



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT ELDORET
APPELLATE SIDE

CIVIL APPEAL 115 OF 2000

RAYMOND WOOLEN MILLS.....APPELLANT

VERSUS

PETER O. OBONYO.....RESPONDENT

(Being an appeal from the judgment in SPMCC (Eld) No. 1491 of 1995,

delivered on the 22/8/2000 by F.O. Kadima, Esq. SRM.)

RULING

The application before me revolves around funds, which were deposited in an income earning joint account with Housing Finance Company of Keya Ltd ('HFCK'), on 14/2/2001, vide certificate of deposit No. 660688, which Peter Obonyo (hereinafter called "the applicant") whose release he now prays for.

Briefly, the applicant was awarded general damages of Kshs. 72,000/- as well as costs, against Raymond Woolen Mills (hereinafter called "the respondent"), in a judgment delivered on 22/8/2000 by the Senior Principal Magistrate's Court at Eldoret in SPMCC No. 1491 of 1995, at which point the respondents were thereafter granted 30 days stay of execution. On 27/11/2000, the respondents moved the court and sought another order of stay pending appeal, which order was granted, subject to their depositing the entire decretal sum in a joint interest earning account, which was done as aforementioned.

In the meantime on 2/10/2002, the respondents had filed their appeal, which they acknowledged, was filed out of time, and it is on record that on 17/12/2002, they withdrew their application for leave to file that appeal out of time, and that they took no further action thereafter. The applicant who feels that there is no valid reason for the continued withholding of the decretal sum has now moved this court in an application in which he seeks the following orders inter alia:

1. That the court declares that there is no appeal on the record.
2. That the entire sums of money deposited herein together with interest accrued be released to him.
3. That the HFCK Eldoret Branch Manger be ordered to release the entire sum of money to his advocate.

He bases his application on the grounds, inter alia, that there is no appeal pending against him and that the amount, whose release he now seeks, was deposited in pursuance of a court order. Mrs. Kittony, learned Counsel for the applicant made submissions to the effect that the subordinate court became functus officio at the time when it delivered its judgment and also when the parties moved to this court. She also urged

this court to find that there is no appeal on the record as their application to validate the appeal has yet to be heard, and that in any event her client was not under any obligation to prod the appellant to prosecute his application of 18/12/2002.

She therefore urged the court to find that there was no evidence that the file was missing, and that the appellants are guilty of laches.

Mr. Kuloba learned Counsel for the respondents however maintained that the applicants should have applied to have his clients' application of 18/12/2002 dismissed instead of proceeding in this manner. It is also the respondents contention that this matter had better be handled by the subordinate court which ordered the deposit, as it is the court which should reverse, review or deal with its decision as appropriate, and also that their appeal remains competent until it is struck out.

The first issue for determination is whether this application is properly before this court, or whether it should have been filed in the subordinate court. It is evident that the respondents have always been aware that they filed their appeal out of time without leave. In my humble opinion once an intending appellant files his appeal, the court which issued the contentious decision becomes functus officio and the matter can only be referred back to that court by the appellate court for specified action should it be necessary, such as in cases where damages would have to be assessed, otherwise the appellate court is mandated with the responsibility of adjudicating upon all matters arising after the appeal is filed. I must state at this point, that it would not matter, that the appeal which is on record is invalid or incompetent. Damages which were awarded to this applicant are an issue in the intended appeal and it is therefore clear that this court is now mandated to deal with the issues arising from this application. The most important thing would be that once the party has brought himself within the jurisdiction of the appellate court, he cannot decide to have his cake and eat it by having his legs in both the subordinate court and the appellate court, on issues which are raised in his appeal.

But is the issue of the release of the funds res judicata? I have perused the records herein as well as in HCCC (Eld) Misc. Application No. 146/2000 and it is clear that on 3/10/2000, these respondents had filed an application for leave to appeal against the aforementioned judgment but they did not prosecute their application, and that on 30/5/2001 this applicant moved the court in an application in which he sought to have their application for leave dismissed. He also sought an order for the release to him of the funds which had been deposited in the joint account with HFCK.

After hearing both parties, my brother Hon. Justice Omondi Tunya dismissed his application on the basis of the ground that since these respondents had already obtained a date for the hearing of their application for leave, it would only be in the interest of justice that they be allowed to prosecute their application. The respondents then appeared in court on 31/7/2002 to prosecute their application but sought an adjournment halfway through their submissions so as to establish a fact which had been raised by the applicant's counsel. Nothing seems to have taken place thereafter. Bearing the above in mind, I find that at no point in time, did the learned Judge deliberate upon, or indeed decide the issue of the release of the funds, it cannot now be said that that request is now res judicata.

Be that as it may, an intending applicant who files his appeal late without leave cannot be heard to say that he has an appeal on the record, for it is a mandatory requirement that he obtains leave to file the appeal out of time. Without such leave, there is no appeal on the record herein, and it is for that reason that I find that it would defeat the interests of justice to continue withholding the applicant's award in the joint account for it would otherwise be tantamount to denying him the enjoyment of the fruits of his judgment.

I do therefore allow this application in its entirety. The applicant shall also have the costs of the application.

Dated and delivered at Eldoret this 15th day of June 2005.

JEANNE GACHECHE

Judge

Delivered in the presence of:

Mrs. Kittony for the applicant

No appearance for the respondents