of the Applicant was to allow the status quo pending the determination of the appeal on its merits.

12. The release of the funds held in the joint interest earning account to the Advocate was opposed on the ground that it would prejudice the client, as it would consequently defeat the ends of justice and render the its appeal nugatory, and that the delay in the

appeal process has been occasioned by factors which are beyond its control. In conclusion, the Client beseeched this Court in the exercise of its inherent jurisdiction, to extend the orders on stay pending determination of the appeal on the basis of its oral application made in Court on 2<sup>nd</sup> December 2020.

13. The Client submitted that its failure to file for stay in the Court of Appeal within thirty days from the 2<sup>nd</sup> December, 2019 was not intentional and deliberate; but was informed by a reasonable assessment of the situation at play, and urged this Court to take judicial notice of the state of affairs at the Court of Appeal, and that had it filed a stay of execution application at the Court of Appeal, to date, the application would still be pending determination of merits. The Client relied on Article 159 (2) (d) of the Constitution that in exercising judicial authority, the courts are to be guided by the principle that justice shall be administered without undue regard to procedural technicalities, and also relied on the decision by the Supreme Court of Kenya in the case of **Zacharia Okoth Obado vs. Edward Akong'o Oyugi & 2 others (2014) e KLR** for this position. The Client also cited the decision in **First National Finance Bank Limited v Universal Apparels (EPZ) Ltd & 2 others [2017] e KLR** on the inherent powers of the Court.

14. In conclusion, the Client submitted that the release of the security for the decretal amount to the Advocate would cause it substantive injustice and will be prejudiced in recovering the security amount in the event the appeal is successful. That on the contrary, the Advocate has not been denied the fruits of the judgment to the extent that the security has been deposited in a joint interest earning account.

### **The Determination**

15. The conditions for the issue of security in stay of execution proceedings pending appeal is set out in Order 42 Rule 6(2) of the Civil Procedure Rules, which provides that the conditions for stay of execution pending appeal to be: granted to be: (a) that substantial loss may result to the applicant unless the order is made, (b) the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

16. The purpose of the security was also aptly explained in **Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd [2019] eKLR**, as follows:

*“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(I) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.*

*Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine.*

17. In the present application, the parties herein consented that stay of execution would be obtain on condition that security is deposited in a joint interest earning account and that the Client filing an application for stay in the Court of Appeal within specified timelines. The said consent was adopted as an order of this Court. An ordinary understanding and interpretation of the said consent order is firstly, if there was no deposit of security then there would be no stay, and secondly, if there was no application for stay in the Court of Appeal, then the stay would lapse. In both instances execution consequently could follow.

18. The Client has in this respect submitted that it deliberately chose not to apply for stay in the Court of Appeal, for reasons of the heavy work load in the Court of Appeal. This Court cannot make such a presumption nor take any judicial notice of the workload at the Court of Appeal, without supporting evidence, which was not provided by the Client. The client in this regard still bears the evidential burden of establishing the state of facts that form the basis of its reliance on the doctrines of judicial notice or

presumption.

19. in the circumstances, this Court is not able to exercise its discretion in its favour of the Client to the detriment of the Advocate, which is being denied the fruits of its judgment by the Client's indolence and dilatory actions. Release of the security will also not render the intended appeal nugatory, as the Client can still be refunded the decretal sum if successful in its appeal.

20. In the premises I find merit in the Advocate's Notice of Motion dated 17<sup>th</sup> June 2020 and accordingly order as follows:

**I. An order be and is hereby granted that the money held in the joint account no. 05459360000 at Bank of Africa in the joint names of TLO LAW & ATAKA KIMORI be released to the firm of Ataka, Kimori & Okoth Advocates forthwith.**

**II. The Advocate shall have the cost of the Notice of Motion dated 17<sup>th</sup> June 2020 of Kshs 20,000/=.**

21. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 8<sup>TH</sup> DAY OF DECEMBER 2020**

**P. NYAMWEYA**

**JUDGE**

**FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING**

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this ruling will be delivered electronically by transmission to the email addresses of the *ex parte* Applicant's, Respondent's and Interested Party's Advocates on record.

**P. NYAMWEYA**

**JUDGE**



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