



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 559 OF 2014

KIARA JEREMIAH.....1ST APPELLANT/RESPONDENT

BENARD OWUOR MADALANGA.....2ND APPELLANT/RESPONDENT

-VERSUS-

MERCY NJERI RWANGI (Suing as personal representative of the estate of

DIONISIO IRERI NJERU)deceased).....RESPONDENT/APPLICANT

(An appeal from the judgment delivered by Honourable A. Murage (Mrs.) (Chief Magistrate) on 21st April, 2015 in Civil Suit No. 111 of 2013)

RULING

The Respondent/Applicant has moved this court by way of a Notice of Motion dated the 12th day of September, 2018 seeking orders that;

a) This Honourable Court be pleased to order the release of funds of Kshs.1,032,566/- herein deposited in an interest earning Account with NIC Bank, City Centre Branch, Account No. 1003244438, pursuant to a Court order of 21st day of April 2015, together with accrued interest to the Respondent/applicant's Advocates Obaga & Co. Advocates forthwith.

b) Costs be provided for.

The application is premised on the grounds set out on the body of the same and its supported by the affidavit sworn by ROSE OBAGA on the 12th day of September 2018.

The Applicants have sought the orders based on the court order made on the 19th day of July, 2018 which the Respondent is alleged to have failed to comply with, as a consequence of which, the Appeal stood dismissed on the 1st day of September, 2018.

That on the 21st April 2015 the Appellants obtained a stay of execution order pending the hearing and determination of the Appeal and as a condition for the stay, they were ordered to deposit a third of the principal sum in a joint interest earning account in the names of both Advocates on record as security for the due performance of the decree. The money was deposited at N.I.C. Bank, City Centre Branch, Account number 1003244438 where it is being held to date.

The Applicants contend that the Appellants complied with only one limb of the order given on the 19th July 2018 and failed to comply with the other limb as they failed to fix the Appeal for directions within the 15 days period ordered by the court. That, in view of the foregoing, it is only fair and just that the decretal sum of Kshs.1,032,566- deposited in N.I.C. Bank be released to the Respondent/Applicant's advocates forthwith as there is no pending Appeal.

The Appellant/Respondent has opposed the application via a replying affidavit sworn by Peter Manda on the 19th October, 2018 in which, he depones that he filed the Record of Appeal on 16th August, 2018 but on the 14th September 2018 when he invited the Respondent so as to fix a date for directions, there was a re-organization exercise that was going on in the civil registry and the file could not be traced and his clerk was informed by the registry staff that fixing of dates would commence from the week of 17th September, 2018.

Counsel depones that by 14th September 2018, the lower court file was yet to be forwarded to the High Court and as such the Appeal was yet to be admitted for taking of directions and based on that, he could not fix the Appeal for directions and therefore, it was premature for the Respondent to apply for the release of the decretal sum before the Appeal could be heard to its logical conclusion.

The Respondent urged the court to take judicial notice of the prevailing interruption of normal services due to the re-organization of the registry and has urged the court to strike out the application with costs. It is averred that the application is misconceived, is an abuse of the court process, lacks merit and thus a waste of court's time.

The court has considered the application and the submissions by the counsel. The orders sought in the application are premised on the orders made by this court on the 19th day of July 2018 after the court dealt with a notice to show cause when this matter came up on 18th June 2018. On the said date, counsel for the Appellants gave a plausible explanation why the matter had not been prosecuted and the court gave the Appellants a reprieve by not dismissing the Appeal but ordered the Appellant to file a Record of Appeal within 30 days from 19th July 2018 and fix the Appeal for directions within 15 days from the date of filing of the Record of Appeal failing which the Appeal would stand dismissed. The Appellant contends that he did not comply with the 2nd limb of the order because there was some re-organization going on in the civil registry and therefore the file could not be traced.

The main issue here is whether the court order was complied with or not. The simple answer being that it was not. As a result of the non compliance, the Appeal stood dismissed on the 1st day of September 2018 and therefore, there is no pending Appeal. The Respondent was right in bringing the application before court and the same is not frivolous or an abuse of the court process as alleged by the Appellant.

The reasons that the Appellant has given for non compliance with the court order would have formed a basis in an application for the reinstatement of the Appeal but not for a replying affidavit in the Application herein.

In sum, I find that the Respondents' application dated the 12th September, 2018 has merit and the same is allowed as prayed. Costs to the Respondent/Applicant both for the application and the appeal.

Dated, signed and delivered at **NAIROBI** this 31st day of **January, 2019**.

L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellants

..... for the Respondents