



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CIVIL APPEAL CASE NO. 236 OF 2013

ZIPORAH MUTHONI NJAGI.....APPELLANT

AND

FAITH WAIRIMU GITUBU.....RESPONDENT

RULING

1. The Motion before me is dated 14th March, 2014. **FAITH WAIRIMU GITUBA**, the applicant herein has moved this Court to dismiss the appeal herein for want of prosecution and lift the interim orders issued in the civil case at the subordinate court which is the subject of this appeal.
2. The Applicant listed four (4) grounds in her application as:
 - a. *That the respondent/appellant has not taken any step in her appeal since 2007.*
 - b. *That there are interim orders which have stayed execution in KERUGOYA SENIOR RESIDENT MAGISTRATE'S COURT CIVIL CASE NO. 101 OF 2007.*
 - c. *That the appellant has not prepared the record of appeal.*
 - d. *That it is mete and just to allow this application.*
3. In her supporting affidavit sworn on 14th March, 2014, the Applicant has deponed that the Appellant appeared to have lost interest in her appeal as no action has been taken since 2007 when the appeal was filed. She further alleged that the Appellant has taken undue advantage after staying decree in the subordinate court pending this appeal and that she is benefiting from the attendant delay.
4. The Respondent opposed the application through E. M. Mutahi Advocate, who relied on the replying affidavit sworn by the Appellant/Respondent on 28th May, 2015.
5. The Respondent deponed that she instructed her erstwhile Advocates, Ngigi Gichoya Advocate to file the appeal on her behalf and she gave him the mandate to follow up the appeal on her behalf. She also added that she was not informed by her former counsel about the status of her appeal and only realized of the current state when she was served with the application to have her appeal dismissed for want of prosecution.
6. The Respondent also opposed the application citing that the application is defective as it does not disclose the section or the rule under which it is made under the Civil Procedure Rules. The Respondent further deponed that the Applicant should have moved the Court herself to have the appeal heard adding that she was ignorant herself about the law and what steps she was required to take to make her appeal heard.

7. I have considered the application which was argued by the Applicant in person. I have considered the response made on behalf of the Respondent/Appellant by Mutahi Advocate. I have looked at the proceedings and have noted that the Appellant filed her appeal on 31st July, 2007 against a decision of the trial magistrate delivered on 10th July, 2007. The Respondent obtained a stay of execution of decree in the lower court on 14th April, 2008 and from that time she appears to have gone to sleep as no step was ever taken from that time henceforth to either have the appeal admitted or even apply and pay for court proceedings.
8. Mr. Mutahi, counsel for the Appellant told this Court that he was now ready to apply for the proceedings and pay for the same in order to move this Court to admit the appeal. The counsel for the Appellant could not however, explain why it has taken her more than 7 years to take any step in prosecuting her appeal. She appears to blame her erstwhile counsel for her inaction but the affidavit filed by her former counsel after being served with the application to have the appeal dismissed, shows that it is the Appellant herself who had failed to go and see her advocates. I am not persuaded that she was ignorant of what the law required of her. Ignorance of law is no excuse for indolence. I do find that the Applicant though has not cited any provision of law in her application, she is within her rights to move this court in view of the inordinate delay exhibited by the Appellant in prosecuting her appeal. In the light of **Sections 1A and 3A** of the **Civil Procedure Act** in addition to **Order 42 rule 35 (2)** of the **Civil Procedure Rules**, the application before me is proper and indeed merited in the circumstances. I do not find any tangible reason advanced by the Appellant/Respondent why she has not taken any step whatsoever in her appeal for more than 7 years after filing it.

Consequently I have to allow the application dated 14th March, 2014 as prayed. The appeal herein is dismissed with costs for want of prosecution.

Dated and delivered at Kerugoya this 19th day of June, 2015.

R. K. LIMO

JUDGE

19.6.2015

Before: Hon. Justice R. Limo

Court Assistant Willy

Faith Wairimu present

Ruling signed, dated and delivered in the presence of Faith Wairimu and in the absence of Siporah Njagi.

R. K. LIMO

JUDGE

19.6.2015