



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT ELDORET**

**CIVIL APPEAL NO. 93 OF 2018**

**FRANCIS NJOGU NJEHIA.....APPELLANT**

**VERSUS**

**TITO KIBET MIBEI.....RESPONDENT**

**RULING**

This is a ruling on a Notice of Motion application by the respondent herein, Tito Kibet Mibei, dated 1<sup>st</sup> April 2019. The respondent prayed that this court reviews and sets aside its orders made on 20<sup>th</sup> November 2018 that granted the appellant stay of execution pending the hearing and determination the appeal arising from Eldoret CMCC No. 71 of 2014.

The applicant further prays that the court grants him leave to execute against the applicant for failure to comply with this order on 11<sup>th</sup> December 2018.

This court, in a ruling dated 20<sup>th</sup> November 2018 ordered that the applicant deposits the full decretal amount in an interest earning account in the name of the advocates for both parties as security pending hearing and determination of the appeal.

The respondent, in his replying affidavit dated 8<sup>th</sup> April 2019, denies that he had failed to honor the court's ruling dated 20<sup>th</sup> November 2018. He claims that his advocates have been in constant communication with the applicant advocates on the opening of the joint account. The respondent further claims that the said joint account was opened on 17<sup>th</sup> February 2019. He attached a confirmation to the same marked as FNN3.

The respondent further averred that he instructed his insurance company to deposit the said decretal amount. He attached an alleged mail sent to his insurance company as proof of the same, marked as FNN4.

The respondent contends that the application at hand is overtaken by events as he has discharged his end of the bargain. The respondent attached a copy of EFT marked as FNN5, as a proof of making the deposit.

The respondent therefore prays that this application, dated 1<sup>st</sup> April 2019 be dismissed.

Given the foregoing, this court is satisfied that that the decretal amount has been deposited in an account under the names of both advocates. This court further notes that compliance with the court's orders dated 20<sup>th</sup> November 2018 was not in time.

However, this court is of the view that the defect is curable as there would be no irreparable harm occasioned on the applicant herein should this application be dismissed. There has been raised no sufficient ground upon which to deny the respondent the right of appeal due to late compliance with a precursor condition to the intended appeal. The application is therefore dismissed in its entirety. Costs be in the cause.

**Dated and delivered at Eldoret this 23<sup>rd</sup> day of July 2019**

**S. M GITHINJI**

**JUDGE**

In the presence of:

Mr. Mugambi for the Respondent

Ms Chebotibin holding brief for Mr. Kurgat for the Appellant.

Court Clerk - Sarah

**S. M GITHINJI**

**JUDGE**