



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL APPEAL NUMBER 195 OF 2005**

**GATEWAY INSURANCE CO. LTD.....APPELLANT/RESPONDENT**

**VERSUS**

**SIMON W. GAKURU.....RESPONDENT/APPLICANT**

***(Being an appeal from the decision and judgment of the Honourable Mutembeyi, the Chief Magistrate delivered on the 16<sup>th</sup> day of November 2005 in Nakuru CMCC No. 365 of 2003)***

**RULING**

1. By an application dated 9<sup>th</sup> May 2007 the Respondent sought a dismissal order of the appeal for want of prosecution, the appeal having not been prosecuted for a period of over 1½ years since its filing on the 19<sup>th</sup> October 2005.

Upon hearing of the application interpartes, the court – Honourable. R.V.P. Wendo, Judge, issued the following orders on the 30<sup>th</sup> May 2014.

1. That the Deputy Registrar of this court to ensure that the proceedings are typed and availed on priority basis, and in any event, not later than thirty (30) days from the date thereof.
2. That the appellant and/or its advocate to take initiative to be supplied with copies of the typed proceedings within thirty five (35) days from the date hereof.
3. That the appellant and or its advocates to prepare the record of appeal and list the appeal for directions within thirty(30) days from the date of obtaining the typed proceedings, failing which the appeal shall stand automatically dismissed.

2. In its application under consideration filed on the 28<sup>th</sup> May 2015 and dated 25<sup>th</sup> May 2015, the Appellant seeks an order that the appeal be deemed dismissed with costs and that the sum of Kshs.651,500/= together with accrued interest and deposited with CFC Bank in Joint names of the parties advocates be released to Mutonyi, Mbiyu and Co. Advocates for the Respondent. The application is premised on the grounds that the Appellant failed to comply with the court orders made on the 30<sup>th</sup> May 2014 and therefore the appeal is deemed dismissed. Further grounds are found in the supporting affidavit sworn by George Kirumba Mbiyu, Advocate for the Respondent/Applicant, that since the orders were issued on the 30<sup>th</sup> May 2014, one year has lapsed and the appellant has taken no steps to comply with the court orders and therefore the appeal stands dismissed.

3. The Respondent/Appellant opposes the application sworn by Eva K. Kirimi – an advocate having conduct of the case for the appellant while acknowledging the court orders – issued on the 30<sup>th</sup> May 2014, she avers that the said orders have become impossible to comply with for reasons that the High Court registry has failed to co-operate with the appellant, that the proceedings of the trial court case have not been typed to enable the appellant prepare and file the record of appeal, as per the court orders.

It is her deposition that by various letters dated 26<sup>th</sup> June 2014, the Registry erroneously issued proceedings in **HCA No. 195 of 2005** (this appeal) instead of proceedings in **CMCC NO. 365/2003**, the trial court case.

It is further stated that by the 5<sup>th</sup> September 2014, the proceedings had not been typed and follow up letters dated 10<sup>th</sup> September 2014, 5<sup>th</sup> May 2015, 6<sup>th</sup> May 2015 and 25<sup>th</sup> May 2015 did not elicit typing of the proceedings and their request to be supplied with hand written transcripts for typing and return on the 25<sup>th</sup> May 2015 went unanswered. It is the appellant's submission that they have been diligent and that failure to comply with the court orders is not deliberate.

4. The court has considered submissions by both counsel and the affidavit evidence on record, together with the exhibits by way of letters addressed to the Deputy Registrar of the High Court by the appellants advocates.

The Court notes that all the said letters were addressed to the Deputy Registrar, High Court, and Reference shown as **Nakuru HCA No. 195 of 2005** requesting for proceedings in **CMCC No 365/2003**.

Pursuant to the requests, the Deputy Registrar had the proceedings typed in respect of **HCA No. 195 of 2005**. In their letter dated 25<sup>th</sup> May 2015, the request was made in respect of **HCA No. 195 of 2005**. With respect to the appellant's submissions, it is this courts view that the said letters, not only were a misrepresentation of what had been requested for but also misleading the Deputy Registrar as evident from the fact that the proceedings in **HCA No. 195/2005** were typed and availed to the appellant.

5. While delivering her ruling on the 30<sup>th</sup> May 2014, the Hon. Justice R.V.P Wendo, Judge alluded to lack of seriousness and laxity by the appellant and/or his advocates, who acted indolently and at that point on 30<sup>th</sup> May 2014 held that the appellant took the bulk of blame for the inordinate delay.

