

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC APPEAL NO. 9 OF 2020

RICHARD SIMON OBERO APPELLANT

VERSUS

PENINA NAMULISA NAKHISA ...1ST RESPONDENT

REZA KHISA2ND RESPONDENT

R U L I N G

1. The application dated 4th February 2022 is listed for hearing on 17th February 2022. It seeks the dismissal of the appeal filed herein on 16th July 2020 and is supported by the affidavit of **MR SIMIYU MAKOKHA** Counsel for the Respondent in which it is averred, inter alia, that the Appellant has *“failed, neglected or refused to set down the appeal for hearing since it was filed on 16th July 2020.”*

2. The application is opposed and **MR HENRY KEPHA ONYANDO** Counsel for the Appellant has filed a replying affidavit dated 14th February 2022 in which he has deponed, inter alia that although he has prepared the Record of Appeal, his efforts to get the lower Court file forwarded to this Court for purposes of admitting the appeal have been fruitless. The appeal cannot therefore be said not to have been prosecuted for more than one year as alleged by the Applicant. There are compelling reasons beyond the appellant’s control. Annexed to the replying affidavit are several letters addressed to the **CHIEF MAGISTRATE BUNGOMA** both by the Appellant’s Counsel and the **DEPUTY REGISTRAR** of this Court calling for the lower Court record to enable the prosecution of this appeal.

3. Although this application is listed for hearing on 17th February 2022, I think I can save both Judicial time and also the parties time and other resources if I determine it on the material readily available in the relevant affidavits.

4. The Appellant filed this appeal on 16th July 2020 and the Record of Appeal on 27th November 2020. From as far back as 2nd September 2020, the Deputy Registrar of this Court has been calling for the record of the lower Court to be submitted to this Court but that has not been done to – date. Counsel for the Appellant has also written letters to the Chief Magistrate dated 4th December 2020, 23rd January 2021, 24th March 2021, 12th July 2021 and 22nd November 2021 requesting that the file from the lower Court be forwarded to this Court. The file is yet to be submitted and it appears that the said letters have not been responded to. The appeal is, therefore, yet to be admitted.

5. In the circumstances, the application by the Respondent seeking the dismissal of this appeal for want of prosecution is clearly premature and is for dismissal.

6. Perhaps this is the right time to take up the issue of delays in the transmission of records from the **CHIEF MAGISTRATE’S COURT BUNGOMA** to this Court for purposes of hearing appeals. My record shows that as of today, there are twenty-nine (29) appeals pending before this Court awaiting records from the Subordinate Court. The oldest appeal is No 3 of 2018. That notwithstanding, on 16th February 2022 I delivered Judgment in **ELC APPEAL No 10 of 2020 APOLLO OMUSULA MANYASI .V. KARIUKI KIRAGU** which was filed on 2nd August 2020. The explanation for that anomaly can be two fold. Either some parties are receiving preferential treatment in the typing of proceedings or some parties are filing appeals and going to sleep. Either way, this is an issue that I invite the new **CHIEF MAGISTRATE** to investigate and take remedial action as a matter of priority including ensuring that correspondence both from the parties and the Deputy Registrar calling for records are responded to. This enables the parties and the Court to know the position of those records.

7. Meanwhile, the preparation and transmission of the record in this appeal be expedited.

8. Ultimately, however, the Notice of Motion dated 5th February 2020 is dismissed with costs.

BOAZ N. OLAO.

J U D G E

17th February 2022.

RULING DATED, SIGNED AND DELIVERED THIS 17TH DAY OF FEBRUARY 2022 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.

BOAZ N. OLAO.

J U D G E

17th February 2022.