



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 444 OF 2015

ALICE MUTHONI NDUURA.

THOMAS WAWERU MUTHAMA

JOSEPHAT MWANGI. APPELLANTS

VERSUS

DAVID ROY GITONGA. RESPONDENT/APPLICANT

R U L I N G

The Respondent/Applicant herein has moved the court by way of a Notice of Motion dated 18th September, 2015 where he has sought the following orders: -

1. That the entire decretal sum of Kshs. 630,233.05 deposited in the interest earning account No. 001300001007456 at African Banking Corporation Ltd be released to the Respondent's Advocates.
2. Costs of the Application be provided for.

The Application is grounded on the grounds set out on the body of the same and on the annexed Affidavit of David Roy Gitonga sworn on the 18th September, 2015 and filed in court on the 22nd September, 2015.

The summary of the facts as contained in the said Affidavit are that, the parties to the Appeal herein recorded a consent judgment on the 27th November, 2014, the contents of which are as hereunder: -

1. The Appellant do file and serve a Record of Appeal within 30 days.
2. The Appellant to prosecute the Appeal within 90 days and in default, the Appeal shall stand dismissed.
3. Mention on the 6th March, 2015 to confirm the status of the appeal.

From the record, the matter was not mentioned on the 6th day of March, 2015.

On the 22nd September, 2015, the Respondent/Applicant filed the Application before the court and the same came up for hearing on the 5th November, 2015.

On the said, Mr. Muyundo appeared for the Applicant but there was no appearance on the part of the Appellant/Respondent though the firm of Anne Kimani & Co. Advocates which is on record for the Appellant had been duly served with a hearing notice and an Affidavit of Service filed in court on the 4th

November, 2015 to that effect. The Appellant did not file a Replying Affidavit to the Application and the same proceeded ex parte.

The Appellant failed to comply with the consent order and failure to prosecute the Appeal within 90 days from the date of the Consent order rendered the same dismissed.

The decretal amount in the sum of Ksh.630,233.05 was deposited in an interest earning account pending the hearing and determination of the Appeal and the Applicant is now seeking that the same be released to his Advocate.

I have considered the Application and the Affidavit in support. The Appellant failed to comply with the consent ordered recorded in court on the 27th November, 2014 and consequently the Appeal stood dismissed upon expiration of 90 days from the date of the consent.

The Application is unopposed as the Appellant did not file any Affidavit in reply and did not attend court when the same came up for hearing.

There is no pending Appeal before the court and there is no reason why the decretal sum should not be released to the Respondent/Applicant.

The Application is allowed with costs to the Respondent/Applicant.

Dated and delivered at Nairobi this 10th day of December, 2015.

.....

L. NJUGUNA

JUDGE

In the presence of

..... For the Appellants

..... for the Respondent/Applicant