**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MACHAKOS**

**Civil Appeal 128 of 2006**

**NICHOLAS MUNYOKI MASYA.....APPELLANT**

**VERSUS**

**1. JOEL NGEI KITEME**
**2. MARTHA NGEI.....RESPONDENTS**

**RULING**

1. By an application dated **28/02/11** ("*Application*"), the Respondents, **Joel Ngei Kiteme** and **Martha Ngei** ("*Respondents*") pray that the appeal filed herein be dismissed for want of prosecution.

2. The Respondents aver that the appeal was filed way back in **2006** and to date no directions on its hearing have been taken. Through their advocate, **Mr. Tamata,** they argue that since obtaining an order for stay in 2006, the Appellant has shown very little interest in prosecuting the appeal. **Mr. Tamata** argued that the only time the Appellant set the appeal down for hearing, his advocate asked for an adjournment. Beyond that, Mr. Tamata argued, the Appellant has failed to perfect the appeal by filing a Supplementary Record of Appeal as allowed by the court way back on **29/04/10. Mr. Tamata** complained that there is no copy of decree on record; no supplementary record of appeal filed; no attempt to set down the case for directions. All these, Mr. Tamata concluded, are the tell-tale signs of an appellant who has no interest in prosecuting the appeal but has merely filed one to vex the Respondents.

3. For the Appellant, **Ms. Serem** sought to rely on the Replying Affidavit she swore on **20/06/2011**. She argued that while it is true the Appellant was granted leave to file a Supplementary Record of Appeal in order to bring into the record a certified copy of the order appealed from, the Appellant experienced serious difficulties in getting the said order. She referred to her Replying Affidavit at **paragraphs 7-9** detailing all the efforts her firm put trying to obtain a certified copy of the order appealed against. The Respondents, through their advocates, were made aware of those difficulties vide a letter dated **20/05/2010.** Finally, a certified copy of the order was obtained on **28/06/10** but by that time, the present Application had already been filed and served. The Appellant further argues that the delay in setting the case for directions is not entirely the Appellant's fault because it has simply been difficult to obtain dates at the registry. In any event, the Appellant argues, legally, there are really no provisions for dismissing an appeal before directions have been given. Lastly, in response to **Mr. Tamata's** arguments that the Appellant failed to file a Supplementary Record of Appeal as asked by the Court, **Ms. Serem** maintains that a Supplementary Record of Appeal was actually filed on **10/12/2007** and served on the Respondents' lawyer's firm on **11/12/2007.** In sum, the Appellant argues that he has diligently pursued the appeal and the same should not be dismissed. Instead, Ms. Serem applied to further leave to file a further Supplementary Record of Appeal to put in a certified copy of the order which the Appellant is appealing from since the earlier order lapsed.

4. The threshold question is whether the Application is properly before the Court granted that the appeal has not been set down for directions yet. The Appellant's counsel argued before me that there is no provision to dismiss an appeal for want of prosecution before directions have been taken. I am of a different view, however. It cannot be that the Appellant is at liberty to take as much time as she wants hence keeping litigation hanging over the head of a Respondent and yet the Respondent does not have a

way to seek protection from the Court. Like a section of the High Court which has considered this question, I am of the view that a Respondent can invoke the inherent jurisdiction of the Court to strike out a nascent appeal for inordinate delay even before directions have been given. The following High Court cases are in accord: *Kariby Timber Industries v Nemchand Anand & Co*. (Mombasa High Court Civ. Appeal No. 11 of 1997); *Payless Car Hire & Tours Ltd v Dick Nyameta Mochache & Another*; *Eliakim A. Akech v National Housing Corp and Another*.

5. The question then turns to whether, in the specific circumstances of this case, the Court should invoke its inherent jurisdiction to strike out the appeal filed herein. In exercising the discretion whether to dismiss the appeal or not, the threshold question the Court asks is if the Appellant has been so inattentive and disinterested in pursuing the appeal that the Court can justifiably conclude it has led to inordinate delay. Using that standard, I am unable to say categorically that the Appellant has been indolent in prosecuting the appeal. The Appellant's counsel has detailed all the efforts they put to obtain the certified copy of the decree appealed against which has led to the delay. The Respondent has not impugned this affidavit evidence and I accept it as true. In the circumstances, while I am certainly sympathetic to the Respondent for the length of time it has taken for this appeal to be prosecuted, I am persuaded that the Appellant has taken appropriate steps to perfect the Appeal for hearing. I therefore decline to accede to the Respondent's request to dismiss it for want of prosecution.

6. However, out of a sense of fairness for the Respondent, the Court will direct that the timeline towards hearing of the appeal be set on an expedited basis. In that vein, the Appellant is hereby granted leave to file a Supplementary Record of Appeal which must be filed and served within **14 days** of today's date. The Appellant should then move the Deputy Registrar to set a date for directions on the hearing of the appeal within **14 days** of filing and serving the Supplementary Record of Appeal. If the Appellant fails to take either of these steps within the time prescribed, the appeal shall stand dismissed.

**DATED, SIGNED** and **DELIVERED** at **MACHAKOS** this day **15TH** day of **FEBRUARY 2012**.

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**J.M. NGUGI**
**JUDGE**