

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI
Civil Appeal 32 of 2002

1. PETERSON GITHU)
2. LOISE WAMBUI GITHU)
3. MARY WAMAHIGA WAIROTi)
4. GLADYS NJERI MURAGE)..... APPELLANTS

VERSUS

ELIZABETH WAIRIMU RINDIRI RESPONDENT

**(Appeal from the original judgment in Chief Magistrate’s Court at Nyeri in Civil Case
No. 497 dated 1st February 2002 by Miss Regina Muriuki – R.M. – Nyeri**

R U L I N G

By a notice of motion dated 17th September 2004 filed on the same date, the appellants are seeking orders under section 3A and section 78 (2) of the Civil Procedure Act for orders that the amount of Kshs.20,000/= deposited by the Appellants pursuant to the order of 6th May 2002 be released to the applicants through their advocate on record.

The order made on 6th May 2002 was for a stay of execution pending the final determination of the appeal in the High Court on condition that the applicants deposit a sum of Kshs.20,000/= in a joint interest earning A/C in the names of the advocates on record.

The appeal was subsequently heard by Hon. Khamoni J who delivered his judgment on 17th June 2004 allowing the appeal, hence the application to have the deposited amount released to the appellant.

Mr. Mburu has however opposed the application on behalf of the Respondents contending that the same is misconceived and incompetent, as the court had no authority under section 78 (2) of the Civil Procedure Act to make such an order. He further submitted that the application for release of the money was frivolous as there was an appeal already filed before the court of appeal which was pending and therefore an order for release of the money would be premature.

I am unable to understand the drift of Mr. Mburu’s argument as section 78 (2) of the civil Procedure Act merely gives an appellate court additional powers to perform “as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction.” I do not see how this power derogates from this court’s powers to discharge orders made by itself.

It is evident that the order for deposit of Kshs.20,000/= was a precondition for staying execution of the decree pending the hearing of the appeal lodged by the appellant in this court. That appeal having been disposed off, the order is spent. It cannot be affected by the appeal filed in the court of appeal by the Respondent.

I therefore overrule the objection raised by the respondent and order that the amount of Kshs.20,000/= deposited by the appellant in an interest earning account pursuant to orders made on the 6th May 2002 be forthwith released to the appellants’ advocate on record.

Those shall be the orders of this court.

Dated signed and delivered this 23rd day of November 2005.

H. M. OKWENGU

JUDGE