

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HCA 115 OF 2014

JOSEPH K. MUNENE MUHUNYO.....APPELLANT

-VERSUS-

GODERT ROLAND DIJKSTRA.....DEFENDANT

RULING

1. A notice to show cause was issued to the parties by the Deputy Registrar of the Court on 3rd on January 2017. The notice was in respect of the appeal filed on 11/8/2014 by M/s. Githui & Co. Advocates on behalf of the appellant. The appellant did not appear in court when the notice came up for hearing before Mulwa J on 1/12/2017. The respondent's counsel was present. The court declined to dismiss the appeal and directed that the Notice to Show Cause be served upon the appellant.

2. When the matter came up before me on 22/3/2017, Ms. Gatu Magana for the respondent told the court that she had served the appellant and filed an affidavit of service. She submitted that the respondent was in support of Notice to Show Cause and to that end had filed a replying affidavit supporting the dismissal. She further submitted that the appellant had not taken any step since filing the memorandum of appeal and had also settled part of the decretal sum. She stated that she believed the appellant was no longer interested in pursuing the appeal and urged the court to dismiss the same with costs.

3. I have perused the file. It is true as submitted by the respondent's counsel that the appellant has not taken any step since filing the appeal on 11/3/2014. My perusal of the affidavit of service however shows that the process server tried to effect service upon the firm of Githui & Co Advocates for the appellant to no avail. Ms. Esther Wanjiru Maina of Gatu Magana & Co. Advocates deponed at paragraph 3 of her affidavit of service that a secretary at the Githui & Co. Advocates offices declined service saying that Mr. Githui held the position that they were no longer acting for the appellant.

4. It is clear from the affidavit of service therefore that the appellant could not have been aware of the hearing date. Be that as it may, the counsel on record for the appellant has the duty to the court and to his client to remove himself from the record procedurally. Since that has not been done, he is still on record and is deemed to be still acting for the appellant.

5. For the above reason, I direct that the Deputy Registrar of the Court issue fresh notices to be served upon the advocates on record. Such notice to show cause shall be heard on a date to be affixed on the notice. For the present, I decline to dismiss the appeal for want of prosecution.

Ruling delivered, dated and signed in open court this..30th ..day of ...March...2017

In the presence of:

C/A Wanjohi

.....for applicants

.....for respondent

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R. LAGAT KORIR

JUDGE