



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUNGOMA.**

**CIVIL APPEAL NO. 11 OF 2009.**

**ANDREW KHAEMBA.....APPELLANT**

**VERSUS.**

**GILBERT LUKORITO MAKAWA.....RESPONDENT**

**RULING.**

[1]. The application herein is brought under Sec. 3A of the Civil Procedure Act. It prays that the instant appeal be dismissed for want of prosecution. The application is grounded on the fact that Memorandum of Appeal was filed in the year 2009. That todate the appellant is yet to prepare the appeal. That the matter was in court two years ago and that there are no steps taken by the appellant to ensure the instant appeal is prosecuted as required by law.

[2]. The respondent filed grounds of opposition under order 51 rule 14 of the Civil procedure rules. The respondent stated the application was filed contrary to the provisions of order 42 rule 35 of Civil Procedure Rules.

[3]. Mr. Nyamu for the applicant argued that the appellant has yet to prepare the record of Appeal since the year 2009. He stated that the appellant has lost interest in the appeal. Further, he argued that the ELC Act provides that matters of land should be dealt with expeditiously. He argued that he appeal is an abuse of the process of the Court, below.

[4]. Mr. Bw'Onchiri for the respondent argued that the application should be under order 42 of rule 35. He stated that the delay was occasioned by the fact that the proceedings were not received in time. That they were received on 13<sup>th</sup> June, 2016. The Counsel however, had no certificate of delay from the executive officer of the Court.

[5]. Mr. Nyamu argued that he is entitled to bring the application under Sec. 3A and that Order 42 32(1) presupposes a situation where the applicant has taken some steps to enable the appeal to proceed for hearing like moving the Court to take directions. He argued that the respondent has not explained the delay.

[6]. Since the Appeal was filed on 7<sup>th</sup> July, 2009 it is now over Seven (7) years. The respondent Applicant has not explained the cause of the delay of Seven years. There was no certificate of delay exhibited to the grounds of opposition, to show when the respondent applied for the proceedings and judgement and when they were provided to him. A party who wishes to file an appeal has a duty to pursue the court to have the proceedings and judgement supplied in time. He cannot go to sleep and wait for the proceedings to be supplied to him and then continue arguing that he applied for the same soon after Judgement. The overriding objective of the court under the Civil Procedure Rules 2010 mandates all

parties to the suit, (appeal in this case) to be proactive and pursue their matters in the court with diligence.

The delay in this case in preparing the record has been for a period of over Seven (7) years. This delay is inordinate. It has not been explained by the appellant. No court can countenance such delay for the reason only that, the proceedings were not supplied.

The applicant was well within his rights to bring this application. The application is merited I dismiss the Appeal herein filed. The costs shall be to the applicant.

Ruling read In Open Court.

**Dated, signed and delivered on 20<sup>th</sup> September, 2016.**

**S. MUKUNYA**

**JUDGE.**

**In the presence of:**

Joy/Gladys - Court Assistants

Mr. Bw' Onchiri for the Appellant

Nyamu & Wataanga for the Respondent