



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 755 OF 2016

FRANCISCO KABIRA GATHARA.....1ST APPELLANT

ELENA WACHERA KARIUKI.....2ND APPELLANT

VERSUS

JOHN MUIKIRIA WAWERU.....1ST RESPONDENT

GRACE NJERI KIMANI.....2ND RESPONDENT

RULING

1. In the Notice of Motion dated 28th September 2018, the respondents *John Muikiria Waweru* and *Grace Njeri Kimani* requested this court to dismiss the appeal filed by the appellants herein for want of prosecution and that upon dismissal of the appeal, the sum of KShs.3,800,000 deposited in court by the appellants be released to the respondents.

2. The application is based on grounds that since July 2017 when the appellants obtained stay of execution pending appeal and deposited the decretal amount in court, they have not taken any step towards prosecuting the appeal; that the appeal is ill conceived and prejudicial to the respondents as it was filed with the sole aim of prolonging the process of litigation.

These grounds are stated on the face of the application and are replicated in averments made in the supporting affidavit sworn by the 1st respondent on 28th September 2018.

3. The application is opposed through a replying affidavit sworn on 5th November 2018 by *Mr. Victor Kariuki*, learned counsel for the appellants. Counsel deposed that subsequent to the filing of the appeal herein, he wrote several letters to the executive officer of Milimani Law Courts applying to be supplied with certified copies of the proceedings in the trial court to enable him file a record of appeal but by the time of filing his response to the motion, the proceedings had not been availed. He referred to letters written on 16th December 2016; 11th July 2017 and 29th June 2018.

4. It is the appellants contention that failure to prosecute the appeal has not been deliberate but has been caused by the unavailability of the trial court's proceedings; that they are anxious to have the appeal prosecuted and will do so if given a chance once the proceedings are available.

5. When the application came up for hearing, parties agreed to have the same canvassed by way of written submissions which counsel on record duly filed outlining the factual background against which the appeal was filed and buttressing the respective positions taken by their clients regarding whether or not the appeal should be dismissed for want of prosecution.

6. I have carefully considered the application, the affidavits on record, the rival submissions made by counsel and the authorities cited. I have also perused the court record.

7. The court record confirms the respondents' contention that the appellants filed their appeal on 15th December 2015; that since 15th June 2017 when the ruling on their application for stay of execution pending the disposal of the appeal was delivered, they have not taken any step to prosecute the appeal. The appellants concede as much and claim that they are yet to file their record of appeal since despite several requests, they are yet to be supplied with certified copies of proceedings in the lower court. The letters annexed to the replying affidavit dated 16th December 2106, 12th July 2017 and 29th June 2018 confirms that as recently as June this year, the appellants' learned counsel was still following up his request for supply of the certified copies of proceedings which he needs in order to compile the record of appeal.

8. I thus find merit in the appellants argument that unavailability of the proceedings of the lower court hampered their ability to prosecute the appeal since without a record of appeal, no action could have been taken to progress the hearing of the appeal. However, I must point out that the appellants do not appear to have been sufficiently proactive in their pursuit of the aforesaid proceedings because as correctly pointed out by the respondents, nothing stopped them from seeking this court's intervention in the matter by for example listing the appeal for mention requesting the court to issue directions aimed at facilitating or fast tracking the process of having the copies of proceedings availed to them for their necessary action. They cannot therefore entirely escape blame for the delay.

9. Be that as it may, the court record shows that the original record of the lower court has been forwarded to this court and it contains the typed proceedings of the lower court which are also certified. As the appellants have maintained that they were keen on prosecuting the appeal and the only thing that was standing on their way was unavailability of the proceedings, now that the proceedings are available, I think that it will be in the interest of justice to give them an opportunity to prosecute their appeal but on terms that would ensure its expeditious disposal.

10. In the circumstances, I decline to dismiss the appeal on condition that the appellants shall file and serve the record of appeal and ensure that the appeal is placed before a judge for directions under *section 79 B* of the *Civil Procedure Act* and if admitted, list it for mention for directions within six months from today's date in default of which the appeal shall stand dismissed for want of prosecution with costs to the respondents.

11. Given that the delay in prosecuting the appeal was mainly caused by the trial court's failure to supply the appellants with certified copies of the proceedings in good time, I will not make any order as to the costs of the application. Each party shall bear its own costs.

It is so ordered.

DATED, DELIVERED and SIGNED at **NAIROBI** this 20th day of December, 2018.

C. W. GITHUA

JUDGE