



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL CASE NUMBER 1457 OF 2000**

**ERNEST DIENI ALWANYI.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**KIPHINA SHIYENYI ODHIAMBO..... 2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**DANCAN M MACHIRA t/a**

**ALDUCHIRA INVESTMENT LIMITED.....DEFENDANT/APPLICANT**

**R U L I N G**

The Plaintiffs/Applicants have moved the court by way of a Notice of Motion Application dated 4<sup>th</sup> November, 2015. The same is brought under Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 40 Rule 7 of the Civil Procedure Rules 2010.

The Applicant seeks for orders that: -

1. This Honourable court be pleased to discharge its stay orders made on the 30<sup>th</sup> May, 2013 by Honourable Judge Mr. Hatari Waweru.
2. This Honourable Court be pleased to order that the money deposited on the 18<sup>th</sup> July, 2013 in the call account with Commercial Bank of Africa Limited, Mama Ngina Branch pursuant to the court order dated 30<sup>th</sup> May, 2013 together with accrued interest be released to the Plaintiffs/Applicants.
3. The costs of this application be provided.

The same is premised on the grounds set out on the body of the Application and is supported by the Affidavit of Albert Khaminwa annexed thereto. It came up for hearing on the 21<sup>st</sup> January, 2016 and on the said date the Advocate on record for the Defendant/Respondent did not attend court though the date had been given in court in the presence of Mr. Bwomote when the parties appeared before me on the 3<sup>rd</sup> day of December, 2015.

The Application proceeded ex parte though the Defendant had filed grounds of opposition on the 3<sup>rd</sup> December, 2015.

The history of this matter is that the plaint was filed on the 9<sup>th</sup> day of December, 1995 and upon service

of the same, the Defendant filed a defence on the 5<sup>th</sup> day of March, 1996. The matter was subsequently heard by Justice Ransley and on the 20<sup>th</sup> day of June, 2005, he delivered the judgment in favour of the Plaintiffs.

However, the Plaintiffs were unable to execute the said judgment for the reasons that the original judgment is missing from the court file and though the court file has a copy of the typed and signed judgment is not complete. The typed and signed judgment does not tally with the incomplete handwritten judgment prompting the Plaintiff's Advocate to file the Application dated 19<sup>th</sup> November, 2012 seeking orders that the court do adopt and endorse the typed judgment delivered on the 20<sup>th</sup> day of June, 2005.

That Application was heard by Honourable Justice Waweru and on the 8<sup>th</sup> day of February, 2013, he allowed a copy of the said judgment to be used for the subsequent proceedings in the matter. The Plaintiffs thereafter extracted a Decree which was issued by this court on the 14<sup>th</sup> day of March, 2013.

The Defendant moved the court by an Application dated 22<sup>nd</sup> February, 2013, for a stay of execution pending the appeal and on 30<sup>th</sup> May, 2013 Honourable Justice Waweru granted orders of stay of execution pending appeal on condition that Defendant deposit the two decretal sums totaling to Ksh.421,620/- into a joint interest account in both names of the Advocates on record which account was opened at Commercial Bank of Africa, Mama Ngina Branch and the said amount deposited therein.

Since then, the Defendant has not served the Plaintiffs with the Record of Appeal though a Notice of Appeal was filed on the 1<sup>st</sup> day of July, 2005. The Plaintiffs contends that the Defendant has employed delaying tactics to prevent them from realizing the fruits of the judgment that was delivered on the 20<sup>th</sup> June, 2005. It is now 10 years since the judgment was delivered and two years since the stay of execution was granted and it's obvious that the Defendant is not interested in pursuing the Appeal. The Plaintiffs urges the court to grant the orders sought in the Application dated 4<sup>th</sup> November, 2015.

Though the Defendant did not attend court when the Application came up for hearing it had filed its grounds of opposition on the 1<sup>st</sup> day of December, 2015. It opposes the Application on the grounds that it duly complied with the court order of stay and deposited the decretal sum in joint names of the Advocates of the parties as ordered by the court and that it is yet to obtain copies of the proceedings and judgment from the superior court in order to lodge an Appeal.

The Defendant further contends that failure of the superior court to furnish it with copies of the proceedings and judgment is a matter beyond its control and that since there are two conflicting judgments of the superior court relating to the same matter, that clearly shows that the Defendant's proposed Appeal is arguable and for these reasons it is fair and just that as the decretal sum has been deposited in an interest earning account the Plaintiffs' Application should be dismissed.

I have carefully read the Application plus the supporting affidavit and I have also considered the grounds of opposition filed by the Defendant herein. I have also taken the liberty to peruse the court record to enable me follow the chronology of events in this file.

The court record clearly shows that an order of stay of execution was granted by Hon. Justice Waweru on 30<sup>th</sup> May, 2013. He granted a stay of execution against the Defendant pending the hearing and determination of the Appeal. However, the said orders were granted upon the following terms.

1. That the Defendant shall within 14 days of today, 30<sup>th</sup> May, 2013 deposit the two decretal sums for purposes of this Order a total of Kshs.421,620/- into a joint interest earning account in the names of the Advocates on record for the parties.
2. The said account to be opened with Commercial Bank of Africa Ltd, Mama Ngina Branch.
3. In default of deposit as above the stay to lapse.

The Defendant deposited the money as ordered on the 12<sup>th</sup> day of June, 2015.

The record further shows that the Defendant filed a notice of Appeal and applied for certified copies of the proceedings and the judgment on the 6<sup>th</sup> March, 2014 which have not yet been availed to enable it file the record of Appeal. The fact that the Defendant has filed a notice of Appeal is a clear indication that it is interested in pursuing the same but without the proceedings it cannot be able to compile the record of appeal. It is not the fault of the Defendant that the proceedings have not been typed.

Though I am in agreement with the Plaintiffs' counsel that the Appeal has taken long, I find that the delay has been occasioned by failure by the court to type the proceedings to enable the Defendant pursue the Appeal.

For these reasons, I find that the Plaintiffs Application dated 4<sup>th</sup> November, 2015 has no merits and the same is dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 25<sup>th</sup> day of February, 2016.

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**L NJUGUNA**

**JUDGE**

**In the presence**

..... ***for the Plaintiffs***

..... ***for the Defendants***