



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CIVIL APPEAL NO. 1 OF 2019**

**(Formerly Nyeri High Court Civil Appeal 50 Of 2013)**

**MILTON MUIGAI GITAHU.....1<sup>ST</sup> APPELLANT**

**CHRISTINE WAMBUI MUIGAI .....2<sup>ND</sup> APPELLANT**

**GITAHU MUGO**

**TA GATEWAY SERVICE STATION LIMITED .....3<sup>RD</sup> APPELLANT**

**VERSUS**

**BEATRICE WANGUI KIUNGU (Suing As The Legal Representative Of The Estate**

**Of George Waitara Wangui – Deceased).....RESPONDENT/APPLICANT**

**RULING**

1. The Applicant herein is the Respondent who was successful in resisting the Appeal by the 3 Appellants. Through the Notice of Motion Application dated 4<sup>th</sup> December 2019 the Applicant seeks that the money held in the joint account no. 01282043881400 at National Bank in the joint names of Muhoho Gichimu & Company Advocates & Gori, Ombongi & Company Advocates be released to the firm of M/s Gori, Ombongi & Company Advocates for onward transmission to the Respondent/Applicant. In the motion, the Respondent/Applicant thus seeks the release of the funds held in the said joint account which was set up on 10<sup>th</sup> March 2014 as a condition for stay pending appeal. The Appeal as adverted to in the opening sentence of this Ruling was heard and a determination issued. The Respondent/Applicant's motion is supported by the affidavit of Beatrice Wangui Kiungu. The Appellants/Respondents opposed the motion and filed a replying affidavit sworn by Milton Muigai Gitahi on his behalf and on behalf of the other 2 Appellants. In the affidavit he deposed that there was a motion for stay that was presented to the Court of Appeal and the Applicant should have awaited the conclusion of the motion in the Court of Appeal before moving Court to release the funds.

2. The motion was argued on 16<sup>th</sup> December 2019 and Ruling date reserved for yesterday 20<sup>th</sup> January 2020. Unfortunately, due to a mix up in Chambers the Court did not render the Ruling and therefore it was deferred to today. The Applicant argued through its Counsel Mr. Gori that the sum should be released as the fruits of judgment were ripe for the Respondent to pick as the Court had dismissed the Appeal. He submitted that the stay granted previously was conditional and it was to subsist pending the hearing and determination of the Appeal. He argued that the Appeal having been dismissed there was basis for the request for the release. He stated that the Appellants' reply had not answered the motion by the Applicant. He argued that there cannot be a stay of a negative order and he thus urged the grant of the prayers in the Applicant's motion.

3. In response, Counsel for the Appellants Mr. Mindo opposed the motion by the Applicant. He argued that the Applicant was dealing with the merits of the stay application pending before the Court of Appeal and that it was premature to do so as this was not the forum for the duel. He submitted that Rule 6(4) of the Court of Appeal Rules makes provision for what constitutes an appeal to that Court. He argued that a Notice of Appeal had been filed copy of which had been annexed in the Replying Affidavit and as such an appeal exists. He stated that the earlier application preferred on 6<sup>th</sup> December 2019 should be dealt with first before the one of 9<sup>th</sup> December 2019 is heard unless of course the applications are consolidated and heard together. He thus sought the dismissal of the Respondent/Applicant's motion and await the determination of the motion filed on 6<sup>th</sup> December 2019.

4. In reply. Mr. Gori submitted that the Appellants had deemed it fit not to file their motion under certificate of urgency and there were therefore no grounds for grant of the motion by the Appellants. He argued that the money has been in court since 2006 and it should be released to the Applicant.

5. The motion that was filed on 9<sup>th</sup> December 2019 was filed under certificate of urgency. Whereas it is prudent to dispose of motions in the order they are presented, there is no bar to a meritorious application skipping the long queue on good grounds. Where a party files an application and takes no steps to prosecute it or set it down for hearing, a party who seeks relief is not barred from seeking interposition by the court as the mere fact of an earlier application having been presented is not a bar or stay of future applications in the suit. Is there merit in the motion by the Respondent/Applicant? The appeal before the Court was against the determination of the Learned Magistrate's decision in the claim before him. Is there an automatic appeal that can be preferred on labour matters to the Court of Appeal? I believe that is a matter for the Court of Appeal to determine as the Rules of this Court are not clear as to whether a second appeal is permitted and what parameters are to be satisfied pending such appeal. Be that as it may, the unsuccessful Appellants have filed a Notice of Appeal against the decision of this Court. They assert there is an Appeal as per the provisions of Rule 6(4) of the Court of Appeal Rules. The motion before the Court seeks

the release of funds which had been held in an account pending the hearing and determination of the Appeal that was determined by this Court. As such, the conditional stay granted when the appeal was mounted has run its course and the proper course is to permit the release of the funds as holding the funds would be denying the successful Respondent in the appeal a chance to enjoy the fruits of judgment. The determination I made, in my view, has nothing positive to be executed or acted upon, save to the extent of costs to the Respondent. The judgment in the appeal did not order any party to do or refrain from doing anything capable of being stopped. It is trite law that negative orders are incapable of execution hence cannot be stayed. It would be an academic exercise on my part to attempt an analysis of this position. Application is allowed as prayed and I hereby order the release of the funds held in the joint interest earning account no. 01282043881400 at National Bank in the joint names of Muhoho Gichimu & Company Advocates & Gori, Ombongi & Company Advocates to be and are hereby released to the firm of M/s Gori, Ombongi & Company Advocates for onward transmission to the Respondent/Applicant. Costs of this application to the Respondent/Applicant.

It is so ordered.

**Dated and delivered at Nyeri this 21<sup>st</sup> day of January 2020**

**Nzioki wa Makau**

**JUDGE**