



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 662B OF 2011**

**ELDORET EXPRESS.....1<sup>ST</sup> APPELLANT/APPLICANT**

**ZACHARY OMWENGA.....2<sup>ND</sup> APPELLANT/APPLICANT**

**-VERSUS-**

**JONATHAN NTHEI TITUS (Suing as Administrators of**

**the Estate of the late LARRY NDILI ITUMO).....RESPONDENT**

**RULING**

The Appellants/Applicants moved this court by a Notice of Motion dated 5<sup>th</sup> June, 2017 under the provisions of Order 45, Rule 1 of the Civil Procedure Rules, 2010 seeking orders that;

**(a) ...spent;**

**(b) ...spent;**

**(c) THAT** the order, judgment and/or decree entered herein on 20<sup>th</sup> June, 2016 dismissing this Appeal be set aside and this Appeal be and is hereby reinstated and thereafter the consent entered herein and dated 12<sup>th</sup> January, 2016 be adopted as judgment of this Honourable Court;

**(d) THAT** the order, judgment and/or decree entered herein on 20<sup>th</sup> June, 2016 dismissing this Appeal be and is hereby set aside and in its place judgment be and is hereby entered for the Respondent in terms of the consent entered herein and dated 12<sup>th</sup> January, 2016.

**(e) THAT** upon grant of prayers Nos. 3, and 4 above, the Appellants' Appeal filed herein being Milimani HCCA No. 662B of 2011; Eldoret express & Another vs. Nzula Itumo Kivindyo & Another be and is hereby reinstated to be heard and determined in the normal way.

**(f) THAT** this Honourable Court does make any such further and/or other orders and issue any other relief it may deem just to grant in the interest of justice.

**(g) THAT** the costs of this Application abide the outcome of the Appeal.

The Application is supported by the Affidavits of Allan Odongo, an Advocate having the conduct of this matter on behalf of the Applicant and that of Maurice Kwena the Applicant Advocate's Clerk both of which are dated 5<sup>th</sup> June, 2017 as well as the grounds on the face of the Application. The Applicants,

through their Advocate, deponed that a Consent was entered into between the Applicants and the Respondent on 12<sup>th</sup> January, 2016 settling and/or compromising the Appeal and to have the money deposited in court released as per the terms of the Consent. Upon receipt of the Consent, the Applicant's Advocate depones that he issued instruction to his Clerk to file and serve the same but the Clerk was informed by the registry officials that the file could not be traced. He further depones that upon numerous visits to the court registry the file could not be traced.

The Applicants came to learn of the Orders issued on 20<sup>th</sup> June, 2016 dismissing the Appeal for want of prosecution, upon receiving a letter from the Respondent's Advocate forwarding the dismissal Order. It is the Applicants contention that they have been actively corresponding with the Respondent's Advocate as if the matter was still on going. The Applicant further depones that the Respondent has threatened execution and urges the Court to uphold the spirit, letter and principal intention of the Parties as captured in the consent dated 12<sup>th</sup> January, 2016. The Affidavits of Maurice Kwena, the Applicant Advocate's clerk sets out how he was unable to file the consent due to unavailability of the file at the registry.

In response, the Respondent filed a Replying Affidavit dated 23<sup>rd</sup> June, 2017 sworn by JONATHAN NTHEI TITUS. The Respondent depones that after the Consent was signed, the same was compromised by the Applicant who went to slumber and never moved the Court to file the consent and ensure that the funds were released despite several reminders. Annexed to the Affidavit are 3 letters from the Respondent enquiring on the progress of the consent. The Respondent depones that the letters were never replied to, as a result of which, his Advocate invited the Applicant's Advocate via letters dated 30/11/2016 and 2/2/2016 to fix a date for the main Appeal.

The deponent further states that they are not threatening to execute against the appellant but rather to have the sum of Kshs.517,852/= deposited in court released to them. He has annexed letters to the Deputy Registrar to that effect. The deponent states that it is his Advocate who has been following up the matter and in the process he became aware of the dismissal orders. That the application is baseless and an abuse of the court process and as such the same should be dismissed with costs.

I have considered the Application, the Affidavits filed herein as well as the oral submissions made in Court. By the time this application was made, I note that the Respondent had already written the letters dated 22<sup>nd</sup> May, 2017 and 2<sup>nd</sup> June, 2017 to have the money deposited in court released to him pursuant to the dismissal orders. I have looked at the consent dated 12<sup>th</sup> January, 2016 which was executed by both advocates but was never filed in Court. The Respondent wrote several letters to the applicants enquiring about the progress of the matter but none of them was replied to by the Applicants. These are the letter dated 7/4/2016, 16/6/2016, 19/10/2016 and one dated 30/11/2016 stating that,

***“we have sent several letters to your office but no response has been elicited. We are proceeding to fix the matter for mention as it seems that the consent has been compromised.*”**

Even though the Applicants through their Advocate have deponed that they were unable to file the consent as the file was missing from the registry, this allegation has not been substantiated in any way. Without any evidence to show that the court file was missing, this court can only presume that the Applicant had been reluctant to proceed and process the release of the money after the consent was signed.

The Appeal was filed in the year 2011. The said dismissal order was made under Order 42 Rule 35 (2) of the Civil Procedure Rules. The Rule provides that,

***“If, within one year after the service of the memorandum of Appeal, the Appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the Appeal before a judge in chambers for dismissal.”***

The Memorandum of Appeal was filed and served in the year 2011 and by the time the Appeal was dismissed for want of prosecution, it was more than five years of inaction.

I see no merit in the Application as the same is an abuse of the Court process. The Applicants have not laid a basis for grant of the orders sought.

The upshot of the above is that, the Application dated 5<sup>th</sup> June, 2017 is dismissed.

It is so ordered.

**Dated, Signed and Delivered at Nairobi this 20<sup>th</sup> day of December, 2017.**

.....

**L. NJUGUNA**

**JUDGE**

**In the presence of:-**

.....1<sup>ST</sup> PLAINTIFF/APPLICANT

.....2<sup>ND</sup> PLAINTIFF/APPLICANT

.....RESPONDENT