



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NUMBER 245 OF 2014

MONICA A. NYAMBURA KARIUKI. APPLICANT/RESPONDENT

VERSUS

ALBERT ONSINSI.RESPONDENT/APPLICANT

R U L I N G

1. The Application before the court is a Notice of Motion dated 25th November, 2014. It is expressed to be brought under Section 3A of the Civil Procedure Act and Order 51 of the Civil Procedure rules. The same is premised on the grounds set out on the body of the same and it's supported by the Affidavit of **Isaac Simiyu Kuloba** sworn on the 25th day of November, 2014.
2. The Applicant seeks for orders that: -
 - i. The sum of Ksh.500,000/- deposited into court by the Applicant/Respondent on the 5th day of March, 2014 pursuant to the order of this Honourable court made on the 4th day of March, 2014 be released to the Respondent/Applicant's counsel for onward transmission to the Respondent/applicant, Albert Onsinsi .
 - ii. The Costs be borne by the Applicant/Respondent, Monica Anne Nyambura Kariuki.
3. The facts as deponed in the supporting affidavit are that the Applicant was serving civil jail in March, 2014 when she made an Application to court for leave to appeal out of time and for a stay of execution of the decree in Milimani Commercial Courts civil Case No. 2010 of 2011 which decree requires her to pay over one Million shillings to the Respondent/Applicant.
4. The court made an initial ex parte order that the Applicant/Respondent be released from civil jail on condition that she deposits a sum of Ksh.500,000/- in court which is part of the Ksh.1,000,000/- due to the Applicant under the decree. The Respondent did deposit into court the sum of Ksh.500,000/- aforesaid on the 5th day of March, 2014.
5. Upon hearing the application for leave to file the Appeal out of time and for stay of execution pending Appeal, the Honourable Justice Ougo made a ruling on the 19th September, 2014 in which she allowed the prayer on filing the Appeal out of time but declined to grant a stay pending appeal. The court ordered the Applicant/Respondent to file the Appeal within 15 days from 19th September, 2014 but no appeal has been served upon the Respondent/Applicant todate and for these reasons, it's only fair and just that the money deposited in court is released to the decree holder so as to pave way for execution to proceed in the magistrate's court for the balance of the decretal sum.
6. The Application came before me on the 2nd day of November, 2015 when counsel for the Applicant appeared but there was no representation on behalf of the Respondent though her Advocate had been served with a hearing notice. The application was stood over to the 25th day of November, 2015 when a Mr. Musyoka holding brief for the counsel for the Respondent applied

for an adjournment as Miss Njuguna Advocate for the Respondent was on maternity leave. The court ordered that she files her replying affidavit before the close of business on 11th January, 2015 which she failed to do. The matter was put off to 25th day of January, 2016 when the same proceeded but even then, she had not filed a replying affidavit and the submissions.

7. I have considered the application, the Affidavit in support and the submissions made by the counsel for the Applicant. I have also taken the liberty to peruse the court file. The Application herein has been brought pursuant to orders that were given by Hon. A K. Ndungu Mr. (Senior Principal Magistrate) (as he then was) on 20th January, 2012 in Civil Suit no 2040 of 2011 wherein the learned magistrate allowed an Application to strike out a defence and consequently, entered judgment against the Respondent as prayed for in the plaint.
8. Pursuant to the orders given by A.K. Ndungu Mr., the Respondent/Defendant was arrested under a warrant of Arrest and she moved to court by way of Notice of Motion dated 3rd March, 2014 seeking orders lifting the warrant of arrest, orders for stay of execution of the decree pending the hearing and determination of the Application and the Appeal. She also sought leave to file appeal against the decree of the lower court out of time.
9. The said Application came up before Justice Ougo who granted the Respondent leave to file Appeal out of time and also ordered her to deposit a sum of Ksh.500,000/- so that she could be released from the civil jail. She, however, declined to grant a stay of execution pending the hearing and determination of the Appeal. The Respondent deposited the money in court on the 5th day of March, 2014 but todate she has not filed an Appeal against the decree of the lower court.
10. The Application is not opposed. Though it was filed way back in the year 2014 and served upon the Respondent, she did not file a replying affidavit or grounds of opposition to it. There being no stay of execution of the decree, this court cannot obstruct the applicant from executing the decree given in the lower court. There is no pending Appeal as the Respondent has todate, not filed any even after she was granted leave by the court to do so.
11. I find that the Application has merits and the same is granted as prayed. Costs of the Application are awarded to the Applicant/Respondent.

Dated, signed and delivered at Nairobi this 24th day of March, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... ***for the Applicant/Respondent***

..... ***for the Respondent/Applicant***