



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL CASE NO. 52 OF 2013**

**EDWARD NJERU NTHIA.....APPELLANT/RESPONDENT**

**VERSUS**

**ROBERT MURIITHI.....RESPONDENT/APPLICANT**

***(An Appeal from Judgment of the Resident Magistrate Runyenjes dated 19/04/2012 Civil Suit No. 65 of 2011)***

**RULING**

This is a ruling on an application dated 22/01/2015 seeking for dismissal of suit for want of prosecution. The applicant relies on the grounds that since the respondent filed the appeal on 16/10/2013, he has not taken any step to prosecute it. The respondent/applicant in lodging the appeal was using delaying tactics of denying the applicant/respondent the fruits of his judgment.

Although the respondent filed a replying affidavit sworn on 13th January 2015 opposing the application, neither him nor his counsel attended court for hearing of this application. He denies that he has taken any steps since filing of the appeal and cites five dates in which the file has been mentioned in court. The respondent states that the applicant filed a similar application earlier and withdrew it on 16/10/2014. He urges the court to dismiss the application for failing to meet the threshold set by the law.

On perusal of the record, the appeal came for mention before the Deputy registrar on 24/6/2014. It is the applicant/respondent who had taken the date for prosecution of his application for striking out the appeal for failure to file the record of appeal. The appellant's counsel attended court but the applicant was absent despite having taken a date and served for the hearing of his application. He later took another date for his application. When it came for hearing on 4/7/2014 the parties were absent from court save for the appellant's counsel. Similarly on the 16/10/2014 appellant's counsel attended court together with the respondent. It is evident from the record that the appellant took a very long time to file his record of appeal which prompted the applicant to file his application for striking out the appeal. The appeal was admitted on 24/2/2014 and for eight (8) months the record of appeal has not been filed. It was filed on 25/9/2014 after the applicant filed an application for striking out the appeal.

The appellant applied for leave to file a supplementary record of appeal on 12/11/2014 which he was granted. Up to the time of hearing this application, the supplementary record had not been filed three (3) months down the line.

I am in agreement with the applicant that the appellant has delayed this appeal by taking almost one (1) year before filing the record of appeal and thereafter failing to file the supplementary record of appeal despite being granted leave. He is not far from being declared an indolent litigant.

However, this court will give the appellant 30 days from the date of this ruling to file the supplementary record of appeal and to fix the appeal for hearing and in default, the appeal will be marked as dismissed for want of prosecution.

The appellant and his counsel to be served with copies of this ruling by the Deputy Registrar in the event that they are absent at the time of delivery.

The application of the applicant is merited save for the court's decision to temper justice with mercy in

favour of the appellant/respondent.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 24TH DAY OF FEBRUARY, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of the Respondent**

**F. MUCHEMI**

**JUDGE**