



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HCA 142 OF 2012

JOSEPHAT KARIRU KIGO.....APPELLANT

-VERSUS-

TOBIAS WAFULA NYONGESA.....DEFENDANT

RULING

1. The parties to this appeal were served a notice to show cause why the appeal should not be dismissed under **Order 42 Rule 35 (2)** of the **Civil Procedure Rules 2010**. There is evidence on record that both the appellant and respondent received the Notices on 9/1/2017 and 12/1/2017 respectively. The Notice was set for mention on 17/1/2017. On the said date the appellant's counsel attended court and requested for time to file an affidavit to show cause why the appeal should not be dismissed. The court (Mulwa J) allowed an adjournment to 8/3/2017.

2. The respondent did not attend court on 8/3/2017. The court was satisfied that the notice and replying affidavit had been duly served upon the respondents and on that basis allowed the appellant to proceed in the absence of the respondent.

3. In her submissions, Ms. Njoroge for the appellant relied on the affidavit sworn by Josephat Kariru Kigo, the appellant in the case. The deponent states in the affidavit that he filed the appeal on 6/8/2012 and immediately applied for proceedings to enable him compile a record of appeal. That since then the proceedings have never been supplied and that the lower court file **Nakuru CMCC No.1907 of 2005** had gone missing. He displayed letters he had written to the Chief Magistrate's Court seeking the proceedings. He pleaded for a chance to prosecute the appeal.

4. In deciding this application, I am guided by the principles aptly summarized in the case of **Ivita Vs Kyumbu (1984) KLR 441:-**

“The test by the court in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court”.

5. I have considered the submissions by Ms. Njoroge on why the appellant has not prepared the record of appeal to date. It is apparent that the unavailability of the proceedings has frustrated her efforts. It is also apparent that the omission has been on the part of the lower court. I am persuaded that such an omission

should not be blamed on the appellant and that the appellant has shown sufficient cause why the appeal should not be dismissed.

6. In the premises, I allow the appellant to proceed with the appeal. Further, I direct the Executive Officer of the Lower Court to avail the file and typed proceedings to enable the appellant compile the record of appeal. The appeal shall however stand dismissed if the appellant shall not have filed the record within 45 days.

Orders accordingly.

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

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R. LAGAT KORIR

JUDGE

In the presence of:

C/A Wanjohi

.....for appellant

.....for respondent