



CONTINENTAL DEVELOPERS LTD..... APPELLANT

VERSUS

ADAN DADACHA KARACHA.....1ST RESPONDENT

FAGICHE FIJOGUTU.....2ND RESPONDENT

RULING

1. By a Notice of Motion dated 18th August, 2009, Omangi Musanga & Co. Advocates who claim to be the advocates for the respondents, Adan Dadacha Karacha and Fagiche Fijogutu, seeks to have the money which was deposited into a joint interest earning account, pursuant to a consent order released to the firm of Omangi Musanga & Co. Advocates. The money was deposited as security pursuant to an application which was made by the appellant for stay of execution.

2. The application now before me is anchored on the following grounds:

(i) That the appellant is not interested in prosecuting its appeal filed herein on 2nd November, 2005.

(ii) That the appellant's delay in prosecuting the appeal herein is an infringement of the applicant's right to enjoy the fruits of the judgment entered against the appellant for the sum of Kshs.233,356/= and interest thereon since 18th October, 2005.

(iii) That the said appeal is an abuse of the process of this Honourable Court.

(iv) That the appellant has not bothered to file record of appeal.

3. The application is also supported by an affidavit sworn by Cheryl Onindo, who swears that the appellant has not taken any action to prosecute his appeal and only intends to frustrate and delay the respondent from reaping the fruits of his judgment.

4. Upon being served with the application, the respondent filed a record of appeal. A replying affidavit was also sworn by Harun Muturi a director of the appellant company in which he depones that the money was deposited into Court pursuant to a consent order agreed upon by both parties. The appellant therefore maintains that the application is an abuse of the Court process as the consent order cannot be altered or varied unless the same is vitiated by fraud. It is further deponed that one of the respondents Adan Dadacha Karacha is deceased and has not been substituted.

5. There was no further affidavit filed in response to the replying affidavit. The appellant's contention that one of the respondents is deceased has therefore not been disputed. If that be so, then unless that particular respondent has been substituted the firm of Omangi Musanga & Co. Advocates do not have proper instructions.

6. Further I have perused the Court record and do find that the parties agreed by consent to have the decretal sum deposited in Court and later into an interest earning account. It follows that that order can only be varied by consent of the parties, or set aside if the same is vitiated by fraud or any other vitiating factor, none of which obtains herein.

7. For the above reasons, I find no merit in this application and do therefore dismiss it with costs.

Dated and delivered this 23rd day of October, 2009.

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant/respondent, absent

Ombae for the respondent/applicant

Eric, court clerk