It appears that the appellant did not take seriously the court orders issued on the 30<sup>th</sup> May 2014 which orders as far as this court is concerned are still in force. If indeed the appellant found the said orders unenforceable as submitted, they had an option, and were at liberty to approach the issuing court for variation or setting aside. This did not happen. It is trite that court orders, however unpalatable remain valid unless set aside on review or on appeal. In **Econet Wireless Kenya Limited -vs- Minister for Information and Communication (2005) KLR 828 Ibrahim J** (as he then was) stated:

***“It is essential for the maintenance of the rule of law and order that the authority and dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors.***

***It is plain and unqualified obligation of a person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged.***

***The compromised nature of this obligation is shown by the fact that it extends even to cases where the person, affected by an order believes it to be irregular or void.”***

The above position has been followed in numerous other decisions.

In **Central Bank of Kenya and Another -vs- Ratilal Automobiles Ltd and Others, Civil Application No Nai.247 of 2006**, the court pronounced itself

***“that Judicial power in Kenya rests in the courts and other tribunals, and that it is a fundamental tenet of the rule of law that court orders must be obeyed, and it is not open to any person to choose whether or not to comply with or ignore such orders as directed to him by a court of law.-”***

6. Against the above backdrop, this court finds that the appellant and/or its advocates failed to obey and act as directed by the court orders, and in particular Order 2 that the appellant and/or its advocates to take initiative to be supplied with copies of the typed proceedings within 35 days from the date of the ruling, thus 30<sup>th</sup> May 2014.

I have considered that during the time frame of 35 days given by the court, the appellant, going by its replying affidavit, wrote a letter dated 26<sup>th</sup> June 2014 requesting for the proceedings. That was 26 days after the orders under consideration. On 10<sup>th</sup> July 2014, erroneous proceedings were supplied. Nothing was done, upto 5<sup>th</sup> September 2014, outside the time frame above, when a perusal was made of the court file when it was found that the proceedings had not been typed and a further request made on the 10<sup>th</sup> September 2014. No other action was taken for six months when further request was made. The court has not been told what other action has been taken since 1<sup>st</sup> July 2015 when the replying affidavit was sworn.

The above in my considered opinion does not demonstrate diligence and deliberate attempts towards compliance with the court order, – by the appellant and/or its advocates.

7. The Advocates/appellant ought to have done more than just writing letters. See part 2 of the Orders of 30<sup>th</sup> May 2014.

Even after being supplied with the wrong proceedings, the appellant took no serious steps to address the problem save for writing other letters. Just like the Honourable R.V.P Wendo, Judge, held I find that the Appellant acted indolently even after the court excused its apparent inactivity and lack of vigilance in following the proceedings. Practically, if a party is diligent and keen on obtaining court proceedings from any court registry, it would not take the period of 10 years that the appellant has taken to be supplied with typed court proceedings. Failure demonstrates serious lack of interest, diligence and indolence on the part of the applicant/ or his advocate.

8. An appeal filed in 2005 ought to have been heard and concluded in this court. **Article 159(1) (b) of the Constitution and Section 1A and 1B of the Civil Procedure Act** Advocates for the just, expeditious, proportionate and affordable resolution of Civil disputes. I find it a mockery of justice that the Record of appeal, for an appeal filed on the 8<sup>th</sup> December 2005 is yet to be prepared. There is obvious prejudice on the Respondent who has been kept away from the proceeds of the fruits of his judgment – by the order of stay of execution issued in early 2005, upon which the Appellant has been riding on and enjoying.

The court orders issued on the 30<sup>th</sup> May 2014 have not been reviewed, set aside, varied or appealed from. They are valid orders of a competent court. As held in the authorities stated above, it is not open to a person to choose whether or not to ignore or obey court orders. That it is an obligation, and a tenet of the rule of law that court orders are obeyed.

9. The appellant having failed to offer plausible explanations for the said none compliance of the court orders, this court finds that the application dated 25<sup>th</sup> May 2015 and filed on the 28<sup>th</sup> May 2015 merited.

Consequently and in terms of the court orders issued on the 30<sup>th</sup> May 2014, the appeal filed on the 8<sup>th</sup> December 2005 stands dismissed with costs.

It is further ordered and directed that the sum of Kshs.651,500/= together with accrued interest and deposited with **CFC Bank** in the names of Mungai Mbugua and Co. Advocates and Simba & Simba

Advocates be released forthwith to **M/S Mutonyi, Mbiyu & Co. Advocates** for the Respondent herein.

Costs of the applications shall be borne by the appellant.

**Dated, signed and delivered in open court this 28<sup>th</sup> day of January 2016**

**JANET MULWA**

**JUDGE**