



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 396 OF 2015

JOSEPH MUCHEKE KAMAU.....APPELLANT

VERSUS

ANTHONY THUO WAWERU.....RESPONDENT

(Being an appeal against the Judgment/Decree of the Subordinate Court delivered on 11th march, 2014

by Hon. S. Atambo PM in CMCC No. 4302 of 2011

(Milimani commercial courts)

RULING

The matter herein was listed for notice to show cause why it should not be dismissed for want of prosecution on the 23rd October, 2019. In response to the same, counsel for the Appellant filed an affidavit sworn by Joseph Mucheke Kamau on the 14th day of October, 2019.

In the said affidavit, the Appellant avers that after the judgment was delivered by the trial court, his advocate wrote several letters to the registry applying for certified copies of the proceedings but the said letters were not received nor did the registry issue an update about the file.

He avers that it was only recently when his advocate on record informed him that the typed proceedings and the missing file had been forwarded to the High Court following which, his advocate filed a Record of Appeal. He contends that the intended Appeal raises arguable points of law and it has overwhelming chances of success.

He has urged the court to exercise its discretion in his favour to enable him pursue the Appeal on merit. He has averred that no prejudice shall be occasioned to the Respondent if the Appeal is saved from dismissal.

From the record, this court is able to establish that when the matter was first listed for notice to show cause, on the 18th October, 2019, counsel who appeared for the respondent sought time to file a response to the notice to show cause but none was ever filed.

The court has considered the affidavit filed on behalf of the Appellant and the contents of the same. The appeal was filed on the 20th August, 2015 and no other action was taken until 18th October, 2019 when the Record of Appeal was filed. This was the same day that the matter first came up in court for notice to show cause. It is likely that the filing of the Record of Appeal was prompted by the notice to show cause that was issued by the court on its own motion.

Infact, looking at the replying affidavit, no good reasons have been given by the Appellant as to why he has not prosecuted his appeal. The averments that the court file was missing are mere allegations which are not supported by any evidence.

Be that as it may, the court notes that the Appellant has already filed the Record of Appeal and the Appeal shall be ready for hearing after directions are given. As noted earlier, the respondent did not file any Response to the notice to show cause and therefore the court can only assume that he will not suffer any prejudice if the matter is not dismissed for want of prosecution.

In the premises, and in the interest of justice, the court will not dismiss the Appeal but since it's an old Appeal, I do hereby order that the Appeal be prosecuted within 90 days from today failing which it shall stand dismissed.

It is so ordered.

Dated, Signed and Delivered at **NAIROBI** this **24TH** Day of **OCTOBER, 2019**.

.....

L. NJUGUNA

JUDGE

In the Presence of

..... For the Applicants

..... For the Respondents