



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CIVIL APPEAL CASE NO. 41 OF 2015.

JOHN BARASA MATIFARI.....APPELLANT

VERSUS.

SIMON WANJALA MABONGA.....RESPONDENT

RULING.

[1]. This Notice of Motion is brought under order 42 rule 35 and order 51 rule 1 of the Civil Procedure Rules. The application prays that this court do dismiss the appeal herein for want of the prosecution.

[2]. The application is grounded on the fact that, it is almost two years since the appeal was filed and served. That the defendant has neglected to take any steps towards having this appeal finalized and that this appeal has caused a 2005 matter to remain unconcluded to the prejudice of the respondent who is ailing and who has suffered a stroke.

[3]. It was the argument of the applicant that the appeal was filed on 25/7/2015 and no steps have been taken to have the appeal heard. That the respondent wrote to the appellants on 22/7/2015 almost one year after the appeal was filed and that they did nothing. The respondent argues that they have not been able to use the suit land, the appellants being the ones in occupation. That they were the successful litigants in the Lower Court and the Lower court file pending awaiting the result of the appeal.

[4]. The respondents replied and opposed the application. They alleged that they applied for the proceedings on 11/2/2015. That for seven months the court file went missing immediately after the Judgment was read. That they wrote a letter on 4th October, 2016. They argued that since the file went missing, the delay therein is not inordinate. The respondents said that they are in occupation since 1971 and that the plaintiff/respondent herein bought the land in 1995.

[5]. Since the appeal was filed a period of over two years has elapsed without any action being taken on the appeal. The respondent states that the court file went missing for a period of seven months. There was no letter shown written to the Deputy Registrar of this Court to allege that the file was missing or was lost over that period. There was no effort by the appellants to reconstruct the court file. In fact, the respondents were woken up by the applicants' Letter of 22/7/2015.

[6]. Parties to any proceedings are mandated by Section 1A of the Civil Procedure Act to assist the court in facilitation of the just, expeditious and proportionate and affordable resolution of the Civil disputes. They are also under a duty to do so. The litigants can no longer file a notice of appeal and/or an appeal and go to sleep. They should diligently pursue the same to its final conclusion.

[7]. I am not convinced that the delay herein is justified or can be explained. The appellant is in occupation of the suit land and it is in his interests that this appeal delays for as long as possible. The

delay herein is inordinate and is not explained or justified.

I allow this application as prayed with costs.

It is so ordered.

Ruling read in Open Court before Mr. Kweyu.

Dated at Bungoma this 10th day of January, 2018.

S. MUKUNYA

JUDGE

In the presence of:

Chemutai - Court Assistant

Mr. Kweyu for Mr. Sichangi

Firm of Ocharo for the Respondent - Applicant