



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO 382 OF 2018**

**MORRIS GARI.....1<sup>ST</sup> APPELLANT/RESPONDENT**

**DAN ONYANGO ODEYO.....2<sup>ND</sup> APPELLANT/RESPONDENT**

**KANTECH STEEL FABRICATOR.....3<sup>RD</sup> APPELLANT/RESPONDENT**

**VERSUS**

**CYRUS MUGWE KURIA.....RESPONDENT/APPELLANT**

**RULING**

This is an application seeking an order for the dismissal of the appeal lodged by 1<sup>st</sup> appellant herein. It is based on Article 50 of the Constitution, Sections 1A,1B,3A and 78 of the Civil Procedure Act, Order 42 rules 13(1),14(1),(2) and (3),35(1) and Order 51 rule 1 of the Civil Procedure Rules, the reasons set out on the face of the application, together with a supporting affidavit sworn by the respondent. The application is opposed and there is a replying affidavit sworn by the 1<sup>st</sup> respondent. Both parties have filed submissions contents of which I have considered.

The 1<sup>st</sup> appellant had earlier moved the court by way of an application dated 15<sup>th</sup> August, 2018 seeking a stay of execution of the lower court judgment. Githua J delivered a ruling on 29<sup>th</sup> November, 2018 allowing the stay sought by the appellant, on condition that the decretal sum is deposited in a joint interest earning account in the names of the advocates on record within 30 days from that date. It was further ordered that, in default of the said orders, the stay issued shall automatically lapse.

There has not been compliance with that order. The 1<sup>st</sup> appellant did not challenge that order by way of review or appeal. I believe it is the default on the part of the 1<sup>st</sup> appellant that caused the respondent to file this application. The default in depositing the decretal sum as ordered by Githua J does not extinguish the 1<sup>st</sup> appellant's right of appeal. What it means is that, the 1<sup>st</sup> appellant is exposed to execution but his right of appeal remains.

Therefore the application to have the appeal dismissed as sought in the present application cannot be sustained. The application is therefore dismissed with costs to the 1<sup>st</sup> appellant.

***Dated, signed and delivered at Nairobi this 27<sup>th</sup> Day of November, 2019.***

**A. MBOGHOLI MSAGHA**

**JUDGE**