



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CIVIL APPEAL NO 165 OF 2013

(Appeal from the Decree passed on 05.03.2010 in Murang'a PMCC No 205 of 2008 - I K Orange, RM)

1. CHARLES MAINA CHEGE
2. JOYCE KABUI CHEGE
3. IRENE WAIRIMU CHEGE
4. JOHN IRUNGU CHEGE.....APPELLANTS

VERSUS

JESSE MUTHIGA ALBERT.....RESPONDENT

RULING

1. The appeal herein (which is against a money decree of KShs 160,000/00 plus costs) was filed on 01/04/2010. The decree was passed on 05/03/2010.
2. The Respondent has applied by **notice of motion dated 21/11/2016** for dismissal of the appeal for want of prosecution upon the grounds that the Appellants have “unreasonably and without justifiable cause failed to set down the appeal for hearing for a period of more than three years since the memorandum of appeal was served upon the Respondent’s advocates”; that this failure to prosecute the appeal “is working an injustice” on the Respondent; and that in all the circumstances of the case it is fair and just that the appeal be dismissed for want of prosecution. The application is supported by an affidavit sworn by the Respondent.
3. The Appellants have opposed the application by a replying affidavit sworn by their learned counsel, Mercy N. Kabethi. Grounds of opposition emerging therefrom are that the counsel was never informed that the appeal was transferred to the High Court at Murang’a from High Court, Nyeri; that from the year 2013 she “wanted to peruse the court file but the same could not be traced”; that she learnt of the transfer of the matter to this court only after being served with the present application; and that the Appellant should not be punished for the failure of the High Court registry at Nyeri to inform the parties about transfer of the matter to Murang’a.
4. I have considered the submissions of the learned counsels appearing. I have also perused the record of the court.
5. It turns out that the memorandum of appeal was served on 07/05/2010. On 14/05/2012 directions were given at Nyeri that the appeal be heard by way of written submissions. On 21/02/2013 the High Court at

Nyeri directed that the appeal be transferred to this court. By that date the Appellants had not filed any submissions. There is no allegation that the Appellants or their counsel were not aware of the directions of the court of 14/05/2012. The appeal was registered in this court on 10/05/2013.

6. It also turns out that the High Court at Nyeri indeed notified the parties' advocates that the appeal had been transferred to this court. That notice, which is dated 21/02/2013, was sent to the Appellants' advocate at P.O. Box 1131, Karatina. The learned counsel for the Appellants acknowledges that the said address was hers, but that she had changed the same to P.O. Box 1260, Karatina "sometime in 2012". She provided no evidence of such change.

7. The bottom-line here is that the Appellants did nothing at all for over three (3) years to prosecute their appeal. There is no evidence of any follow up of the matter at the High Court, Nyeri if they thought that the appeal was still there. There is not even an affidavit by the Appellants themselves to demonstrate any interest in their own appeal.

8. The decree herein is for money, a fairly modest sum of money. The Respondent has been kept out of his money for over (3) years. No proper, acceptable reason has been given for the failure to prosecute the appeal all that time.

9. I will allow the application in the circumstances. The Appellants' appeal herein is hereby dismissed with costs for want of prosecution. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 20TH DAY OF SEPTEMBER 2017

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 22ND DAY OF SEPTEMBER 2017