



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO.472 OF 2014**

**BERNARD NJOROGE GATHUA.....APPELLANT**

**VERSUS**

**MWANZIA MUTISO (suing through his father and next friend**

**GIDEON MUTISO MUKALA.....RESPONDENT**

**RULING**

1. The subject matter of this ruling is the Notice of Motion dated 15th March, 2021 brought by the respondent/applicant herein and supported by the grounds set out on its body and the facts stated in the affidavit of advocate **Lewis Kyengo**. The applicant sought for an order that the decretal sum of Kshs.1,219,538/= paid into court on 19/12/2014 by the Appellant be released to the respondent.
2. The appellant/respondent opposed the Motion by filing the replying affidavit sworn by his advocate, **Joseph Makumi** on 7th May 2021.
3. When the motion came up for interparties hearing before this court, the parties respective advocates chose to rely on the averments made in their respective affidavits.
4. I have considered the grounds laid out on the body of the Motion, the facts deponed in the affidavits supporting and opposing it; and the contending oral submissions.
5. A brief background of the matter as seen in the record is that the appellant herein filed an application for stay of execution of the trial court's decree and upon hearing the said application the magistrate directed that the appellant deposits the entire decretal sum of Kshs.1,219,538/= into court which was paid as a precondition for the grant of interim stay of execution.
6. The temporary stay of execution was hinged on the final outcome of this appeal which was eventually heard and determined by dint of the honourable court's judgment dated 17th October, 2019 partially allowed the appellant's appeal having found and declared that the execution process by the respondent was illegal the same having been carried out in the pendency of a valid stay order and a moratorium which is still in place.
7. The appellant further applied for an order for review of the above judgment particularly on the release of the decretal sum which prayer was dismissed by dint of this Honourable Court dated 23rd July, 2020.
8. The dismissal order has prompted the Motion now before this COURT.
9. In his affidavit, Mr. Lewis Kyengo states that there is no appeal which has been filed against either the said judgment or

the resultant ruling on the appellant's review application.

10. The advocate stated that for over 20 years the Respondent son's health has severally deteriorated and the family's resources badly depleted on account of the respondent's huge medical expenses to such an extent that the family is in dire need of the decretal sum in order to seek medical help for him.

11. In response, Mr. Joseph Makumi stated that the prayer by the respondent to have the security released to them was declined by the trial magistrate on 18th November 2015 having found that the execution against the appellant by the respondent was illegal and ordered the money to remain deposited in court pending the hearing and determination of the appeal or as the court may deem fit.

12. It is the advocate's assertion that neither the appellant nor the respondent can withdraw the security deposited till the appellant's appeal is heard and determined or Orders of moratorium barring execution are lifted as the respondent who is a man of straw and unsound mind will not be in a position to refund the same when the appellant's appeal succeeds.

13. Having considered the rival submissions, it is clear that the respondents in their motion dated 15th March 2021 are seeking orders that the decretal sum of kshs.1,219,538/= paid into court on 19/12/2014 by the appellant be released to the respondent.

14. According to the respondent the decretal sum was paid as the condition for the grant of a temporary order for stay of execution of a valid decree of the lower court upon hearing of an application

made by the appellant.

15. The respondent avers that the temporary stay of execution was hinged on the final outcome of this appeal which was heard and determined by dint of this court's judgment dated 17th October 2019. The applicant further applied for an order for review of the said judgment for the decretal sum to be released to him which was dismissed.

16. On the other hand the appellant avers that the appeal was partially allowed having already found and declared that the execution process by the respondent was illegal having been carried out on the pendency of stay orders and moratorium.

17. It is clear that no appeal has been filed against either the said judgment or the resultant ruling on the review of the application.

18. The stay orders have lapsed because they were in place pending the determination of the appeal which was partially in favour of the respondent.

19. In my opinion, this is a very old matter and as matter of fact litigation must come to end. The appellant should let the respondent enjoy the fruits of his judgment considering the fact it has taken long it would only be fair and just if the monies were released to the respondent.

20. In the case of the ***Independent Electoral & Boundaries***

***Commission v Maina Kiai & 5 Others (2017) eKLR,***

***“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny.***

21. In the end the motion dated 15<sup>th</sup> March 2021 is found to be meritorious. It is allowed as prayed save that each party bears its own costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021.

.....

J. K. SERGON

**JUDGE**

In the presence of:

.....for the Appellant

.....for the Respondent