



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL APPEAL NUMBER 26 OF 2014**

1. SAMUEL CHEPTOO .....1<sup>ST</sup> APPELLANT/APPLICANT

2. BELINDA KIRUI ..... 2<sup>ND</sup> APPELLANT/APPLICANT

**VERSUS**

**BENSON MEMBA MBALANI ..... RESPONDENT**

*(Being an appeal from the Ruling of Hon. F. Muguongo - Resident Magistrate read and delivered on 17<sup>th</sup> February 2014 in NAKURU CHIEF MAGISTRATE COURT CASE NO. 328 OF 2013)*

**RULING**

1. Before the Court is an application by Notice of Motion dated the 26<sup>th</sup> January 2015. The applicant who is the Respondent in the appeal seeks orders that:

1. Spend

2. The court be pleased to order the sum of Kshs.100,000/= deposited in court by the appellant on the 11<sup>th</sup> April 2014 be released to the Respondent's Advocates in pursuit of completion of settlement of the decree.

The grounds upon which the application is based are that the decree has not been fully satisfied, and on affidavit sworn by the respondent that the appellant failed to comply terms of a consent order entered on the 13<sup>th</sup> May 2014, that

a) The sum of Kshs.100,000/= deposited in court be released to counsel for the applicants and the respondents, to be placed in a joint interest earning account pending the hearing and determination of the appeal.

e) In default of any of the terms and conditions, stay of execution to lapse and the Respondent be at liberty to proceed to execute the decree.

2. In his affidavit, the applicant states that the appellant did not comply with the consent orders and that the sum of KShs.100,000/= was deposited in court on the 11<sup>th</sup> April 2014 as security. It is further stated that as at June 2014, the decretal sum was KShs.339,242/= while costs amounted to KShs.50,000/= as awarded by the court for 5 applications.

The appellant depones further that Motor vehicle Registration Number KAQ742 F was sold on attachment for Kshs.265,000/= leaving a balance of Kshs.74,242/=. Interest accrued is said to have been

Kshs.6,063/= and the total balance of the decretal sum at Kshs.80,305/= plus Kshs.130,305/=. On that basis, the applicants seek an order to have the amount deposited in court of Kshs.100,000/= released to them to offset the above balance partly.

3. The application is opposed. It is said to be *Resjudicata*. The Respondent in his Replying Affidavit sworn on the 24<sup>th</sup> February 2015 states that the applicant had filed a similar application dated 14<sup>th</sup> July 2014 which was heard by the court alongside the Respondents application dated 10<sup>th</sup> July 2014 and was dismissed on the 2<sup>nd</sup> October 2014 in a ruling delivered by Honourable Justice Wendo. He further states that the auctioneers have not filed their returns showing how the monies realized from the sale of the motor vehicle were utilised hence misleading the court to have the money deposited in court released to them.

4. The court has considered the application, the supporting affidavit and annexures thereto together with the replying affidavit and submissions by both counsel.

The first issue that in my view I ought to consider as whether the application as filed is *Res Judicata* – in view of the Ruling delivered by the court on the 2<sup>nd</sup> October 2014. In the said ruling referred to the court, the court found that the appellant failed to comply with the consent order, and the default clause authorised the respondent to execute the decree which was done by sale of the subject motor vehicle. The court observed that it was not demonstrated what was realised from the sale of the motor vehicle and stated that .....

***“until the respondent provides evidence, the court cannot grant the respondent's prayer to release the money to him and the application dated 14<sup>th</sup> July 2014 is declined until the Auctioneer files his documents with the court then the respondent will be at liberty to apply.”***

From the above, it is clear that the court authorised the respondents, now the applicants, to apply when the auctioneer would be able to demonstrate what was realized from the sale of the vehicle.

It is therefore my finding that the application hereof is not *Res Judicata*.

5. On the matter of the release of the KShs.100,000/= to the Applicants, the appellant vide the deposit receipt exhibited hereof and in his replying affidavit states that the deposit was for security, for conditional stay of execution, and urges the court to have it retained by the court pending hearing and determination of the appeal. The applicants on the other hand depones that the said sum was deposited as part of the decretal and ought to be released and payable as part of the decretal sum I have noted, that the applicants have not exhibited or demonstrated whether or not the auctioneers costs were ever taxed save for a letter by the auctioneer tabulating his costs in the tune of KShs.171,462/=.

In my view this is not what the Honourable Justice Wendo meant in her ruling when she directed that the auctioneers bill of costs be taxed. No certificate of auctioneers costs has been exhibited. It can therefore not be assumed or taken for granted that the tabulated sum of Kshs.171,462/= is the taxed costs to the auctioneers. A certificate of costs has to be shown.

6. The appellants have indicated that they are keen on prosecuting the appeal and that the said Kshs.100,000/= they deposited should be so held as security for costs-pending the hearing and determination of the appeal.

In the absence of full compliance by the auctioneer as envisaged in the ruling dated the 2<sup>nd</sup> October 2014, this court finds it proper to have the sum of Kshs.100,000/= deposited in court, to continue to be so held and to act as security for costs and or as part decretal sum for the performance of the money decree pending the hearing of the appeal, as rightly held in the case **Insta Products EPR Ltd -vs- Cobra Security Ltd CA 318/2013**. The court has noted that there is already a Record of Appeal filed on the 8<sup>th</sup> April 2015. The appellant is directed to take urgent steps to take directions to facilitate hearing of the appeal and in any event within 60 days of the orders hereof.

For the reasons above stated, the court finds no merit in the application dated 26<sup>th</sup> January 2015 and it is disallowed with no orders as to costs.

Orders accordingly.

**Dated, signed and delivered in open court this 29<sup>th</sup> day of October 2015.**

**JANET MULWA**

**JUDGE**