



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 1143 OF 2001**

**GUCHU MUIRURI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**DANIEL MAINA NJUGUNA.....DEFENDANT/APPLICANT**

**RULING**

1. The Notice of Motion was taken out by the Defendant/Applicant dated 10<sup>th</sup> November, 2017 and filed on 17<sup>th</sup> November, 2017 in which he sought the following orders inter alia:

*i. The Plaintiff/Respondent's Notice of Appeal herein be struck out and or be dismissed for want of prosecution*

*ii. The costs of this application be provided for.*

2. The Motion is supported by the Affidavit of Daniel Maina Njuguna sworn on 10<sup>th</sup> November, 2017 and filed on 17<sup>th</sup> November, 2017. He averred that he is the lawful administrator of the estate of the Late Laban Njuguna, who was his father vide Ad Litem issued on 16<sup>th</sup> October, 2017. He averred that he was granted leave by court to substitute his late father in this suit wherein he was the Defendant. He averred that he sought to have the Plaintiff/Respondent's Notice of Appeal filed on 4<sup>th</sup> July, 2012 struck out owing to the failure by the Plaintiff/Respondent to file his Record of Appeal and prosecute the said appeal yet the Notice of Appeal was taken more than 5 year ago. He requested that the taxation costs which had been deposited into a joint interest earning account with the advocates on record be withdrawn owing to failure to file a reference against the taxed costs on the part of the Plaintiff/Respondent. He averred that the delay to file the said appeal and prosecute the same has prejudiced him as the money deposited in the joint interest earning account is not benefiting him. He urged the court to strike out the Notice of Appeal for want of prosecution.

3. The Motion was opposed by the Plaintiff/Respondent, Guchu Muiruri vide the Replying Affidavit he swore on 2<sup>nd</sup> March, 2018. He averred that he had been unwell and hence unable to prosecute the appeal. He averred that sometimes on 18<sup>th</sup> May, 2016, the Defendant passed away and was advised by his advocate that a Record of Appeal could not be filed in the name of the deceased and had to wait for the family to substitute the deceased. He urged this court to dismiss the application and afford him an opportunity to prosecute the appeal.

4. The Defendant/Applicant in his written submissions dated 10<sup>th</sup> July, 2018 filed on 11<sup>th</sup> July, 2018 argued that the application is premised on a judgement that was lawfully obtained plus costs which were awarded against the Plaintiff/Respondent who refused to pay. The Plaintiff/Respondent then applied for stay pending appeal on 7<sup>th</sup> August, 2013. He argued that it was agreed by consent and the Plaintiff/Respondent deposited the taxed costs in a joint interest earning account in 2013 and has failed to prosecute his appeal since then. He argued that the taxed costs were independent of the intended appeal and the Plaintiff/Respondent ought to have filed a reference to set aside the taxation costs. He argued that the Plaintiff/Respondent had earlier filed an appeal with the Court of Appeal under Civil Appeal No. 166 of 1990 which was dismissed. He urged this court to release the taxed costs to him.

5. I have considered the grounds stated on the face of the Motion and the facts deponed in the affidavits filed in support and against the Motion. I have also considered the written submissions by the Defendant/Applicant. The court has identified the following issues for determination as:

- a) Whether inordinate delay has been occasioned.
- b) Whether the reason for the inordinate delay is satisfactory.
- c) Whether the intention to appeal is proper before the court.

d) Whether the orders sought are merited.

6. The Defendant/Applicant has argued that the intended appeal was filed in 2013 and that the Plaintiff/Respondent has since failed to prosecute the said appeal by his neglect to take measures to prosecute the appeal. The Plaintiff/Respondent argued that he was still interested in prosecuting his appeal. He argued that the delay was occasioned by his illness as well as the passing on of the defendant. He argued that he had to wait for the family to substitute the deceased and that the substituted defendant was the current Defendant/Applicant. In the case of **IVITA V. KYUMBU (1984) KLR 441** the principles to be considered before an order for dismissal for want of prosecution can be made were restated as follows: -

7. First, whether the delay was prolonged and inexcusable, and secondly, whether justice could be done despite such delay. It is understandable that succession matters take time to conclude hence the Plaintiff/Respondent has given a plausible reason for the delay.

8. The Plaintiff/Respondent has also stated that he was unwell for sometime. That assertion has not been controverted and this court has no reason to doubt its veracity.

9. In the end, I find the explanation given by the Plaintiff/Respondent for the delay to prosecute his appeal to be plausible.

10. Consequently, I decline to dismiss the notice of appeal for want of prosecution. Therefore, the motion is found to be without merit hence dismissed.

11. In the circumstances of this case, a fair order on costs is that each party shall meet its own costs.

**Dated, Signed and Delivered in Nairobi this 28<sup>th</sup> day of September, 2018.**

**J.K. SERGON**

**JUDGE**

***In the presence of:***

.....For the Plaintiff /Respondent

.....For the Defendant/Applicant