



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 348 OF 2013**

**DANIEL MUNGAI GITAU.....APPELLANT/RESPONDENT**

**VERSUS**

**CATHERINE GATHONI KAMAU.....RESPONDENT/APPLICANT**

**RULING**

1. The Respondent moved this court by a notice of motion dated 11<sup>th</sup> August, 2016 seeking the dismissal of this appeal for want of prosecution and that the security deposited as a condition for appeal be discharged and released to the applicant forthwith.

2. The motion is supported by the affidavit of the respondent. She contended that the appellant has since the filing of the memorandum of appeal on 21<sup>st</sup> June, 2013 not taken steps to prosecute the appeal which is more than 2 years and 7 months. It was stated that the appellant has neither served a record of appeal nor fixed this appeal for directions. It was averred that the appellant has also failed to forward to the counsel for the respondent a copy of the deposit slip for the decretal sum leaving the respondent only to speculate compliance with the court order on deposit of security.

3. In response thereto, Paul Kariba the legal officer of APA insurance Limited, which is the appellant's insurer filed a replying affidavit on 9<sup>th</sup> September, 2016. He has stated as follows; that the decretal sum of KShs. 810,000/= was deposited in a joint interest earning account at National Bank of Kenya, Kenyatta Avenue Branch Account No. 01282040853800. He contended that the applicant has not given compelling reasons why the court should discharge the stay of execution orders which were arrived at by consent. He stated that the appellant has been pursuing the typing of the proceedings in the matter and acknowledged that there has been delays in preparing the record of appeal.

4. He averred that the said delay cannot be attributed to the appellant but to the shortage of secretaries at the lower court registry which has made typing of proceedings and judgment slow. That whereas the proceedings have been typed, the same have not been proof read and certified. That compounding the matter further, the secretary who typed the proceedings was transferred from the station and no one has any idea where she might have saved the soft copy of proceedings to enable the making of amendments on the draft as and where necessary.

5. He averred that in the subordinate court's file, there is only one copy of the typed proceedings which has not been proof read and certified and the appellant's advocate could not be issued with a copy thereof. That the appellant's advocates were verbally advised by the Executive Officer to make a copy of the proceedings in the court file, re-type the same and submit a soft copy to the court to expedite proof reading and certification. That prior to the above, the appellant's advocate had written several letters to the Executive Officer, Chief Magistrates court for assistance in obtaining the proceedings to no avail and

the appellant's advocates are yet to be served with a notice from the Deputy Registrar of the High Court, calling for the lower court file as required by the procedures of the court.

6. That failure to set the appeal down for hearing is borne out of factors beyond the appellant's control as his advocates on record have been very consistent in following up on the typing of the proceedings and the appellant is interested in pursuing the appeal to its logical conclusion. He contended that this application is premature as the scenarios under order 42 rule 35 of the Civil Procedure Rules have not crystallized.

7. The applicant submitted that it was after his letter of 20<sup>th</sup> April, 2016 to the appellant that he applied for certified copies of the proceedings vide a letter dated 14<sup>th</sup> June, 2016. The appellant cited section 3A of the Civil Procedure Act that nothing shall limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice to prevent the abuse of court process. To back up the said argument, the applicant cited **Adnan Karama Petroleum Limited T/A A.K. Filling Station) v. National Environment Management Authority (2007) e KLR** where the court held that there will be no sympathy for an indolent and untruthful litigant.

8. On whether the court should allow the prayer for setting aside the order staying execution, it was argued that the power to set aside is discretionary. That the evidence before court is that the appellant has not been keen on prosecuting the appeal and does not deserve orders of setting aside.

9. The respondent's submissions were a reiteration of the averments in the affidavit. She however cited **UAP Insurance Company Limited v. Washington Gatura Kimani (2016) e KLR** and **Kirinyaga General Machinery v. Hezekiel Mureithi Ileri HCCC No. 98 of 2008**.

10. The applicable law on dismissal of an appeal for want of prosecution is Order 42 rule 35 of the Civil Procedure Rules. The said provision provides:

***“35 (1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.***

***(2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”***

11. The court has considered the application and the material before it. It is clear from the supporting affidavit to the application that the appellant had not been keen in following up the proceedings and had to be prompted to do so by the Respondent vide her advocate's letters dated 20<sup>th</sup> April, 2016 and 28<sup>th</sup> June, 2016 notifying them that the same were ready for collection.

12. The court, however, has noted that the proceedings are now ready but the lower court file has not been forwarded to this court.

In the interest of justice, this court shall give the appellant a chance to prosecute the Appeal. The application dated the 11<sup>th</sup> August, 2016 is hereby dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 28<sup>th</sup> day of June, 2017.

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**L. NJUGUNA**

**JUDGE**

*In the presence of*

..... *For the Appellant/Respondent*

..... *For the Respondent/Applicant*