

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 521 OF 2013

EVANS MOGUSU ONDWARI.....APPELLANT

VERSUS

DABASIA BUILDING LIMITED.....RESPONDENT

(Appeal from the judgment of Honourable Mr. P.Nditika, Senior Principal Magistrate at Milimani delivered on 30th July, 2013 in CMCC No. 13247 of 2006)

RULING

The matter herein was listed for notice to show cause, on the 27th day of July 2018. In response to the same, counsel for the Appellant filed a replying affidavit, explaining the delay in prosecuting the same.

The reasons given for the delay are that the Lower court file was missing for sometime as a result of which he was not able to obtain the proceedings on time. He has annexed the letters that he wrote to the Executive Officer enquiring about the file and the proceedings.

That upon receipt of the proceedings, he proceeded to file a record of Appeal on the 25th August, 2015 and on the 10th September, 2015, he wrote a letter requesting the executive officer to list the Appeal for directions (A copy of that letter is annexed and marked KM 4). The said letter was not responded to and the Appeal has never been listed for directions.

It is averred that the delay is excusable and the same was due to factors beyond his control. That the Appeal has high chances of success and dismissing it at this stage would highly prejudice the appellant. He has urged the court to allow him to prosecute the Appeal on merits.

The court has considered the affidavit and the reasons given for the delay in prosecuting the Appeal. I have also perused the record of the court. Judgment in the matter that gave rise to this Appeal was delivered on the 18th September, 2013. The Appellant filed the Appeal on the 4th October, 2013. The proceedings were applied for on 10th October, 2013. The Appellant depones that he obtained certified copies of the proceedings on 10th April 2014 following which he complied and filed a record of Appeal on the 25th August, 2015.

The record shows that the Lower court file was forwarded to this court vide a letter dated 29th May, 2014 following which the Appeal was admitted on the 19th October, 2015. It would appear that counsel for the Appellant was not notified of the admission of the Appeal to enable him list it for directions.

From the foregoing, it cannot be said that the Appellant has been indolent in prosecuting the Appeal. Having filed the record of Appeal, the Appeal is ready for hearing save for the directions. In view of the foregoing, the court will not dismiss the Appeal but since it's an old matter, it is hereby ordered that, it be prosecuted within 90 days from the date of this ruling, failing which it shall stand dismissed.

Dated, Signed and Delivered at Nairobi this 27th day of **September, 2018**

.....

L. NJUGUNA

JUDGE

In the presence of:

..... ***For the Appellant***

..... ***For the Respondents***