

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 472 OF 2014

1. **MARBLE AUTO DEALERS**
2. **GASTON JOSEPH NGOGO.....RESPONDENTS**

VERSUS

1. **REGINA NZILANI NGILA (SUING AS A NEXT FRIEND OF
S O (MINOR).....APPLICANT**

RULING

1. The Applicant has filed a Notice of Motion dated 6th May, 2015 seeking an order that the sum of KShs. 397,816/= deposited in a joint interest earning account in the names of Wangari Muchemi & Company Advocate and Kale Maina & Bundotich Advocates be released to the Plaintiff/decreed holder.
2. The motion is premised on the grounds set out on the body of the application and the Supporting Affidavit of the Applicant. The reasons advanced for this application are that following delivery of judgment against the Respondents in favour of the Applicant, the Respondents filed an application for stay of execution and leave to appeal out of time. That a consent order for stay was granted on condition that the Respondents paid the Applicant part of the decretal sum and the balance thereof be deposited in a joint interest earning account in the names of the Respondents' and Applicant's advocates. That despite the orders of stay of execution and leave to appeal having been granted, the Respondents have neither prosecuted their application nor filed an appeal and that she is thereby denied the fruits of her judgment.
3. Agnes Wangari Gichohi who is an advocate in conduct of this matter on behalf of the Respondents swore a Replying Affidavit in opposition to the application. She contended that the application was fixed for hearing on 24th September, 2014 when the same was not listed and the court file was unavailable. It was further stated that the advocate who had conduct of the matter at the time forgot about the file and the clerk in charge failed to invite the Applicant's advocate for fixing of a date. That when she was served with this application on 11th May, 2014, she requested for the file but it could not be traced immediately because it had been misfiled with closed files. That the failure to prosecute the appeal is thereby not inordinate but was as a result of an oversight and that it will be unfair to release funds to the Applicant without giving the Respondents a right to be heard on appeal. She contended that save for the delay, the Applicant has not demonstrated that she will be prejudiced by the funds being held in the account. She further stated that the beneficiary of the funds is a minor and the Applicant has not demonstrated her financial capacity to refund in case the appeal succeeds.
4. *The question that begs in this application is whether or not the advocate's error is excusable. With this regard I am fortified by the cases of **Philip Chemwolo & Another v. Augustine Kubende (1982-1988) KAR 103** and **Patrick Mutunga Mwilu & 10 Others v. Mary Katua & 2 Others (2012) eKLR**. These cases are for the proposition that an advocates mistakes should not be visited on a litigant since the advocate only losses costs unlike a litigant who has a higher stake in the suit and that the courts must guard such a litigant from such losses. While I appreciate that the Applicant has the responsibility to follow up the progress of his matter, every case is to be decided on its special circumstances. Although there was a blunder on the part of the Appellant's advocate, the Appellant who is the higher stakeholder than his advocates in the case had no contribution to the blunder at all. The foregoing fact coupled with the duty of the court to sustain matters and determine them on merit and further since the application has once come up for*

hearing after the stay order, I find that it would be unjust to lock out such a litigant from prosecuting his case. The upshot is that this application is dismissed. Costs shall abide the outcome of appeal. However, the application dated 26/5/2014 shall be prosecuted within six (6) months failure of which it shall stand dismissed without the necessity of any order to that effect.

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A. MABEYA

JUDGE

Dated, Signed and Delivered at Nairobi this 25th day of September, 2015.

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JUDGE