



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NO. 156 OF 2003

TITUS KIRAGU.....1ST PLAINTIFF

SUSAN W. KIRAGU.....2ND PLAINTIFF

VERSUS

KIORIAH NJOKA.....1ST DEFENDANT

ESTHER WAGIKONDI NJOKA.....2ND DEFENDANT

RULING

1. By an application dated 24th July, 2014 the Plaintiffs seek that the sum of shs. 292,000/= deposited in court by the Plaintiffs as security for costs in their appeal to the Court of Appeal at Nakuru vide **Civil Appeal No. 13 of 2014 – Kioriah Njoka –vs- Titus Kiragu and Susan W. Kiragu** be so held and released to costs of appointed land surveyor for sub division of Land Reference No. 10317/14, North East of Naivasha and yielding of titles from the subdivision in the names of the administrator of the estate of the late Njoka wa Kioriah.

2. The application is supported by the affidavit of Titus Kiragu, one of the applicants sworn on the 24th July, 2014 and on grounds, among them that the Notice of Appeal to the Court of Appeal was withdrawn under Rule 81 Court of Appeal Rules. In effect, the suit hereof is spent, and that the monies deposited thereof ought to be released to the parties entitled to it. The Applicant argued that the property subject of this suit LR No. 10317/14 has not been subdivided for distribution to the beneficiaries who have not provided for the survey fees in the scheme of distribution in the Succession Cause in Nairobi High Court Succession Cause No. 3270 of 2003, Estate of the late Njoka wa Kioriah.

3. The application is opposed. By their grounds of opposition and replying affidavit filed on the 26th October 2004 the 1st Respondent states that the suit hereof having been struck of by this court on the 16th December 2004 with costs and the Notice of Appeal having been withdrawn on the 25th July 2014 there is no existing suit, and the court has become *functus officio*. As such this court is no longer seized of the case.

It is argued for the Respondents that the sum of shs. 292,000/= deposited in the court, was security for costs for the appeal which as stated above has been withdrawn. The Respondent states that, the deposit were costs due to the successful party in the appeal. In this scenario, since the Applicant withdrew the appeal, and as costs follow the event, the said deposit are costs to the Respondent, subject to a certificate of costs being issued and should not be released to the depositor, the Applicants.

4. It is further argued that this court has no jurisdiction to order a transfer of the money to be paid out to parties in another suit, in a different court. It is on those grounds that the Respondents have urged that the application be dismissed as incompetent and misconceived.

5. I have perused the pleadings in this case, the various applications by both parties culminating with the present application. This suit was struck off by this court with costs to the Respondents on the 16th December, 2004. Being dissatisfied with the order of dismissal, the Applicants filed a Notice of Appeal in the Court of Appeal, but on the 25th July 2014, the said Notice of Appeal was withdrawn. In effect, the suit remains dismissed as aforesaid. On the 21st May, 2013 the Applicant was ordered by this court to deposit a sum of shs 292,000/= as security for costs in the appeal to the Court of Appeal, to the order of the would be successful party. The said sum was duly deposited as ordered. The deposit, being security for costs in the appeal, and the appeal having been withdrawn, it follows that the successful party the Respondents herein, is entitled to the same, but subject to the costs being either taxed or agreed, by the parties. It is trite law that unless otherwise ordered by the court, costs follow the event. I have not seen any order in this matter stating otherwise.

6. This court has been informed of a Succession Cause No. 3270 of 2003 pending determination in the High Court at Nairobi involving the estate, subject of this case. Suffice to state that this court, not being seized of the Succession Cause, can not make any orders touching on the same as doing so would be meddling with matters not before it.

7. I have considered submissions by both counsel. Having made the above observations, I come to the conclusion that the application under consideration lacks in merit, is incompetent, irrelevant and to say the least, an abuse of the court process. I decline to grant the orders prayed for and proceed to dismiss the same with costs to the Respondents.

Delivered, dated and signed at Nakuru this 6th day of March, 2015

JANET MULWA

JUDGE

Ruling dated and signed in open court in the presence of:

Aswani for Respondents

N/A for Applicants

Court clerk - Omondi