

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 270 OF 2011

CHARLES KINYANJUI MWAURA.....APPELLANT

VERSUS

ELIKANA KINYANJUI.....RESPONDENT

RULING

1. A notice to Show Cause why this appeal should not be dismissed dated 22nd June, 2015 was issued in this appeal under Order 42 Rule 35 (2) of the Civil Procedure Rules.
2. Mr. Mworira learned Counsel for the Appellant stated that upon service of the notice, he requested his clerk to trace the file and it was realised that the file was missing in the office as it had been archived. He stated that that was occasioned by movement from offices. That as a result thereof the file was erroneously closed. He stated that it was the advocate's mistake to have not taken steps to prosecute the appeal but that the Appellant had deposited costs of KShs. 500,000/= in the year 2012 to stay execution with an intention to prosecute the appeal. Counsel urged that the Appellant be given an opportunity to prosecute the appeal. He stated that the appeal was on summary judgment which was made on a technicality and that the appeal raises triable issues and dismissing it would prejudice the Appellant.
3. Ms. Odera learned Counsel for the Respondent contended that the Memorandum of Appeal was filed on 17th June, 2011 and since then, the Appellant has not taken any step to file a record of appeal. She stated that there is no evidence by the Appellant proving movement of office. That the Appellant went to sleep after depositing the sum of KShs. 500,000/= as there was no threat of execution. She stated that the Respondent has been denied the fruits of his judgment.
4. I have given due consideration to the disposition and submissions by Counsel. The Appellant was given a conditional stay but failed to ensure that its appeal is set down for hearing. It is only upon service of the Notice to Show Cause that his advocate was awakened. This is a clear indication that the Appellant had lost interest in his appeal. Prudence require that litigants keep track of their cases. The court in **Alice Mumbi Ng'ang'a v. Damson Chege Ng'ang'a & another [2006] eKLR** observed as follows:-

"This court has ruled in several cases that a civil case once filed is owned by a litigant and not his advocate. It behooves the litigant to always follow up his case and check its progress. "

5. It follows therefore that a Plaintiff's primary responsibility is ensuring that his/her suit is set down for hearing without undue delay. There was no evidence to prove the so called movement of office. In the circumstances, I do not find the reasons advanced for failure to prosecute to be satisfactory. This appeal is hereby dismissed with costs to the Respondent.

A. MABEYA

JUDGE

Dated, Signed and Delivered at Nairobi this 18th day of September, 2015.