



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CIVIL APPEAL NO. 7 OF 2018**

**JIMUNA CHIRA GACHAU.....APPELLANT**

**VERSUS**

**DAVID NDIRANGU NGOTHO & ANOTHER.....RESPONDENTS**

**RULING**

1. The respondents pray that this appeal be dismissed for want of prosecution. They argue that the appeal was lodged way back on 1<sup>st</sup> March 2018 but the record of appeal has neither been prepared nor any steps taken to set the appeal down for directions.
2. Those matters are buttressed by a deposition sworn by the 1<sup>st</sup> respondent on even date.
3. The substance of the motion is that the delay is unreasonable and prejudicial to the respondents' interests. For instance, a conditional stay of execution was granted requiring the appellant to deposit the decretal sum in a joint interest earning account but he never complied.
4. The application is opposed through a replying affidavit sworn on 31<sup>st</sup> August 2020 by C. Kiplagat, counsel for the appellant. He avers that on a number of occasions, he wrote to the Executive Officer of the lower court to be supplied with certified proceedings. He obtained them on 19<sup>th</sup> August 2019 and lodged a record of appeal. Regarding the question of security, he avers that his firm presented cheques to Equity Bank on 1<sup>st</sup> December 2019.
5. In a nutshell, he submitted that the delays were beyond his control; and, that it is fair and just that the appeal be determined on its merits.
6. All the parties filed submissions on 11<sup>th</sup> November 2020. On 17<sup>th</sup> November 2020, learned counsel for the appellant and respondents intimated to the court that they were relying wholly on their written submissions.
7. It is common ground that the decree was issued way back on 8<sup>th</sup> February 2018. The memorandum of appeal was filed on 1<sup>st</sup> March 2018. I have seen a written consent dated 2<sup>nd</sup> August 2018 for the conditional stay of execution. It was executed by the appellant's counsel and the respondents' previous advocates, *Irungu Kang'ata & Company*. Their successors were only granted leave to come onto the record on 19<sup>th</sup> September 2019.
8. The original record of the lower court bears a letter from the appellant's counsel dated 7<sup>th</sup> March 2019 requesting for typed proceedings. That was more than *a year* from the date of filing the memorandum of appeal. After another year, to be precise on 19<sup>th</sup> August 2020, the lawyers wrote to the Deputy Registrar of the High Court for release of the original lower court file to "*enable [them] to collect the proceedings and judgment to.....compile the record of appeal*"
9. The record of appeal was only lodged on 1<sup>st</sup> September 2020, more than *two years* since the filing of the memorandum of appeal and *six months* after filing of the present motion for dismissal. Although the appellant has displayed two cheques dated 18<sup>th</sup> October 2018 by his insurers, there is no further evidence that the joint interest account was opened in terms of the consent I referred to.
10. The prejudice to the respondents is thus self-evident. It is not lost on me that the impugned judgment was delivered by the Chief Magistrate at Murang'a. I thus find that there has been a lengthy delay.
11. Quite obviously, the appeal has never been admitted or listed for directions. The only thing going for the appellant is that it has now lodged the record of appeal. In our *adversarial* system of justice, it remained the primary obligation of the appellant to follow up on his appeal.
12. The test in a matter of this nature was well laid out in *Ivita v Kyumbu* [1984] KLR 441. It is whether the delay is *prolonged* and

*inexcusable*, and if it is, whether justice can still be done. In that event, instead of dismissal, the court may exercise its discretion to set the suit down for hearing.

13. While it is true that the appellant wrote a number of letters to the court to be supplied with typed proceedings, the first such request was made more than a *year* after filing the appeal. It is not clear from the record when the proceedings were typed. So much so that I cannot blame the appellant wholly for the delay. But the lethargy on the part of the appellant still remains apparent. The 1<sup>st</sup> respondent is prejudiced because the estate cannot reap the benefits of the decree.

14. In the interests of justice this appeal may be heard on merits. However, justice is a two-way street. I have dealt at length with the lackluster conduct of the appellant; and, the prejudice to the 1<sup>st</sup> respondent from a stagnant appeal. I am thus prepared to grant the 1<sup>st</sup> respondent costs which will perhaps assuage him; and, keep the appellant wide awake.

15. The upshot is that the 1<sup>st</sup> respondent's notice of motion dated 26<sup>th</sup> February 2020 is *dismissed*. The appellant shall however pay the 1<sup>st</sup> respondent *thrown away* costs of Kshs 15,000 within the next *thirty* days. The appellant shall also ensure that the appeal is placed before the judge in chambers for admission or directions within *thirty days* of today's date. If the appellant fails to meet *any* of the conditions within the set *time*, the appeal shall automatically stand *dismissed*.

It is so ordered.

**DATED, SIGNED and DELIVERED at MURANG'A this 26<sup>th</sup> day of January 2021.**

**KANYI KIMONDO**

**JUDGE**

***Ruling read in open court in the presence of:***

No appearance by counsel for the respondents.

No appearance by counsel for the appellant.

Ms. Dorcas Waichuhi, Court Assistant.