

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 581 OF 2013

PAUL KITHINJI IKIUGU.....PLAINTIFF/APPLICANT

VERSUS

NTIMA FARMERS COOPERATIVE SOCIETY LTD.....DEFENDANT/RESPONDENT

RULING

1. The application dated 7th June, 2017 seeks the following orders that:

“1. Spent.

2. That the orders issued by the honourable court on the 19th day of April, 2016 be set aside.

3. That the court do extend time within which to prosecute the appeal

4. That the honourable court be pleased to reinstate the appeal filed by the Appellant/Applicant.

5. That costs of this application be provided for.

2. It is stated in the grounds and the affidavit in support that the appeal herein was dismissed for non-attendance on 19th April, 2016. That the court had ordered that the appeal be prosecuted within the year 2014 but the same was not done due to mistakes attributable to the Applicant counsel. It is contended that the Applicant has instructed another advocate who has strict instructions to prosecute the matter expeditiously. The Applicant is willing to abide by any conditions set by the court.

3. The application is opposed. According to the replying affidavit, there has been inordinate delay and laxity in prosecuting the appeal herein while the Applicant is enjoying the stay orders. That the mistakes of the Applicant's former advocates should not be visited on the Respondent and litigation ought to come to an end.

4. The application was disposed of by way of written submissions. I have considered the said submissions.

5. A perusal of the court record herein confirms that the Applicant was to ensure the appeal was heard within the year 2014. This did not happen. Although one may argue that the mistakes of a counsel should not be visited on a litigant, the Applicant had the obligation to follow up on the progress of his case. As stated by the court in the case of **Savings & Loan Ltd v Susan Wanjiru Muritu Nairobi Milimani HCC 397/02:**

“A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case.”

6. Stay of execution orders were issued herein on 27th January, 2014. Since then the Applicant seems not to have taken any steps to ensure the appeal has been prosecuted. The delay is inordinate. To balance the competing interests of the parties, this court allows the application on condition that the principal amount of Ksh.1,061,927.30/= is deposited in a joint interest earning bank account of the counsels herein or in court within 30 days from the date hereof. In default the appeal to stand dismissed. The Record of Appeal to be prepared and appeal listed for directions within 90 days from date hereof.

Dated, signed and delivered in Nairobi this 28th day of March, 2019

B. THURANIRA JADEN

JUDGE