

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 31 OF 2017

ABRAHAM N. NYAORA.....APPELLANT

=VRS=

ANDREW OGUTU SIBWOGA.....RESPONDENT

{Being an Appeal from the Judgement and Decree of Hon. J. Mitey – RM dated and delivered on the 10th day of December 2013 in the original Keroka Senior Resident Magistrate’s Court Civil Case No. 68 of 2013}

JUDGEMENT

This is an appeal against the judgement of the lower court dismissing the appellant’s suit against the respondent. The appeal was initially filed in the High Court of Kisii but the same was transferred to this court upon its establishment. The appeal had not been admitted and so when it was placed before me on 1st August 2018 I admitted it and ordered that notices be sent to the Advocate for the appellant to file the Record of Appeal and serve it upon the respondent within 21 days. I also directed that the appeal be placed before me on 20th September 2018 for directions. When Counsel holding brief for the Advocate for the appellant appeared before me on that day he intimidated that the Record of Appeal had been filed and served and sought directions that the appeal proceeds by way of written submissions. This court obliged and fixed a date for mention to confirm filing of submissions. It also directed Counsel for the appellant to serve the mention notice upon the respondent. The date fixed for mention was 1st November 2018. On that day Counsel for the appellant appeared and disclosed to the court that they were yet to serve the respondent. We fixed a fresh mention date – 7th February 2019 – but come that day there was no attendance by either party. This court however noted that Counsel for the appellant had filed his submissions and so it fixed a judgement date and since there was ample time it directed that the respondent could still file his submissions. It is now evident that the respondent was not served. Counsel for the appellant admitted that much when he came before this court on 1st November 2018. This court extended the period in the appellant’s favour to 7th February 2019 but on that day his Advocate did not attend. It would be unjust to consider the merits of this appeal in the circumstances as that would be determining the case without giving the respondent a right to be heard. So what is the best cause of action?

I have considered this carefully and my finding is that it would be to dismiss this appeal. From the record this appeal was filed on 8th January 2014. The record shows that on the day it was transferred to this court it had been placed before the judge for dismissal for want of prosecution. The judge instead of dismissing it gave it a lifeline and ordered its transfer here. It is clear that the appellant would not have acted if it was not for that prompting from the court. A party who neglects and/or refuses to serve the adverse party is as good as the one who does nothing to prosecute its case. The appellant was required to serve the record of appeal in the manner provided for service of summons – **see Order 48 Rule 2 of the Civil Procedure Rules**. This provided him with a wide spectrum of the modes of service but none was attempted. It is my finding therefore that this is a good case for dismissal for want of prosecution.

It is accordingly dismissed with an order that the appellant shall bear his own costs. It is so ordered.

Signed, dated and delivered in Nyamira this 28th day of March 2019.

E. N. MAINA

JUDGE