



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 286 OF 2014**

**MARTHA WAMBUI.....RESPONDENT**

**VERSUS**

**1. IRENE WANJIRU MWANGI**

**2. THE REGISTERED TRUSTEE MATER HOSPITAL.....APPLICANTS**

**RULING**

1. The Applicants herein filed the Notice of Motion dated **18<sup>th</sup> September, 2014**, under **Section 1, 1A, 3A, 3B, and 3C** of the **Civil Procedure Act, Cap 21 Laws of Kenya** and **Order 50** of the **Civil Procedure Rules**. They essentially seek that the conditional order for stay of proceedings in Nairobi Chief Magistrate's Civil Suit Number 2923 of 2014 granted on 23<sup>rd</sup> July, 2014 be vacated and the suit does proceed to its logical conclusion.

2. The motion is premised upon the grounds on the face of the application and the averments in the affidavit sworn by **Irene Wanjiru Mwangi** (1<sup>st</sup> Respondent) on 18<sup>th</sup> September, 2014. She deponed that the Respondent has failed to deposit the sum of KShs. 106,400/- as ordered by the court on 23<sup>rd</sup> July, 2014.

3. That by 31<sup>st</sup> July, 2014 when this matter came up for mention, the Respondent had not filed a Record of Appeal as ordered by the Court. She deponed that the appellants conduct is a pointer that she is not interested in pursuing an appeal and urges that this application should be allowed.

4. The Application is opposed vide a replying affidavit sworn on 3<sup>rd</sup> October, 2014 by Billy Amendi, Counsel in conduct of this matter.

He deponed that a bankers cheque was bought on 30<sup>th</sup> July, 2014 and forwarded to court vide a letter dated 1<sup>st</sup> August, 2014. He however deponed that the respondent experienced challenges in placing proof of payment on the court file. He contended that the respondent has met all the legal requirements necessary for the appeal to proceed. He further contended that it is the applicants who have been frustrating the ends of justice for a speedy resolution of the dispute by filing numerous applications thus this application and those in the Lower Court; and that the delays by the applicants are calculated to escalate mortuary bills to the detriment of the Respondent.

He disputed the applicants' allegation that the Respondent was on 31<sup>st</sup> July, 2014 ordered to file her

Record of Appeal within a certain time frame of seven (7) days. Mr. Amendi stated that if there are any mistakes on the part of Counsel, the said should not be visited on the respondent who has discharged her obligations on time.

5. I have considered the affidavits. The Respondent obtained stay orders which halted the proceedings in the Lower Court. The stay order was given on condition that the Respondent was to deposit a sum of KShs. 106,400/- in court within fourteen (14) days and file a record of appeal within seven (7) days from the date of the order.

6. The issue for this court's determination is whether or not the Respondent complied with the conditions attached to the orders of stay granted. In the event, the question is answered in the negative, whether or not reasonable grounds have been offered.

7. I have taken the liberty to peruse the records in this Court file. It is revealed that the Respondent deposited the sum of money ordered to Milimani Law Courts Deposit (KCB Bank) account number (particulars withheld) on 11<sup>th</sup> August, 2014 and forwarded the same to court on 14<sup>th</sup> August, 2014. The said sum of money was to be deposited by 7<sup>th</sup> August, 2014. It is obvious that the respondent delayed in depositing the money. Although the delay has not been explained, I agree with the respondent's argument that the failure to remit the money in court within time should not be visited on her. Further, the delay was for about six (6) days. I do not find it inordinate.

8. As for the issue of the failure to file a Record of Appeal, I agree with the Applicants that the Respondent was given seven (7) days within which to file the same and as at now, none has been filed. The Respondent has attempted to explain that there was difficulty in obtaining Lower Court Proceedings. The certificate of delay exhibited by the respondent show that the proceedings were ready for collection by 4<sup>th</sup> September, 2014. Despite the proceedings being ready by 4<sup>th</sup> September, 2014, due diligence to file a record of appeal in good time was not exercised. The Respondent has not also been candid enough to exhibit a draft for this court's benefit. I find this laxity wanting.

9. Despite my latter sentiments, I acknowledge that this is a burial dispute which in my view is quite sensitive. It is in the interest of justice that the respondent be given audience on her appeal.

10. I accordingly disallow this application on the following terms:

- a. The respondent herein does file and serve her record of appeal within seven (7) days from the date herein failure to which the proceedings in the Lower Court do proceed to hearing.
- b. Parties to obtain hearing dates from the registry on priority basis.
- c. Costs shall be in the cause.

**Dated, Signed and delivered** in open court this **17th** day of **October 2014**.

**J.K.SERGON**

**JUDGE**

In the presence of:

**Malonza h/ b for Mukete for the Applicant**

**Mrs. Ndegwa h/b Masore for the Respondent**