



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 166 OF 2016

TABITHA NYAMBURA NDUNGU.....1ST APPELLANT/RESPONDENT

FREDA NJAMBI KIMANI.....2ND APPELLANT/RESPONDENT

VERSUS

ROSE NYAMBURA KAMANDE.....RESPONDENT/APPLICANT

R U L I N G

1. This is an application by way of Notice of Motion filed on 28th February, 2018 and expressed, to be brought under Order 42, Order 51 of the Civil Procedure Rules 2010, Sections 98, 1, 1A, 1B and 3A of the Civil Procedure Act seeking for orders:

- “a) That this Honourable court be pleased to allow the Applicant leave to file his Memorandum of Cross Appeal out of time in the Respondents’ appeal herein.**
- b) That this honourable court be pleased to order the Respondents herein to furnish security of appeal by depositing in court the entire decretal sum of Kshs. 710,030/= already paid to them by the Applicant.**
- c) That upon grant of prayer a & b above, the draft Memorandum of Cross Appeal attached herein be deemed as duly filed and served on the Respondents”.**

2. ALLAN ODONGO swore a supporting affidavit as the advocate with the conduct of this matter, on behalf of the Respondent/Applicant. The Application is premised on the grounds that judgment was delivered in favour of the Appellants/Respondents and they were paid a sum of Kshs. 716,404/= but have filed the instant appeal, hence the need for the Applicant to file his Memorandum of Cross Appeal.

3. Allan Odongo in his supporting affidavit filed on 28/02/2018, deposed that judgment was delivered in favour of the Appellants against the Respondents who filed an application seeking leave to appeal out of time but the same was dismissed, and in the circumstances, the Applicants proceeded to pay the decretal sum of Kshs. 716,404/= to the Appellants who have since filed their record of appeal and as such, the Applicant wishes to file his Memorandum of cross appeal out of time.

4. KIMAMO MUCHIRI filed a replying affidavit together with the grounds of opposition on behalf of the Appellants. He confirmed that decretal sum was paid to the Appellants and stated that the Respondent has not demonstrated why the Appellants should deposit the decretal sum in court. He said the Respondent was guilty of delay and has not shown sufficient cause for not filing the memorandum of Cross Appeal on time or shown what prejudice he would suffer if the application is not allowed.

5. The application was canvassed by way of oral submissions. Miss Muragwa, counsel for the Respondent wished to rely on her application as well as her supporting affidavit. Mr. Kimamo, counsel for the Appellants submitted that the application is misconceived as a similar application was earlier dismissed.

6. The court has considered the Respondent’s motion and material canvassed for and an in opposition thereto. There is no dispute that the decretal sum awarded in the lower court was paid over to the Appellants in or about August 2017, therefore during the pendency of the instant appeal, preferred by the Appellants through the memorandum of appeal filed on 21st November 2016. And that in February, 2017 the Respondent had unsuccessfully moved the court in a miscellaneous application seeking leave to file an appeal out of time. Indeed, it is upon the dismissal of the said motion that the Respondent paid up the decretal sum. The dismissal decision was not appealed against. Neither did the Respondent seek review of the dismissal order.

7. Therefore, by dint of the provisions of Section 7 of the Civil Procedure Act prayer 1 and 3 of the motion before me is *res judicata*. And it follows that, if prayer (1) cannot be granted, the prayer for security by way of deposit of the decretal sum cannot succeed. At the time the decretal sum was paid over to the Appellants, the Respondent was aware of existence of the instant appeal and the fact that it had not been

compromised, despite the payment being made. It is too late in the day for the Respondent to seek a surrender of the funds paid out to the Appellants.

8. All in all, it is my considered view that the motion filed on 28th February 2018 must fail and be dismissed with costs. I so order.

DELIVERED AND SIGNED AT KIAMBU THIS 30TH DAY OF MAY 2019

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C. MEOLI

JUDGE

In the presence of:

No appearance for the Appellants

No appearance for the Respondent

Court Assistants – Kevin/Nancy