



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 755 OF 2016**

**FRANCISCO KABIRA GATHARA.....1<sup>ST</sup> APPELLANT**

**ELENA WACHERA KARIUKI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JOHN MUKIRIA WAWERU..... 1<sup>ST</sup> RESPONDENT**

**GRACE NJERI KIMANI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The appellants approached this court vide a Notice of Motion dated 14<sup>th</sup> February 2020 seeking that a sum of KShs.3,617,896 they deposited in court on 14<sup>th</sup> July 2017 as a condition for stay of execution pending hearing and disposal of the appeal be released to them.
2. The application is premised on grounds that the appeal has now been determined and it is only fair that the money be released to them.
3. The application is opposed through a replying affidavit sworn by the 1<sup>st</sup> respondent on 26<sup>th</sup> May 2020. While admitting that the appellants deposited the aforesaid monies in court pursuant to a condition for grant of stay of execution pending appeal, the 1<sup>st</sup> respondent contended that the money should continue being held as security for costs since the suit in the lower court was still pending and the respondents are apprehensive that when it is determined, the appellants may not be in a position to pay the decretal amount.
4. The application was argued orally before me on 24<sup>th</sup> June 2020. Learned counsel appearing for the parties namely, *Mr. Kariuki* for the applicants and *Mr. Wambua* for the respondents exclusively relied on the averments made in the affidavits supporting and opposing the motion.
5. I have considered the application and the affidavits on record. I have also perused the court record. The record confirms that indeed the appeal was heard and determined in the appellants' favour on 19<sup>th</sup> December 2019. It is not disputed that the appellants' deposited the money in question as a precondition for stay of execution pending disposal of the appeal. Now that the appeal has been determined, I agree with the appellants that no good reason exists to justify further retention of the money by this court.
6. In my view, the respondents' opposition to the motion is, to say the least, unfounded. The trial court's proceedings are separate and distinct from the appeal that has now been determined by this court and in any event, the respondents' apprehension that the appellants may not be in a position to pay the decretal amount when the suit in the lower court is finally determined lacks any basis and is purely speculative. It presupposes that the suit will be determined in the respondents' favour while the truth is that none of the parties or even this court, can foretell the outcome of the suit.
7. In view of the foregoing, I find merit in the motion and it is hereby allowed in terms of prayer 1 with no orders as to costs.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 30<sup>th</sup> day of June 2020.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Kariuki for the appellants

Mr. Wambua for the respondents

Ms Mwinzi: Court Assistant