



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. 182 OF 2011
ESTHER CHUMBA.....APPELLANT
VERSUS
KIMAIYO BIRGEN.....RESPONDENT

RULING

1. The respondent prays that this appeal be *dismissed*. The notice of motion is dated 18th January 2016. The respondent pleads that the appellant has lost interest in the appeal. He states that the appeal was filed over *five years* ago. He contends that the appeal is *dormant*; and, that *no* steps have been taken by the appellant to set it down for hearing.
2. Those matters are buttressed by a deposition of the respondent sworn on even date. He avers that he was not formally served with either the memorandum or the record of appeal; and, that he only learnt of the action when he was served with a motion for stay of the decree. He deposes that the appeal is a ploy to deny him fruits of the judgment. The pith of the motion is that the delay is inexcusable; and, prejudicial to the interests of the respondent.
3. At the hearing of the motion, learned counsel for the appellant opposed the application. There is however *no* replying affidavit *or* grounds of opposition filed on behalf of the appellant. Learned counsel asserted that the appellant is keen on prosecuting the appeal; and, that *no prejudice* will be suffered by the respondent if the appeal is heard on *merits*. He pointed out that the record of appeal was filed on 17th June 2016; and, the appeal admitted formally on 27th June 2016.
4. On 25th April 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.
5. The memorandum of appeal was lodged on 11th November 2011. That is well over *five years* ago. On 19th April 2011, the appellant sought stay of execution of the decree. The High Court granted a conditional stay *ex parte*. The stay was subject to a deposit of Kshs 100,000 within seven days. When the matter was heard *interparties*, the terms were varied: the deposit was now to be made within three days into a joint interest earning account of both counsel.
6. I agree with the respondent that thereafter the appellant went into deep slumber. The memorandum of appeal was never *formally* served on the respondent. The record of appeal was *not* lodged until well after service of this motion for *dismissal*. The motion for dismissal was filed on 18th January 2016. The record of appeal was only filed *six months later* on 17th June 2016. There is a clear *pattern* of *delays* by the

appellant.

7. It must never be forgotten that in our *adversarial* system of justice, it remained the primary obligation of the appellant to follow up on his 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. The bitter truth is that the appellant went to sleep.

8. The appellant has not filed a replying affidavit to explain the delay of *five years*. The appellant is content with the order of stay. The original transcript of the lower court file is attached to the appeal file. In summary, there is nothing on the record that prevented the appellant from having the appeal admitted earlier; directions given; and, the appeal set down for hearing. The delay of over *five years* is *too long*; and, *inexcusable*.

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 appellant has *not* taken any steps to list the appeal for directions or for hearing since the filing of the appeal on 18th November 2006. The application for dismissal is thus properly before the Court.

10. 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 to set the suit down for hearing.

11. The blame for failure to progress the appeal rests entirely at the appellant's doorstep; or, that of her learned counsel. The appeal has lain dormant for over *five years*. Inordinate delay has thus been established. There is *no* replying affidavit or other explanation. The delay has *not* been explained *at all*. It is thus *inexcusable*. See *Ivita Vs Kyumbu* [1984] KLR 441, *Allen v McAlpine* [1968] 1 All ER 543, *Ramuka Agencies Ltd v Esther Wanjira Maina and another* Nairobi, High Court ELC 1187 of 2007 [2012] eKLR.

12. I have also perused the decree that was appealed against. The claim in the lower court was for the tort of *defamation*. Judgment was entered against the appellant for Kshs 400,000 together with costs. Granted the decree, I would have expected the appellant or her counsel to be a little more diligent in the matter.

13. I am alive of the overriding objective to do justice to the parties. It is in the interests of a fair trial that disputes be resolved expeditiously. Sections 1A and 1B of the Civil Procedure Act speak strongly to the duty of parties and counsel to assist the court to expedite justice. The respondent is obviously *prejudiced* by a *stagnant* appeal. The dictates of justice and the inherent power of the court require, in circumstances such as these ones, to free the respondent from the hold of the appellant's inert grip.

14. The upshot is that the appeal is hereby *dismissed* with *costs* to the respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 18th day of May 2017.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

No appearance by counsel for the respondent.

Mr. Awi holding brief for Mr. Omboto for the appellant instructed by Rioba Omboto & Company Advocates.

Mr. J. Kemboi, Court Clerk.