



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 314 OF 2009

GRAHAM WALIAULA SOITA..... APPELLANT

VERSUS

CHRISTINE WAITHIRA THIONGO.....RESPONDENT

R U L I N G

1. On 15th July 2009 the Court herein (Okwengu, J) granted stay of execution of the decree of the lower court pending appeal upon the following conditions -

“(i) That the sum of KShs 300,000/00 be released to the Respondent.

(ii) That the balance of the amount of KShs 255,000/00 deposited in court be released to the parties’ advocates to be deposited into an interest-earning account in the joint names of the parties’ advocates.

(iii) That a record of appeal be filed within 90 days.

(iv) That this appeal be disposed of within 12 months failing which (the) order for stay of execution shall be discharged unless otherwise extended by this court.”

2. The Respondent later filed notice of motion dated 7th February 2011 seeking dismissal of the appeal for want of prosecution and release to her of the KShs 255,000/00. That application was dismissed on 27th September 2011 (Ang’awa, J) upon the technicality of having been brought under the wrong rules of procedure.

3. The Respondent subsequently filed **notice of motion dated 24th December 2012** seeking her main order that –

“the amount of KShs 255,000/00 plus all interest accrued thereon, held at Barclays Bank Limited, Westlands Branch in A/C NO. 073-6002256 in the joint names of the advocates for the parties be released forthwith to the Respondent”.

This application is the subject of this ruling.

4. The application is stated to be brought under **sections 1A(3) and 63(e)** of the **Civil Procedure Act, Cap 21** and is predicated upon two grounds –

- (i) That the Appellant has failed to take any step to progress the appeal despite the clear directions and orders given by (the Court) on 15th July 2009.
- (ii) That in view of non-compliance with the said orders of 15th July 2009 the stay order lapsed in July 2010.

There is a supporting affidavit sworn by the Respondent's advocate, **Edith Wanjiku Muriu**.

5. The Appellant has opposed the application by a **replying affidavit filed on 7th March 2013**. It is sworn by the Appellant's advocate, **Fidellis Mueke Ngulli**. She accuses the lower court of delay in supplying copies of the proceedings and judgment, and thus, in effect, occasioning the Appellant's failure to comply with the orders of 15th July 2009.

6. I have considered the submissions of the learned counsels appearing.

7. There is no dispute that the Appellant did not file his record of appeal within 90 days from 15th July 2009. There is also no dispute that the appeal was not disposed of within 12 months from the same date. The Appellant never applied for extension of those periods of time; his reasons for failure to comply are thus irrelevant for purposes of the present application.

8. The effect of failure to dispose of the appeal within 12 months from 15th July 2009 was that the stay of execution granted on that date stood discharged on or about 14th July 2010 as it was not otherwise extended. The Appellant never sought extension of the stay!

9. I find absolutely no reason to deny the Defendant the orders sought. I will allow the notice of motion dated 24th December 2012 as prayed with costs. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 26th DAY OF NOVEMBER 2013

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER 2013