

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 589 OF 2012

TRI-CLOVER INDUSTRIES (K) LTD.....APPELLANT

VERSUS

PATRICK KITHEKARESPONDENT

RULING

1. The Respondent herein has a decree for money against the Appellant. The Appellant appealed against that decree. The lower court apparently granted a stay of execution pending appeal upon the condition that the Appellant deposits the decretal sum in court. That was done.
2. The Respondent has now applied by **notice of motion dated 22nd May 2013** for an order that the said decretal sum deposited in court on 26th November 2012 be released to him through his counsels on record. The application is opposed by the Appellant.
3. I have read the supporting and opposing affidavits. I have also considered the submissions of the learned counsels appearing.
4. The ground for the Respondent's application is that the Appellant has failed to cause the appeal to be listed before a Judge for directions, and that therefore there has been delay in prosecuting the appeal. In the Respondent's view there is no longer any appeal properly before the Court.
5. That view of the Respondent is, with respect, erroneous. **Order 42** of the **Civil Procedure Rules, 2010** (the **Rules**) that deals with appeals does not provide that an appeal will abate if not placed before a Judge for directions as provided for under **Rule 11** thereof. It will be noted that the Appellant has not applied for dismissal of the appeal for want of prosecution, a remedy that is provided for in the Rules.
6. The appeal is still in place, and for this reason the Respondent's application is premature. The same must be refused. It is dismissed with no order as to costs. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF SEPTEMBER 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2013