



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 370 OF 2012**

**N.K. BROTHERS.....APPELLANT**

**VERSUS**

**GILBERT OMERKUL.....RESPONDENT/APPLICANT**

**RULING**

1. This ruling is precipitated by the Notice of Motion dated 4<sup>th</sup> November, 2019 taken out the respondent/applicant herein in which he sought for an order for the release of the decretal sum deposited in an account in the joint names of Modi & Co. Advocates and M/s Wagaki Murage & Co. Advocates held with Prime Bank-Kenindia Branch, plus costs of the application.
2. The Motion is supported by the grounds laid out in its body and the facts averred in the affidavit sworn by the respondent/applicant.
3. The appellant on its part did not file a response to the Motion despite having been served with the application.
4. When this Motion came up for hearing on 10<sup>th</sup> December, 2019, *Mr. Muriithi* learned advocate for the respondent/applicant chose to rely on the grounds set out on the face of the motion and the facts deponed in the supporting affidavit.
5. I have considered the grounds set out in the body of the Motion and the facts deponed in the affidavit supporting it.
6. The respondent/applicant stated that the decretal sum was deposited in a joint interest earning account in the joint names of the firm of advocates appearing in the matter pending the hearing and determination of this appeal.
7. The respondent/applicant pointed out that the appeal was subsequently heard and dismissed with costs vide the judgment delivered on 31<sup>st</sup> October, 2019 and which judgment the appellant has not appealed against, neither has the Appellant's advocate signed off for the release of the decretal amount which stood at Kshs.744,769.80/ as of 31<sup>st</sup> July, 2019.
8. It was the respondent's/applicant's averment that he urgently needs the money to cater for his financial needs as he is currently unemployed while at the same time, his dependants continue to rely on him for support.
9. It is apparent from the record that on 3/7/2012, Judgment was entered in favour of the Respondent in Nairobi C.M.C.C. No. 4232 of 2009 in the sum of Kshs.433,000/ plus costs and interest thereon on the premise of a work injury claim.
10. The record shows that thereafter, the appellant sought for and was granted an order for stay of execution pending the hearing and determination of the appeal.
11. I have seen a copy of the deposit receipt issued by Prime Bank Ltd-Kenindia Branch for account number 400001264463 annexed to the Motion bearing the account details and amount being held therein.
12. It is not in dispute that the appeal was heard and finally dismissed on the abovementioned date.
13. The Respondent/applicant availed an affidavit of service to indicate service of a hearing notice in relation to the instant Motion but there is no evidence on record to demonstrate that the appellant was served with the Motion.
14. In the circumstances, I am not satisfied that the respondent/applicant has laid the basis for me to be allowed to prosecute the motion exparte. Consequently, I decline to determine the motion on its merits exparte but instead direct the Respondent/Applicant to save it upon the Appellant and thereafter have it fixed for interpartes hearing.

**Dated, Signed and Delivered at Nairobi this 20<sup>th</sup> day of December, 2019.**

**J.K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent/Applicant