



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 511 OF 2014

THE REGISTERED TRUSTEES OF THE SISTERS

OF MERCY Trading as the MATER HOSPITAL.....APPELLANT

-VERSUS-

JOYCE NJERI MUKURURI (Suing as the mother and

next friend of ANNA MARIE WAITHIRA).....RESPONDENT

RULING

1) The respondent herein took out the motion dated 16th July 2020 in which she sought for:

i. Spent

ii. THAT the security deposit of ksh.1,852,900 deposited in account no. [...] at Kenya Commercial Bank, Kipande House Branch, under the joint names of Simba & Simba Advocates and Havelock Nduati & Company advocates together with the interest be released to Simba and Simba advocates vide account number [...] held at Kenya Commercial Bank, Kipande House Branch.

iii. THAT this honourable court be pleased to make such further orders as are necessary for the ends of justice.

iv. THAT costs of this application be provided for.

2) The respondent filed the affidavit of Maruti A. Khamala in support of the motion.

3) When served with the motion, the appellant filed the replying affidavit of Diana Mutugi to oppose the application.

4) When the motion came up for interpartes hearing learned counsels were permitted to make oral submissions. I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavits filed in support and against the motion.

5) I have further considered the rival oral submissions. It is the submission of the respondent/applicant that the amount sought to be released to her was deposited in an interest earning account in the joint names of learned counsels as security for the due performance of the decree as a condition for the grant of the order for stay pending appeal.

6) The respondent/applicant further stated that this appeal was dismissed for want of prosecution. The respondent urged this court to grant the order now that the appeal has been determined.

7) On its part, the appellant/respondent urged this court not to grant the order. It was pointed out that the typed proceedings and judgment were only availed to the appellant on 21.8.2019 and the appellant/respondent proceeded to file the record of appeal on 5th September 2019.

8) It is stated that the record of appeal was filed out of time as a result of the delay by the registry in returning the lower court file for processing. The appellant/respondent also argued that the delay in prosecuting this appeal is as a result of mistake of counsel who was handling this matter and who has since left the employment of the law firm.

9) The respondent further deponed that the parties were negotiating for an out of court settlement of the matter and is therefore surprised when it was served with the current application. The appellant further stated that though it had sought for an out of court settlement the appellant is still desirous to prosecute its appeal and that the appeal cannot be set down for directions without typed proceedings and judgment which the appellant has not received. The appellant further argued that the delay in obtaining typed proceedings and judgment was

not the appellant's mistake.

10) The record shows that on 24th January 2019, Justice Kamau issued an order directing the appellant to file a record of appeal within 60 days. The learned Judge further issued a qualified order stating that in the event the trial court's file with the typed proceedings has been placed in this court's file and the appellant fails to file the record of appeal this appeal will automatically stand dismissed and the amount deposited as security for the due performance of the decree shall be released to the respondent.

11) The appellant deponed in the replying affidavit that it applied to be supplied with typed proceedings and judgment from the trial court sixty days after the delivery of the ruling of Lady Justice Kamau of 24th January 2019. It is further averred that uncertified typed proceedings and judgment were supplied on 27.2.2019. The same were returned to the trial court for certification but the certified copies were eventually received by the appellant on 21st August 2019.

12) It is said that on 5th September 2019 the appellant filed the record of appeal. The aforesaid facts are not controverted by the respondent/applicant. I have already pointed out that Lady Justice Kamau gave a conditional order.

13) The learned Judge expressly stated that the appeal would automatically stand dismissed if the appellant fails to file the record of appeal after the trial court's typed proceedings and judgment have been placed in this court's file. The explanation narrated by the appellant shows that the appellant filed the record of appeal within 14 days from the date of receiving the trial court's certified typed proceedings and judgment.

14) With respect, I am persuaded that the appellant/respondent has given a plausible explanation to show that the appeal was not automatically dismissed. The appellant has shown that it filed the record of appeal without unreasonable delay upon obtaining the typed proceedings and judgment. I have come to the conclusion that the orders sought in the respondent's motion cannot be granted because the order deeming the appeal as automatically dismissed has not crystalised therefore the appeal is still pending.

15) In the end, I find no merit in the motion dated 16th July 2020.

The same is dismissed with costs abiding the outcome of the appeal.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 6th day of November, 2020.

.....

J. K. SERGON

JUDGE

In the presence of:

..... **for the Appellant/Applicant**

..... **for the Respondent**