



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 183 OF 2008

SOMENI INDUSTRIES LIMITED.....1st APPELLANT

DAVIES MUNYI GUYA.....2nd APPELLANT

VERSUS

FRANK JAPHETH NJAGI.....RESPONDENT

RULING

This ruling relates to the Notice of Motion dated the 27th January, 2020 brought by the Respondent / Applicant under order 39 Rule (2), order 40 Rule (1) of the Civil Procedure Rules and Sections 1A, 3 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya in which, the applicant has sought for the release of the decretal sum of Ksh 298, 224 deposited in Court by the Appellant, on the 11th August 2008.

The application is premised on the grounds set out on the body of the same and it's supported by the annexed affidavit sworn by ISAAC OMEKE MIENCHA, on the 27th January, 2020.

In the said affidavit, it is deponed that the Appeal herein was filed on the 15th April, 2008 and thereafter, the Appellants filed an application seeking stay of execution pending the hearing and determination of the Appeal. That the stay of execution orders were issued subject to the respondent depositing the decretal sum of Ksh 298,224 in Court which amount was deposited on the 11th August, 2008 vide receipt number 461781.

It is further deponed that, the Appellants never took steps to prosecute the appeal prompting the respondent to file an application dated 18th May, 2010 seeking to have the appeal dismissed for want of prosecution. That the court upon hearing the said application, granted the Appellants 120 days within which to prosecute the appeal failure to which the appeal would stand dismissed. That the Appellants never took steps to prosecute the appeal after the said ruling and as it stands now, there is no pending appeal.

The Respondent in this application did not file a response to the same and did not attend Court during the hearing and therefore, it proceeded ex parte.

The Court has duly considered the application together with the affidavit in support.

From the record, the court is able to confirm that, vide a ruling delivered on the 1st November, 2017, the Appellants were ordered to prosecute the appeal within 120 days failing which it would stand dismissed. The record further shows that since then, the Appellants has not taken any other step in this appeal meaning that the same stood dismissed upon the expiry of the 120 days ordered by the court within which it ought to have been prosecuted.

The sum of Kshs. 298,224/= that the applicant has sought release of, was deposited as security pending the hearing and determination of the appeal. As noted, there is no pending appeal and the Appellants have not challenged the orders made on 1st November, 2017 in anyway. Further, the Appellants did not defend the application which implies that they have lost interest in the appeal.

In view of the foregoing, the court finds merit in the application and the same is hereby allowed as prayed. Costs of both the application and the Appeal are awarded to the Respondent.

It is so ordered.

Dated, signed and Delivered at Nairobi this 25th day of June, 2020.

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L.NJUGUNA

JUDGE

IN THE PRESENCE OF

.....**FOR THE 1ST APPELLANT**

.....**FOR THE 2nd APPELLANT**

.....**FOR THE RESPONDENT**