

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 543 OF 2017

PETE KUSIMBA NYONGESA.....1ST APPELLANT

GRACE MURORIA.....2ND APPELLANT

VERSUS

WILLY MULI MUSYOKA MAATI.....RESPONDENT

RULING

On 19th June, 2018 I delivered a ruling on an application at the instance of the appellants that sought an order of stay of execution pending the appeal file against the judgment of the lower court.

In that ruling, I granted the order sought on condition that the appellants paid Kshs. 1 million to the respondent and the balance of the decretal sum be invested in an interest earning account in the names of both advocates for the parties within 30 days from the date of that ruling.

It is common ground that the said conditions have been fulfilled.

There is now an application before me by way of Notice of Motion dated 26th April, 2019 seeking an order that the amount deposited following the above ruling be released to the applicant, and that the Memorandum of Appeal be struck out and the appellants be barred from filing the record of appeal.

There is an alternative prayer to the effect that the respondent be awarded a substantial amount from the decretal sum to enable him access medical assistance. The application is supported by an affidavit sworn by the respondent alongside grounds set out on the face of the application. The same is opposed and there is a replying affidavit sworn by the advocate for the appellant. Upon directions both parties filed submissions and cited some authorities which I have noted.

The applicant has cited Article 48 of the Constitution, Order 51 of the Civil Procedure Rules, Sections 1 A, 1B and 3 of the Civil Procedure Act in advancing the application. The orders sought by the applicant appear to be asking this court to review the orders of the ruling made on 19th June, 2018.

Both parties recognize the rights of the respondent as well as the appellants. These rights were highlighted in my said ruling. I have previously observed in other matters that the systemic shortcomings of the institution should not be blamed on the parties that seek justice before the courts. Invariably in all cases where parties have expressed the desire to appeal, proceedings from the lower court are never availed in time. The delay in the filing of the record of appeal by the appellant herein falls in that category.

To date the record of the lower court has not been availed to facilitate the preparation of the record of appeal by the appellants. They cannot be punished because of that. They are not in charge of the preparation of the record of appeal, a responsibility that is squarely in the control and mandate of the lower court.

While not downplaying the urgency of the respondent's condition, the court is unable to give the orders sought because prejudice may follow on the part of the appellants yet they have all the rights to be heard.

Bearing that in mind, the application before me is declined and therefore dismissed. I direct that the Deputy Registrar shall facilitate the availability of the lower court record within 30 days from the date of this ruling and thereafter upon receipt of the proceedings by the appellants, the record of appeal shall be filed within 14 days. Each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 21st Day of November, 2019.

A. MBOGHOLI MSAGHA

JUDGE