

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 408 of 2009

JOEL K MASIKE. APPELLANT

VERSUS

ELIZABETH N KINUTHIA. RESPONDENT

RULING

The application before the court is dated 21st June, 2012. It was filed by the decree-holder and seeks release of funds deposited in court on 25th May, 2012 as a condition of stay of execution pending the determination of the appeal. The court gave a further condition to the effect that the Appellant/Respondent in this application, must prosecute the appeal within six months. The Applicant prays that since the Appellant did not prosecute the appeal within the six prescribed then, the funds deposited in court amounting to ksh.454,802/50 which was the 2nd half of the decretal amount, should now be released to the respondent-decree holder. The order was made on 28th July, 2011, a year and four months back.

The Applicant/Respondent also seeks that the appeal be now dismissed as well, because it was filed out of the prescribed time and without leave of court, thus making it fatally incompetent. That the said fact was as well brought to the notice of the Appellant, but the Appellant has never filed any application seeking the leave to appeal out of time.

I have carefully perused the record and the application. I have considered the prayers sought. It is not denied by the Respondent/Appellant that this appeal is no appeal because it is fatally incompetent, having been filed outside the prescribed time without leave of court. Secondly, the appeal was to be prosecuted within six months after the conditional order for deposit into court of the decretal sum was made.

Unfortunately, no sanction was given in case there was default in prosecuting within six months as ordered. On the other hand, as already found above, there is no appeal to talk about in relation to any issue. I accordingly see no reason not to release the funds deposited in court as there is no stay of execution or order not to have the funds released.

The Respondent tended to argue that the appeal if it finally succeeds will be rendered nugatory. That does not make much legal sense if at the same time he also admitted that the present appeal is incompetent.

The conclusion I reach, therefore is as follows: -

- 1. The appeal being fatally incompetent is hereby ordered struck out.***
- 2. The funds deposited in court of Ksh.454,802/50 are hereby ordered released to the Respondent forthwith.***
- 3. Costs in this application and appeal are to the Respondent.***

Orders accordingly.

Dated and delivered at Nairobi this 27th day of November, 2012.

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D A ONYANCHA
JUDGE