



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION
HIGH COURT CIVIL CASE NO. 460 OF 2014

JOSEPH MUCHEKE KAMAU.....APPELLANT/RESPONDENT

VERSUS

ANTHONY THUO WAWERU.....RESPONDENT/APPLICANT

RULING

1. The Application dated 8th December, 2015 seeks orders that the sum of Ksh.458,000/= together with any accrued interest, deposited in court on 11th November 2014 by the Advocates for the intended Appellant/Respondent herein, Joseph Mucheke Kamau, be released to the firm of Wahito & Company Advocates for the Judgment Creditor/Applicant herein.

2. The application is based on the grounds stated on the face of the application and the supporting affidavit sworn by the Applicant, Antony Thuo Waweru. It is stated that on 11th March, 2014, the lower court entered judgment in favour of the Applicant for the sum of Ksh.458,000/=. Subsequently, the Respondent who was aggrieved by the said judgment applied to this court for orders of stay of execution pending appeal. The application was allowed pending the hearing of the application interpartes on condition that the sum of Ksh.458,000/= be deposited in court. The said amount of money was deposited. The court subsequently proceeded to hear the application seeking orders for leave to be granted to appeal out of time and for a stay of execution of the lower court judgment.

3. The court made a ruling allowing the two applications on the following conditions:

“(i). The decretal sum of Ksh. 458,000/= which was deposited in this court on 11th November 2014 to be deposited in a joint interest earning account to be opened and held by both advocates for the parties to his application within 21 days from the date hereof.

(ii) The applicant to compile, file and serve the respondent with a complete record of appeal within 21 days of the filing of the intended appeal.

(iii) The appeal once filed to be mention on 22nd October 2015 to confirm if the lower court record shall have been availed to the appellate file.

2. The applicant to file an appeal within 21 days from the date hereof.

4. The Applicant's complaint is that the Respondent has not complied with any of the aforestated conditions. It is the Applicant's contention that the foregoing demonstrates lack of interest in the appeal on the part of the Respondent.

5. The application is opposed. It is stated in the replying affidavit that the court file could not be traced despite the many letters to the Deputy Registrar requesting for the same which letters were not acknowledged. That on 20th August, 2015 the Memorandum of Appeal was filed and the remarks "pending confirmation of leave to file" made on the courts copy of the same. The Respondent expressed surprise at the availability of the court file for the filing of the application under consideration. The failure to compile the record of appeal is also blamed on the disappearance of the court file. According to the Respondent, he is keen to prosecute the appeal, hence the deposit of the decretal sum. It is further averred that the release of the decretal sum will render the appeal nugatory.

6. The application was canvassed by way of written submissions which I have duly considered.

7. The copy of the Memorandum of Appeal and the copies of the letters said to have been served to the registry requesting for the file have not been annexed to the replying affidavit filed herein and neither are the said copies in the court file. However, the issue whether the said documents exist or not has not been raised by the Applicant. It is difficult for this court to establish whether the file herein went missing or not or whether the Appeal was listed for mention on 22nd October, 2015. It does not come out clearly from the Respondent's affidavit evidence how the disappearance of the file herein contributed to the failure to compile the record of appeal. In the Respondent's own words, the appeal file was opened. A request to have the lower court record availed could have therefore been made. However, I appreciate the difficulty that could have been faced regarding attempts to process the release of the decretal sum without the file herein.

8. With the foregoing, my view is that the interests of justice would be served by having the appeal herein heard on priority basis. Consequently, the application is dismissed with costs in cause. Both the miscellaneous file and the appeal file to be mention on 28th February, 2017 for directions.

Dated, signed and delivered at Nairobi this 16th day of Feb., 2017

B.THURANIRA JADEN

JUDGE