



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO.375 OF 2013**

**VISION HOUSING CO-OPERATIVE LIMITED.....APPELLANT**

**VERSUS**

**WAIRIMU KINYANJUI**

**MARY WAMBUKU KAMAU as Trustee of**

**NGEI KUGERIA.....RESPONDENTS**

**RULING**

The Appeal herein was filed on 5<sup>th</sup> day of July 2013. By a Notice of Motion dated 2<sup>nd</sup> April, 2014, the Appellant sought a stay of execution of the decree issued in CMCC No. 982 of 2008 pending the hearing and determination of the Appeal. That application was heard and a ruling delivered on the 11<sup>th</sup> day of March, 2015. Since then, no action was taken in the matter prompting the court to list the matter for notice to show cause why it should not be dismissed for want of prosecution.

When the matter came up in court on the 20<sup>th</sup> September 2018, both parties had filed their respective affidavits in response to the said notice.

In his replying affidavit, counsel for the Appellant deponed that he took over the matter in the month of May 2016 and filed a notice of change of advocates soon thereafter.

That, at the time of taking instructions, he was not handed over the original file by the previous advocate and on 20<sup>th</sup> September 2016, he wrote a letter to them seeking the release of the same. Thereafter, he made several attempts to trace the court file without success and on 11<sup>th</sup> October 2016, he wrote to the Deputy Registrar requesting that he be allowed to reconstruct the court file.

That, it was not until May 2018 when his court clerk informed him that the file had been traced and on the 17<sup>th</sup> May, 2018 he wrote to the Deputy Registrar requesting for a date for directions but to date he has never been informed whether the Appeal has been admitted or not to enable him prosecute the Appeal.

He averred that the Appellant is ready and willing to prosecute the Appeal and pray that the court should not dismiss the same.

On her part, counsel for respondent filed a replying affidavit on the 19<sup>th</sup> day of September 2018 in which she depones that since the matter was last in court on 11<sup>th</sup> March 2015, the Appellant has taken no other step to have the matter concluded.

She avers that the 1<sup>st</sup> Respondent who had been granted authority by the 2<sup>nd</sup> Respondent to plead on behalf of both, passed away on 15<sup>th</sup> August, 2015 and to date, he has not been substituted and in the premises, the suit has since abated.

The court has considered the two affidavits in response to the notice to show cause. Counsel for the Appellant contends that the delay in prosecuting the Appeal was caused by the delay in getting the file from the previous Advocate and also due to the disappearance of the court file. He has annexed a letter dated 20<sup>th</sup> September 2016 requesting for the file from the firm of Wanyoike & Macharia Advocates. I also see a letter dated 25<sup>th</sup> September 2016 to the firm of M.M Rungare & Co. Advocates informing them that they have taken over the matter and that the court file has been unavailable. They sought to know whether they have any objection to them requesting the court to allow them to reconstruct a skeleton file. There is also the letter dated 15<sup>th</sup> May 2018 to the Deputy Registrar, Civil Appeal section which was received on 17<sup>th</sup> May 2018 requesting for a date for directions.

Though counsel for the Respondents contend that the appellant has not taken steps to prosecute the Appeal, she has not denied having received the letter dated 26<sup>th</sup> September 2016. Counsel has also raised the issue of the death of the first Respondent and has contended that

the Appeal has already abated. Whereas the Appeal has abated against the first Respondent, it is still alive as against the 2<sup>nd</sup> Respondent and therefore the court cannot dismiss it on that ground.

Looking at the affidavit by the counsel for the Appellant, it is clear that he was taking action in the Appeal in that on 15<sup>th</sup> May 2018 he had requested the Deputy Registrar to list the matter for directions.

In the circumstances, it would not be fair for the court to dismiss the Appeal but since it is an old matter, I do order 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 19th day of October, 2018**

.....

**L. NJUGUNA**

**JUDGE**

In the presence of:-

..... **For the Plaintiff**

..... **For the Defendant**