



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CIVIL APPEAL NO. 58 OF 2013**

**MILLING CO-OPERATION OF KENYA**

**(2009) LIMITED.....APPELLANT/APPLICANT**

**-VERSUS-**

**SAMUEL MUCHAI NJUGUNA**

**T/A WAMU STORES.....1<sup>ST</sup> RESPONDENT**

**RAHAB WAMBUI T/A WAMU STORES.....2<sup>ND</sup> RESPONDENT**

**FRANCIS MURIUKI MURAGURI**

**T/A LUSOI STORES.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. There are two applications before me.

The 1<sup>st</sup> one was filed by the 3<sup>rd</sup> Respondent, Francis Muriuki Muraguri t/a Lusoi Stores on the 25<sup>th</sup> March 2019.

The Respondent seeks costs on the dismissed appeal, relying on the Order by Mativo J on a notice to show cause why the appeal should not be dismissed, it is dated 28<sup>th</sup> January 2019.

2. The application is premised on provisions of **Order 42 Rule 35 Civil Procedure Rules and Sections 3A, 99 and 80 of the Civil Procedure Act**. It is averred that as there was no compliance by the Appellant of the **Court Order dated 28<sup>th</sup> January 2019, the Appeal stood dismissed, 45 days from the said order**. On that ground, the 3<sup>rd</sup> respondent sought costs of the Appeal and those of the primary suit in the sum of Kshs.186,260/= deposited in court as security for costs, and further order for the release of the said costs to the 3<sup>rd</sup> Respondent.

3. The Respondent/Appellant by a replying affidavit filed on the 3<sup>rd</sup> April 2019 opposed the application on grounds that circumstances did not allow the appellant to comply with court orders of the 28<sup>th</sup> January 2019.

4. **The second application was filed by the appellant on the 5<sup>th</sup> April 2019**, a day after submissions were taken on the 1<sup>st</sup> application.

It is brought under **Order 45 Rule 1, 22 rule 22 and Section 3A, 63(e) of the Civil Procedure Act**.

The Appellant sought an order to arrest and suspend the ruling in respect of the 3<sup>rd</sup> respondent's application – (the 1<sup>st</sup> application) due on 11<sup>th</sup> July 2019, and in the main, an order to review, **vary and/or set aside** the court orders dated 28<sup>th</sup> January 2019, and thereafter reinstate the appeal, by extending the time within which the appeal should be fixed for hearing.

5. It is supported by a supporting affidavit sworn by the Advocate **Jimmy Aggrey Simiyu** and grounds stated at the face of the application.

6. At the hearing of the first application on the 20<sup>th</sup> June 2019 both parties agreed that as the two applications are closely related, that a ruling on both may be delivered on the 11<sup>th</sup> July 2019.

7. I have considered submissions on both applications by the rival parties' advocates.

The issue to settle at the first instance is whether as at the 5<sup>th</sup> April 2019 when the applicant filed its application for review and/or varying of the orders dated 28<sup>th</sup> January 2019 (Mativo J) whether there was a competence appeal on record, upon which the application could be anchored. It read

**1. That the court is inclined to grant the Appellant one chance to prosecute their case**

**2. The accordingly, I order the appellant to fix their case for hearing within 45 days from today in default the same shall stand dismissed.**

8. In my understanding of my brother Judge Orders, 45 days lapsed on the 13<sup>th</sup> March 2019.

Therefore the **Appeal stood dismissed on the 13<sup>th</sup> March 2019 midnight**. That is the submission by Mr. Kanyi Advocate for the 3<sup>rd</sup> Respondent, before the application for review or varying of the said orders was filed on the 5<sup>th</sup> April 2019. In the circumstances, it is evident that there was no appeal on record as at the 5<sup>th</sup> April 2019, meaning that the said application had no legs upon which it could stand on.

9. I agree with the 3<sup>rd</sup> respondent that the application is incompetent and an abuse of the court process.

I need not go into the reasons advanced for the prayer for vacation of the orders as doing so would be acting in a vacuum.

10. Had the appellant filed its application before the expiry of the 45 days given in the order, the court would have considered the grounds and perhaps grant the extension of time sought to fix the appeal for hearing.

11. It is worth to note that the appellant had prior to the said order been granted sufficient time to progress its appeal without any fruitful action taken. The appeal was filed in 2013 and was listed for Notice to Show Cause why it should not be dismissed for want of a prosecution under **Order 42 Rule 35 (2)** several times.

In the circumstances, I am persuaded to dismiss the appellant's application with costs to the 3<sup>rd</sup> respondent upon reasons I have rendered above.

12. Back to the notice of motion dated 25<sup>th</sup> March 2019, the 1<sup>st</sup> application. The appeal being the basis of the orders of stay of execution pending hearing and determination is already dismissed. It follows that the said orders given under **Nakuru High Court Misc. Application No. 81 of 2013 on the 15<sup>th</sup> March 2013** must be vacated, there being no appeal on record.

Consequently the judgment and consequential orders in the primary suit, Nakuru CMCC No. 252 of 2011 ought to be actualized in favour of the 3<sup>rd</sup> Respondent.

13. The decretal sum together with costs and interest in the sum of Kshs.186,260/= was deposited in court as security for the due performance of the decree by a court order issued on the 19<sup>th</sup> March 2013 (Wendoh J).

This is the amount that the 3<sup>rd</sup> respondent by its prayer No. 2 seeks to be released to itself.

Given the circumstances above, there is no reason to deny the 3<sup>rd</sup> Respondent fruits of its judgement.

14. I proceed to allow the 3<sup>rd</sup> Respondent's application dated 25<sup>th</sup> March 2019 in its entirety with costs. In the result, the Deputy Registrar of this court is directed and ordered to release the sum deposited in court in the sum of Kshs.186,260/= to the 3<sup>rd</sup> Respondent's advocates Kanyi Ngure & Company Advocates.

The 3<sup>rd</sup> Respondent shall have the costs of the Application from the Appellant.

It is so ordered.

**Signed, delivered and dated at Nakuru this 11<sup>th</sup> Day of July 2019.**

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**J.N. MULWA**

**JUDGE**