



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**HIGH COURT CIVIL APPEAL NO. 18 OF 2019**

**WILLIAM MAEMA.....1<sup>ST</sup> APPELLANT/RESPONDENT**

**MUTINDA MUTHAMA.....2<sup>ND</sup> APPELLANT/RESPONDENT**

**VERSUS**

**NDUKU JOSEPH & MONICA KASYOKA JOSEPH**

*(Suing as the administrators to the estate of the late*

**JOSEPH KYUTHA).....RESPONDENT**

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*(Being an appeal from Original Civil Suit Case No. 59 of 2018 judgement dated 6<sup>th</sup> March 2019*

**R U L I N G**

1. Before me, is an application by way of **Notice of Motion** dated 1<sup>st</sup> February, 2021 filed by the Respondent/Applicant seeking the following order: -

- (i) That the appeal filed herein be dismissed for want of prosecution.*
- (ii) That the Registrar lists the appeal for dismissal for want of prosecution.*
- (iii) Costs of the appeal be provided for.*

2. The grounds are: -

- a) That the appellants have refused, neglected and/or otherwise failed to take the steps to prosecute the appeal for a period of over 2 years.*
- b) That the delay is intentional, inordinate and/or inexcusable on the part of the appellant as they have not shown any reason for the delay.*
- c) That the appellants have failed to deposit half the decretal sum awarded in the lower court being Kitui CMCC No. 59 of 2017 as directed by the court as a condition subsequent to staying execution.*
- d) That the appeal is therefore, an abuse of court process.*
- e) That the applicants continue to suffer unnecessary due to the delay in the prosecution of this appeal which according to them has caused delay of the execution of the award given by the trial court.*

3. The applicants have supported their application with an affidavit sworn by Musili Mbiti where he has majorly reiterated the above grounds.

4. The applicants submit that the appellants deposited half the decretal amount as a condition for stay of execution but did it after 2 months. They fault the appellants for taking no steps to prosecute their appeal two years four months since the appeal was filed. They cite the

provisions of **Order 42 Rule 11 of Civil Procedure Rules** where the appellant is required to list the appeal for mention for directions 30 days after filing the appeal.

5. They have further relied on the provisions of **Order 42 Rule 35** where an appellant is required to list the appeal for hearing within 3 months after directions are given. They point out that **sub-rule 35** requires that the Deputy Registrar lists down the appeal for dismissal if the appellant does not set down the appeal for hearing one year after service of memorandum of appeal.

6. They claim that the appellants have offered no explanation to explain the delay in prosecuting their appeal.

7. They fault the counsel on record saying that he is under instructions from insurance company who to them is a stranger in this proceedings.

8. The respondents have opposed this application. They deny the applicants claim that they failed to comply with court orders arguing that they have deposited Kshs. 1,064,839 in court as a condition for stay as directed by the lower court.

9. They blame the delay of typing of proceedings of the lower court file and Covid-19 pandemic as cause for the delay. They have exhibited copies of email correspondences directed to the lower court asking for proceedings. They point out that courts in 2020 were not operating because of Covid-19 situation stating that the same is in public domain. They urge this court to take judicial notice of that fact.

10. They submit that there is no point of laying blame on them because even the lower court file is still at the typing pool at the moment.

11. The court has considered this application and the response. It is true that under **Order 42 Rule 35 Civil Procedure Rules** an appellant is required to set down the appeal for hearing one year after filing it. However, the dismissal of an appeal on the basis is rarely invoked because of the realities in our courts. The courts truly find themselves pressed for resources to be able to timely supply typed proceedings when requested by parties. Currently there is an acute shortage of secretaries in Kitui Law Courts.

I have gone through the record in this matter and I have noted that the lower court file was call for by the Deputy Registrar on 5<sup>th</sup> April 2019 but up to now the file from the lower court has not been forwarded to this court for consideration as provided under **Section 79B and 79C of the Civil Procedure Act**. The Respondent certainly cannot be blamed for that failure by the subordinate court to have the proceedings typed and forwarded to this court.

12. I am also aware about the negative effects of Covid-19 pandemic on court operations when it broke out early in 2020 in this country. The pandemic saw court operations slowing down and advocates like everyone else for some time stayed away from work place. It would not be in the interest of justice to punish or prejudice a party on account of a pandemic whose magnitude was felt in the entire world.

13. This court finds that the reasons advanced by the respondent in not taking steps or moving this court are excusable and reasonable. I am not persuaded that this appeal should be dismissed on grounds of the appellant not complying with conditions given by the trial court for stay. In such situations, the remedy lies in the execution not an application for dismissal.

14. Having found reasons for delay to prosecute this appeal, reasonable given the circumstances this court finds no merit in this application the same is disallowed but I will not make any order as to costs. I will direct the Deputy Registrar of this court to speed up the process of typing of proceedings and have the file forwarded to this court for further action. Towards that end and in order to speed up the disposal of this appeal, I will direct the parties to take a mention date in this appeal for further Orders as may be deemed fit by this court to make.

For avoidance of doubt this ruling applies to **Civil Appeal No 34/2019 & Civil Appeal No. 35 of 2019** both which were consolidated with this appeal for purposes of this application.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 24TH DAY OF FEBRUARY, 2022.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**