



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL CASE 691 OF 2009**

**BERHAVE HAILE TESFAYE.....APPLICANT**

**V E R S U S**

**TIMOTHY M WEKESA.....RESPONDENT**

**R U L I N G**

1. In this matter, a consent order was recorded on 23<sup>rd</sup> November 2009 as follows-

- “1. The Applicant do file his memorandum of appeal within 14 days of today.**
- 2. The Applicant do deposit in court within 14 days of today the sum of KShs 350,000/00 as security.**
- 3. In default of order 1 or order 2 above, the stay of execution now granted to stand lifted, and the Respondent shall be at liberty to execute the decree.**
- 4. Costs of this application in the appeal.”**

2. It is common ground that indeed the Applicant duly deposited the sum of KShs 350,000/00 in court on 4<sup>th</sup> December 2009.

3. The Respondent has now applied by **notice of motion dated 7<sup>th</sup> February 2012** for the main order that the aforesaid sum of KShs 350,000/00 deposited by the Applicant in court be released forthwith to the Respondent through his advocates towards payment of the decretal sum, which is said to now stand at over KShs 400,000/00. The inherent power of the court has been invoked.

4. The Applicant has opposed the application by replying affidavit sworn by his advocate and filed on 9<sup>th</sup> May 2012. The grounds of objection emerging from the replying affidavit are -

- (i) That the court never ordered that memorandum of appeal be filed within 14 days.

(ii) That the sum of KShs 350,000/00 was deposited as security, and as such the Respondent is not entitled to the money.

5. The averment by the Respondent that no memorandum of appeal was ultimately filed by the Applicant is also denied.

6. I have considered the submissions of the learned counsels, appearing. No authorities were filed.

7. At the hearing of the application, it was conceded by the Applicant's learned counsel that ultimately no memorandum of appeal was ever lodged. At some point the Respondent had been under the impression that the Applicant had duly filed memorandum of appeal, and he had, by notice of motion dated 22<sup>nd</sup> March 2011 (which ended up in this file), sought dismissal of "the appeal" for want of prosecution. It turned out that no appeal was lodged after all.

8. Indeed the sum of KShs 350,000/00 was deposited in court by the applicant as security. But what was it securing? Obviously it was securing the decree already in place in favour of the Respondent so that in the event that the Applicant's appeal (if filed) is dismissed, the Respondent would not have to go to the trouble of executing against the Applicant!

9. As it happened, the Applicant never filed appeal. Why should the Respondent not have access to the money that was meant to secure his decree anyway?

10. I have no hesitation at all in granting the Respondent the orders that he seeks. The sum of KShs 350,000/00 deposited in court by the Applicant on 4<sup>th</sup> December 2009 shall be forthwith released to the Respondent through his advocates on record, the same to go towards payment of the decretal sum.

11. The Respondent shall also have the costs of all the proceedings in this file, except those of the notice of motion dated 22<sup>nd</sup> March 2011.

12. It so ordered.

**DATED AT NAIROBI THIS 24<sup>TH</sup> DAY OF MAY 2012**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 25<sup>TH</sup> DAY OF MAY 2012**