



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 129 OF 2017**

**JUMA HAMILTON.....APPELLANT**

**VERSUS**

**MARTIN MUTUA KITHUVI.....RESPONDENT**

**RULING**

1. Before me for determination is the respondent's Notice of Motion dated 11<sup>th</sup> November 2019 in which the respondent (hereinafter the applicant) who was the judgment creditor in a suit concluded in the lower court seeks release of the decretal amount awarded in the suit in the sum of KShs.457,000 which was deposited by the appellant (judgment debtor) in a fixed interest earning account as a condition for stay of execution pending the hearing and determination of the appellant's appeal. The appeal challenges the trial court's decision in which the applicant was awarded the decretal amount.
2. The applicant prays that the decretal sum be released to his advocates on record, *M/S Wanyonyi & Muhia Advocates* together with all accrued interest and that the appellant be compelled to pay costs of the suit in the lower court and interest thereon from the time of filing suit until payment in full as well as costs of the application.
3. The application is supported by the grounds stated on its face and the depositions made in the supporting affidavit sworn by his learned counsel, *Ms Salome M. Beacco*. The applicant contends that since filing the memorandum of appeal on 23<sup>rd</sup> March 2017 and obtaining orders of stay of execution, the appellant has failed to take any step towards facilitating hearing of the appeal.
4. The applicant further asserts that on 31<sup>st</sup> July 2019, the court declined to dismiss the appeal for want of prosecution on condition that the appellant lists the appeal for directions under *Section 79 B* of the *Civil Procedure Act* and *Order 42 Rule 13* of the *Civil Procedure Rules* within 90 days of that date in default of which the appeal would stand dismissed with costs to the respondent; that the applicant failed to comply with the conditions given by this court and that consequently, the appeal stands dismissed for want of prosecution and there is no reason why the decretal amount should not be released to the applicant.
5. The application is opposed through a replying affidavit sworn by the respondent, Mr. *Juma Hamilton* on 11<sup>th</sup> December 2019. The respondent contests the motion principally on grounds that he has already filed a record of appeal and that the appeal has high chances of success and ought to be heard on merit; that he was prevented from filing the record of appeal due to delay in the supply of typed copies of the lower court's proceedings; that since the decretal amount is in a joint interest earning account, the applicant does not stand to suffer any prejudice if the application was dismissed and the appeal proceeded for hearing.
6. The court record shows that hearing of the application was fixed for 11<sup>th</sup> March 2020 by consent of the parties. However, on the hearing date, only the applicant's counsel attended the court. The respondent was not represented and consequently, hearing of the application proceeded *ex parte*.
7. During the hearing, learned counsel for the applicant, *Ms. Beacco* invited the court to find that as the respondent failed to comply with the conditions imposed by this court in its ruling dated 31<sup>st</sup> July 2019, the appeal stood dismissed and the applicant was entitled to the release of the decretal amount.
8. Having considered the application, the affidavits on record and the oral submissions made by *Ms. Beacco* as well as the court record, I find that the respondent has not disputed that since the filing of the memorandum of appeal on 23<sup>rd</sup> March 2017, he has not taken any steps to progress the appeal for hearing.
9. The court when ruling on an application presented by the respondent seeking dismissal of the appeal for want of prosecution considered the reasons advanced by the appellant explaining the delay in filing the record of appeal and decided to sustain the appeal on two conditions.

The appellant was directed to file the record of appeal and cause the appeal to be listed for directions under both *Section 79 B* of the *Civil Procedure Act* and *Order 42 Rule 13* of the *Civil Procedure Rules* within 90 days of the date of the ruling which was 31<sup>st</sup> July 2019 failing which the appeal would stand dismissed with costs to the respondent.

10. The court record shows that the appellant did not comply with any of the two conditions. He filed his record of appeal on 10<sup>th</sup> December 2019 over a month after the time limited by this court had expired. It is apparent that the appellant's action of filing the record of appeal was prompted by the service of the current application. His claim that he could not have filed the record of appeal on time due to unavailability of the lower court's typed proceedings is untenable given that during the hearing of the respondent's motion seeking dismissal of the appeal, the appellant had informed the court that the typed proceedings were ready and were only awaiting certification by the trial court.

11. It is also worth noting that before filing the record of appeal way past the deadline imposed by the court, the appellant did not bother to seek extension of time within which he was directed to comply with the aforesaid conditions.

12. Given the foregoing, I wholly agree with the applicant that as the appellant failed to comply with the conditions prescribed by this court on 31<sup>st</sup> July 2019, as matters now stand, the appeal stands dismissed with costs to the applicant. The appellant had deposited the decretal amount in an interest earning account as security for the due performance of the decree pending determination of the appeal.

13. Now that the appeal stands dismissed, I do not find any reason why the respondent should be kept away from the fruits of his successful litigation. In the premises, I find merit in the applicant's motion dated 11<sup>th</sup> November 2019 and it is hereby allowed in terms of prayer 2 with a direction that the monies in the aforesaid joint interest earning account should be released to the advocates on record for onward transmission to the applicant.

14. The applicant had also asked the court to order the respondent to pay him costs of the suit in the lower court together with interest thereon. It is not clear from the court record what orders the trial court made on costs of the suit since the original record of the lower court has not been availed to this court and the trial court's judgment is missing from the irregularly filed record of appeal.

15. Be that as it may, the award of costs of a suit is within the province of the trial court and an appellate court can only make an order for payment of costs in the lower court when determining an appeal. In the premises, the respondent's aforesaid prayer cannot be the subject of my determination in the context of the instant application. I therefore decline to make any orders with respect to prayer 3 of the application.

16. Lastly, the applicant is awarded costs of the application.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI** this 14<sup>th</sup> day of May 2020.

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Obagwa for the applicant

No appearance for the respondent

Ms Carol: Court Assistant