



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO 89 OF 2010**

**MOSES K. BURER.....APPELLANT**

**VERSUS**

**WILLIAM SEREM.....RESPONDENT**

**RULING**

1. The respondent prays that this appeal be dismissed. The respondent contends that the appellant is disinterested in prosecuting the appeal. He avers that the lethargy is prejudicial; and, he cannot reap the fruits of his decree granted by the lower court.
2. The appellant states that the appeal was fixed for hearing on 7<sup>th</sup> October 2014. The parties agreed; and, the court directed that the appeal be determined by written submissions. The submissions were to be filed and exchanged by 9<sup>th</sup> December 2014. By June 2015, the appellant had not complied. The respondent then filed the motion for dismissal. Those matters are buttressed in the notice of motion dated 11<sup>th</sup> June 2015.
3. The appellant opposes the application. There is a replying affidavit sworn by the appellant on 20<sup>th</sup> January 2016. He deposes that the submissions could not be filed because the court file went missing; and, his lawyer failed to diarize the matter. He pleads with the court not to visit upon him the sins of his counsel. He also avers that he has since filed and served the submissions. He states that he is keen on prosecuting the appeal; and, that no prejudice will be suffered by the respondent if the appeal is heard on its merits.
4. On 20<sup>th</sup> January 2016, 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 26<sup>th</sup> May 2010. That is *more than five years* ago. The record of appeal was filed on 15<sup>th</sup> October 2012, *more than three years* ago. I have seen the standard form affixed on page 1 of the court record. The appeal was admitted by Azangalala J (as he then was) on 6<sup>th</sup> October 2011. That is well over *four years*.
6. There is thus *no* contest that there has been *delay* in prosecuting the appeal. When the appeal was listed for hearing on 7<sup>th</sup> October 2014, the parties agreed to proceed by written submissions. The appellant defaulted. The appellant was only woken up from his slumber by the filing of this motion for dismissal on

10<sup>th</sup> June 2015. That was nearly a *year* from the date of the last directions. A replying affidavit to the motion for dismissal was not filed until 20<sup>th</sup> January 2016, the same day I heard this motion for dismissal.

7. There is no tangible evidence that the court file went missing. It is a bare statement. Even if the appellant is to be believed, he took *no* steps to move the court by correspondence or an appropriate motion for reconstruction of the court file. It is clearly a red herring. The bitter truth is that the appellant went to sleep. 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.

8. However, the present motion is founded on the *wrong* procedure. It is predicated upon Order 17 rules 2 and 4 of the Civil Procedure Rules 2010. That order deals with dismissal of *ordinary suits* for want of prosecution. The correct Order and Rule relating to dismissal of *appeals* is Order 42 rule 35. The suit that was dismissed in the lower court related to *property*. The appellant was aggrieved and brought this appeal. True, there has been laches; but the test in a matter of this nature is whether *justice* can still be done. See *Ivita v Kyumbu* [1984] KLR 441. I note that the appellant filed written submissions on the main appeal on 28<sup>th</sup> October 2015.

9. There is an overriding objective to do justice to the parties. In the interests of justice this appeal may be heard on merits. However, justice is a two way street. I dealt at length with the lackluster conduct of the appellant. The respondent is prejudiced by the existence of a stagnant appeal. The respondent cannot realize the fruits of the decree in the lower court. I am thus prepared to grant the respondent costs. That will perhaps assuage the respondent; and, keep the appellant wide awake.

10. The upshot is that the respondent's notice of motion dated 11<sup>th</sup> June 2015 is *dismissed*. The appellant shall however pay the respondent *thrown away* costs of Kshs 10,000 within the next *thirty* days. The appellant shall also ensure that the appeal is set down for *hearing* within *sixty days* of today's date. If the appellant fails to meet *any* of the conditions within the set *time*, the appeal shall automatically stand *dismissed*.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 16<sup>th</sup> day of February 2016.

**GEORGE KANYI KIMONDO**

**JUDGE**

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

No appearance for the respondent/applicant.

Mr. Kiboi for the appellant instructed by Kiboi Tuwai & Company Advocates.

Mr. J. Kemboi, Court clerk.