



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CIVIL APPEAL NO. 28 OF 2015**

**EASTERN PRODUCE (K) LTD.....APPELLANT**

**VERSUS**

**AMON KIRWA NGETICH.....RESPONDENT**

**RULING**

1. The respondent prays that this appeal be *dismissed*. The notice of motion is dated 24<sup>th</sup> October 2016. The respondent pleads that the appeal was lodged on 9<sup>th</sup> March 2015. He avers that since that date, *no* steps have been taken by the appellant to set it down for hearing.
2. Those matters are buttressed by a deposition sworn by *Amon Ng'etich* on even date. The substance of the motion is that the delay is prejudicial to the interests of the respondent. He avers that the appellant is enjoying an order *staying* execution of the *decree* of the lower court in *SPMCC 266 of 2010*.
3. The appellant opposes the application. There is a replying affidavit sworn by the appellant's counsel, *Anne Odwa* on 2<sup>nd</sup> March 2017. She deposes that the appeal has *not* been admitted. At paragraph 4, she annexes a letter to the Deputy Registrar requesting that the file be placed before a judge in chambers for admission. The letter is dated 19<sup>th</sup> March 2015.
4. She avers that the appeal could not be admitted in the absence of the original file or proceedings of the lower court file. To date, the Deputy Registrar has not availed that record. She places the blame at the doorstep of the Deputy Registrar. Lastly, she states that *directions* have not been taken in the appeal. In a synopsis, she contends that the notice of motion is premature; and, should be dismissed.
5. On 7<sup>th</sup> March 2017, learned counsel for the appellant and respondent made brief oral submissions. I have considered the rival arguments. I have also paid heed to the records before me, the pleadings, and depositions.
6. The memorandum of appeal was lodged on 9<sup>th</sup> March 2015. That is *two years* ago. The record of appeal has not been filed. I must agree with the appellant that the circumstances are *beyond* its control. It is the duty of the Deputy Registrar to call for the *original record* of the lower court. The original file is unavailable. As a result, the appeal *cannot* be presented to a judge in chambers for *admission*. It follows as a corollary that *directions* cannot be taken.
7. I remain alive that in our *adversarial* system of justice, it remains the primary obligation of the appellant to follow up on its appeal. See *Anne Chege & another v Peter Musasya*, Nairobi, High Court Civil Appeal 840 of 2003 [2006] eKLR, *Daniel Okoko v Dan Owiti*, Nairobi, High Court Civil Appeal 452 of 2003 [2006] eKLR.

8. From the letter of 19<sup>th</sup> March 2015 (annexture AHO1); and, the letter by the Deputy Registrar to the lower court dated 25<sup>th</sup> March 2015, I *cannot* say that the appellant has gone into slumber. In summary, the appellant is hindered by factors outside its control from fixing the appeal for hearing.

9. Order 42 rule 35 (1) expressly authorizes an aggrieved respondent to move the court for dismissal if the appeal is *not* set down for hearing *three months* after taking directions. In the instant case, the appeal has *not* been admitted or directions taken. The test in a matter of this nature was well laid out in *Ivita v Kyumbu* [1984] KLR 441. It is whether the delay is *prolonged* and *inexcusable*, and if it is, whether justice can still be done. In that event, instead of dismissal, the court may exercise its discretion and fix the suit for hearing.

10. The delay here is *not* too lengthy; and, it has been well *explained*. It is thus *excusable*. The application for dismissal is *premature* in the circumstances. I also note the application has been brought by *notice of motion*. The court ought to be moved by way of *chamber summons*. But I am then reminded that justice should be rendered without *undue* regard to *technicalities*. See Article 159 (2) (d) of the Constitution.

11. In the end, the notice of motion dated 24<sup>th</sup> October 2016 is devoid of merit. It is *dismissed*. Costs shall abide by the outcome of the main appeal. But that is not to say that the appellant can lie on its laurels: I stated earlier that in our *adversarial* system of justice, it remains the primary obligation of the appellant to follow up on its appeal. The respondent's prejudice is self-evident: he *cannot* reap the fruits of his decree.

12. The appellant *shall* liaise with the Deputy Registrar to ensure that the original transcript of the lower court is forwarded to the High Court; and, that the appeal is placed before a judge in chambers for *admission* or *directions* in the next *ninety days*. In *default*, the appellant *may* move the Deputy Registrar to place this appeal before a judge in chambers for *dismissal*.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 29<sup>th</sup> day of March 2017.

**KANYI KIMONDO**

**JUDGE**

***Ruling read in open court in the presence of:***

Mr. Mathai for Mr. Were for the respondents instructed by D. L. Were Company Advocates.

No appearance by counsel for the appellant instructed.

Mr. J. Kemboi, Court clerk.