



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CIVIL APPEAL NO. 61 OF 2018

**ALVINA WAMBOGO MUNENE (Personal Representative of the estate of
the late ALFRED MUNENE SALESIO.....APPLICANT/RESPONDENT**

VERSUS

ELIJAH MURAGE.....RESPONDENT/APPELLANT

RULING

1. By an application dated 23.11.2020 and filed on 4.12.2020, the applicant/respondent in the Appeal Alvina Wambogo Munene sought ORDERS:-

i. Spent.

ii. That this honourable court be pleased to order for the release of Shs.3,000,000/= deposited in court as security by the respondent on 19.2.2020 to the firm of Charles Kariuki & Koome Advocates at NCBA Bank PLC A/c No. 1002*** Meru Branch.**

Upon grounds stated at the body of the application, and supported by an affidavit sworn by the Applicant on the even date.

2. On the 7/12/2020, this court ordered for service of the application and return for inter parties hearing on the 16.12.2020. The application was duly served by email to the respondent's advocates and confirmation of service filed.

3. On the hearing date, the respondent's Advocate M/s Kairu & MCCourt Advocates failed to attend court, nor had they filed any responses to the application.

Having been satisfied that the respondent was duly served, the applicant by her advocate, Mrs. Makworo argued the application, and urged for the prayers sought to be granted.

4. I have considered the unopposed application dated 23.11.2020, and the supporting affidavit.

The subject sum of Kshs. 3,000,000/= was deposited in court as security by the respondent on the 19.2.2020, as a condition for stay of execution of the judgment in Kerugoya CMCC No. 164/2015 Alvina Wambogo Munene - vs - Elija Munene, pending hearing and determination of the appeal. The court order is dated the 20.12.2019.

5. By the said court order, the balance of the decretal sum was put in abeyance pending determination of the appeal.

6. Judgment was delivered by the trial court on the 10th August, 2018.

I have perused the proceedings. The Memorandum of Appeal was filed on the 21.11.2018. The proceedings of the subordinate court were typed and certified on the 8.12.2020.

The Appellant is yet to file the Record of Appeal as at the time of preparation of this ruling.

7. The court order of 20.12.2019 was that the security was to be deposited in court within 21 days from the said date, but was deposited on the 19.2.2020 outside the period allowed by the court, but nonetheless the security was deposited.

8. By an order of the court dated 7.10.2020, if the appeal was not filed within 30 days i.e by the 7.11.2020, the respondent was granted liberty to execute the decree, by having the money deposited in court released to the respondent/decree holder.

9. I have earlier rendered that the proceedings of the subordinate court were certified on the 8.12.2020.

The appellant would not have filed the Record of Appeal earlier, without benefit of the proceedings.

10. To order the release of the security to the Respondent in my view, would be contradicting the terms of the court orders (Gitari J)

dated 20.12.2019 when the said security was ordered to be deposited in court as a condition for stay pending hearing and determination of the Appeal.

11. I agree it has taken long to have the proceedings typed to enable the appellant to file the Record of Appeal. I cannot attribute the delay to the appellant entirely. To have the security released to the respondent would in the circumstances defeat the purpose for which the court orders were given and would also defeat the ends of justice.

12. The Court, by **Sections 1A, 1B and 3A of the Civil Procedure Act**, and **Article 159 (2) (d) of the 2010 Constitution** is enjoined to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court, and to dispense justice without undue regard to technicalities. Such technicality in the circumstances is depositing the security in court out of the time specified in the order, because the said deposit was nevertheless deposited in court.

13. To that extent, and in exercise of my unfettered discretion, and having regard to the circumstances hereto, I find the application dated 23.11.2020 without merit. It is dismissed.

14. The appellant is directed and ordered to file and serve the Record of Appeal within 45 days of this ruling, failure to which the appeal shall stand dismissed.

15. I make no orders as to costs.

Signed electronically.

J. N. MULWA

JUDGE

DELIVERED AT CHUKA THIS 8TH DAY OF APRIL, 2021

L. W. GITARI

JUDGE