



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 99 OF 2014**

**TIPIS JAMES .....1<sup>ST</sup> APPELLANT**

**JAMLEK MACHARIA ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**PHILIP ONGERI KIMARI.....RESPONDENT**

**RULING**

1. On 20/09/2018, I gave a ruling in this matter. The ruling arose from an application by the Respondent in the appeal. The Respondent wanted the appeal dismissed for want of prosecution.

2. In appreciating the inaction by the Appellants in the matter, I expressed myself thus in that ruling:

*5. That memorandum of Appeal was filed on 07/07/2014. That is exactly four years ago. Fourty eight months. Since then, the Appellant, apparently, did not do anything. They did not even serve the Memorandum of Appeal on the Respondent!*

*6. When confronted by the present Application, the Appellants have, through their lawyer, produced a letter dated 27/01/2017 requesting the Executive Officer of Molo Law Courts to furnish them with proceedings and judgment. Nothing was done before then. And nothing was done afterwards. Yet, the Appellants say that that letter is enough proof that it is not their fault that nothing has happened in the appeal for fourty eight months.*

3. Still, I declined the invitation to dismiss the appeal for want of prosecution. Here was my reasoning:

*7. I would ordinarily not be taken by this kind of inexcusable delay. I note that the Appellants did not even produce any evidence of payment of deposit for the proceedings let alone any follow up. I, of course, also notice that this lone, lame attempt at action was done more than two years after the Appeal was filed. However, I am bothered here that the circumstances are not quite ripe to dismiss the appeal at the instance of the Respondent. The appropriate thing for the Respondent to have done would have been to move the Deputy Registrar of the Court to list the matter for dismissal under Order 42 Rule 35(2). It is only for this reason that I will decline to accept the invitation to dismiss the Appeal herein for want of prosecution. In part, this is so as not to depart from a reasonable consensus on the proper interpretation of Order 42 Rule 35 by different judges of the High Court. See, for example, *Jurgen Paul Flach -V- Jane Akoth Flach (2014) eKLR and Rosarie (EPZ) Limited -V- Stanlex Mbithi James (2015) eKLR.**

4. Thus, I gave the Appellants a lifeline. The only condition I gave them was to file the Record of Appeal within twenty-one days. And there was a catch: the appeal would stand automatically dismissed if the record of appeal was not so filed.

5. Incredibly, the Appellants failed to adhere by the condition imposed by the Court. The twenty-one days expired on or about 13/10/2018. By then the Appellants had not filed a Record of Appeal. Instead, they approached the Court eleven days later vide the present Application seeking for extension of time to file the Record of Appeal. What is their excuse for failing to do so? They claim, through their lawyer, that they have “vigorously tried to obtain typed and certified copies of proceedings through their court clerks...”

6. The Appellants were singularly unable to demonstrate any efforts they put to obtain the Court proceedings. No letter was produced to demonstrate that they wrote to the Court registry to obtain the proceedings. Indeed, even the so called “vigorous efforts” were deponed to by the advocate not by the persons who allegedly made the efforts. I find the explanation given unpersuasive and incredible. I am not persuaded that the Appellants’ advocates put any efforts at all to obtain certified copies of the proceedings. I am, therefore, unable to exercise my discretion to enlarge time. *Vigilantibus non dormientibus, aequitas succurrit.* Equity comes to the aid of those who are vigilant; not those who are indolent.

7. The Application dated 22/09/2018 is dismissed with costs.

8. Orders accordingly.

**Dated and delivered at Nakuru this 15<sup>th</sup> day of January, 2019**

**JOEL NGUGI**

**JUDGE**