



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
Civil Appeal 25 of 2007

TELKOM KENYA LTD APPELLANT
VERSUS
HUDSON KELLY AGALO RESPONDENT

RULING

The Notice of Motion dated and filed on 26th August 2009 seeks the basic order that:-

- (a) **the sum of money deposited herein by the appellant as security pursuant to an order of stay be released to the respondent on the basis that the appeal upon which the security was given has been determined in favour of the respondent and the respondent is thus entitled to the security.**

A replying affidavit was filed by counsel for the appellant in opposition to the application. It is undated but was filed on 6th October 2009. A reply thereto by way of a supplementary affidavit was filed by the respondent's counsel on the 5th November 2009 but is dated the 3rd November 2009.

At the hearing of the application **Mr. P. J. Otieno**, Learned counsel, appeared for the respondent while **Mr. Siganga**, learned counsel, appeared for the appellant.

From the arguments of the two counsels it was apparent that each desired that the money deposited in court be released to their respective clients.

Both counsels agree that the appeal filed by the appellant against the decision of the Chief Magistrate in CMCC number 490 of 2003 was withdrawn with costs to the respondent.

To be specific, the record shows that the appeal was withdrawn on 17th December 2008 on application by the appellant for reason that it was filed out of time and that the error needed correction.

Thereafter the respondent filed a bill of costs dated 20th December 2008 which was slated for taxation on the 15th January 2009.

On the 15th January 2009 the bill was agreed at Kshs. 145,584/=. There was to be a stay of execution for forty five (45) days.

On 27th April 2009, the parties through their respective counsels appeared before Mwera J and were directed to agree on the release of the money deposited in court. They returned before the judge on the 29th April 2009 but had not agreed. Several other mention dates were taken and finally on the 4th March 2009 when the parties again appeared before the judge it became apparent that they had not resolved the issue of the release of the money. Whereas the respondent was of the view that the money be released to him, the appellant was of the view that the money be converted to costs in favour of the respondent.

The judge directed that a formal application be made and hence this present application. Now each party wants the money. The appellant is ready to surrender the money on condition that it is converted into the respondent's costs. The respondent would not hear of that.

The respondent contends that he was the successful party upon the withdrawal of the appeal and so the money should be released to him. The appellant contends that the appeal was not heard and determined on merit and so the issue of the respondent's alleged success does not arise.

In this court's opinion, this matter ought not have reached this far. It is a pity that the parties could not comprehend the import of the withdrawal of the appeal and resolve on their own the issue of the release of the deposited money and more so when it is agreed that a fresh appeal has already been filed and fresh terms pertaining to security given.

Would a withdrawn appeal be considered successful if a fresh appeal arising from the same decision of the trial court has been filed? This court does not think so.

The withdrawal of the initial appeal meant that the parties and all that appertained to the appeal retreated or retracted to their respective positions before the appeal was filed.

Therefore, the money deposited in court should revert to its actual owner i.e. the depositor who in this case was the appellant's counsel as per the deposit receipt number B 374310 dated 16th July 2007.

It was foolhardy for the respondent to even think that the money would or should be released to him on the basis of his alleged success in the withdrawn appeal.

The appeal was never heard and determined on its merits so as to gauge the success of either party. The appeal was simply withdrawn with costs to the respondent.

Since the respondent has expressed that he would not be agreeable to the deposit being treated as his costs then he is at liberty to pursue the issue of his costs at a different forum without becoming an "**irritant**" to the appellant.

In sum, this application must and is hereby dismissed with costs to the appellant.

It would be rather harsh and unfair for this court to order that the costs of the application be personally paid by the respondent's counsel as suggested by the appellant's counsel.

Although the counsel for the respondent should have known better, he made this application after being directed to do so by the court. The counsel was however at liberty to disregard the directive. Nobody was pointing a gun at his head.

Dated, signed and delivered at Kisumu this 12th day of February 2010.

J. R. KARANJA

JUDGE

JRK/aao