



REPUBLIC OF KENYA

High Court at Machakos

Civil Appeal 22 of 2006

GOLDEN HARVEST APPELLANT

VERSUS

JOSEPH MUNGUTI KYUMBE RESPONDENT

(Being an appeal from the Judgment of the Resident Magistrate Hon S.M. Mwendwa (RM) in Machakos Chief Magistrate Case No. 1067 of 2006 dated 13th

February 2008)

(Before B. Thurania Jaden J)

RULING

The application dated 21/5/2010 seeks orders that the Appellant’s appeal No. 22 of 2009 be dismissed with costs to the Applicant.

The application is supported by the affidavit of the applicant, **Joseph Munguti Kyumbe** sworn on 21/5/2010. According to the said affidavit, the Respondent was the Plaintiff in the lower court in **Machakos CMCC 1067 of 2001** when judgment was entered in the Respondent’s favour for Kshs.263,000/= as General Damages on 13/2/2006. The Respondent lodged the appeal herein and applied for a stay of execution which application was allowed by consent and a decretal sum deposited in a joint interest earning account. That thereafter the Appellant failed to prosecute their appeal and did not serve the Respondent with the record of appeal. The Applicant’s contention is that the Appellant has lost interest in the appeal and the appeal ought to be dismissed as the continued pendency of this matter is prejudicial to the Applicant.

In opposition to the application, the Respondent through **Aneez Lalji** a director of the Appellant

Company swore a replying affidavit on 5/7/2012. The delay in setting the appeal down for hearing is blamed on the lack of typed proceedings and lack of a certified copy of the lower court judgment. That efforts made to fix the appeal herein for mention in the year 2011 were not fruitful as the court's diary was full. That further efforts made in the year 2012 to fix the appeal for hearing were also not successful due to the court's diary being full. The Respondent avers that he is interested in the prosecution of the appeal.

The application as canvassed by way of written submissions. The firm of **B.M. Mung'ata Advocates** appeared for the Applicants while the firm of **Manthi Masika** appeared for the Respondent. I have duly considered the written submissions.

A perusal of the court record shows that the lower court's file was not availed until the year 2010. The appeal was admitted on 1/10/2001. There is therefore no reason why the record of appeal was not compiled by the Applicant after the lower court file was availed.

However, there were efforts made by the Respondents to fix the appeal for mention/hearing in the year 2011 and 2012 as demonstrated by the correspondence exhibited (annexture "**AL II**" and "**AL III**").

I am therefore inclined to give the Respondents a chance to have the appeal heard and determined. The appeal to be given a hearing date on a priority basis. Costs in cause.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **18th** day of **April** 2013.

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JUDGE