



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 44 OF 2011

BETWEEN

PRIMAROSA FLOWER LIMITED.....APPELLANT

VERSUS

HEZRON OSAMA RATEMORESPONDENT

(Being an appeal from the judgment and decree of the Senior Resident Magistrate's Court at Nyahururu(Hon.Musyoka(Esq) R.M., Presiding) delivered on or about the 25th February 2011 in the Senior Principal Magistrate's Court at Nyahururu in Civil Suit No 162/2010)

RULING

1. A Memorandum of Appeal was filed by the appellant in this appeal on the 25th March, 2011 and proceedings requested for vide its letter dated 12th April, 2011 from the Magistrate's Court at Nyahururu. The proceedings were received by the appellant's advocates on an undisclosed date and the lower court file with typed proceedings and judgment forwarded to this court on the 23rd November, 2011. To date the Record of Appeal has not been filed.

2. On the 1st September, 2014 and again on the 25th February, 2015 the court issued Notices to Show Cause why the appeal should not be dismissed under Order 42 Rule 35(2) of the Civil Procedure Rules. The Notice to Show Cause came up for hearing on the 13th March, 2015. The appellant was granted time to file a replying affidavit and take steps in the appeal. The Notice to Show Cause came up again for hearing on the 16th June, 2015.

3. The appellant relied fully on its Replying Affidavit filed on the 16th March, 2015, and sworn one George Ombati an Advocate, practicing in the firm of B.M. Mutie and Company Advocates which firm has the conduct of this appeal on behalf of the appellant. He deposes that the decretal sum in the lower court case was deposited in court as a condition for stay of execution of the decree, and that in 2011 when the firm was relocating offices their file was misplaced and have recently traced the file. How recent is not indicated. It is its prayer that the court exercise its discretion and allow it to take steps to prosecute the appeal.

4. Learned counsel Mr. Ndubi for the Respondent is of the opinion that no sufficient cause was shown – why the appeal could not be prosecuted yet proceedings were ready since November, 2011. He submitted that even after the court issued notices to show cause since October, 2014, nothing has been done

showing lack of interest in the appeal.

It is his further submission that the respondent has been shut out of the decretal sum for close to five(5) years without any reasonable cause; that the delay is against the spirit of Section 1A, and 1B of the Civil Procedure Act and Article 159(2)(b) of the Kenya Constitution. It is his his submission that if the appellant was interested in the appeal, the record of appeal would have been filed when the Notices to show cause were issued.

5. I have considered submissions by counsel and the Replying Affidavit. It has not been sufficiently explained why for a period of over four(4) years the Record of Appeal has not been filed despite the proceedings having been ready since October, 2011. Issues raised by the appellant as to misplacing of their file is not a good reason. More so that since September, 2014 when the court issued notices to show cause, nothing was done. It is clear that the appellant has lost interest in the appeal. The prolonged delay is not in the interest of justice.

As held in **Ivita -vs- Kyumbu (1984) KLR**, the delay is inexcusable and justice ought to be done to both parties. The respondent has been shut out of the fruits of his judgment and the inordinate delay will be prejudicial to his interest.

6. Section 1A and 1B of the Civil Procedure Act enjoins the court to facilitate the just, expeditious, proportionate and affordable resolution for civil disputes. The above objectives will be achieved by dismissing the appeal for want of prosecution with costs to the Respondent.

It is so ordered.

Dated, signed and delivered in open court this 25th day of June 2015

JANET MULWA

JUDGE

In the presence of:

Ms. Kawira holding brief for Ombati for Appellant

No appearance for Respondent

Court clerk - Linah