



**NYANSIONGO TEA
FACTORY.....PLAINTIFF**

-VERSUS-

**SAMSON
NYAMWEYA.....DEFENDANTS**

RULING

Before me is an application dated 6th June 2011 seeking orders that:-

- (1) *The appeal herein be dismissed with costs for being an abuse of the court process and or otherwise for want of prosecution.*
- (2) *Upon granting order (1) above, the respondent do pay the appellant Kshs.93,955/= being the decretal sum with interest and costs from 30th June 2005 to date.*
- (3) *The Appellant to bear the costs of this appeal and this application.*

The application is brought pursuant to section 1A and 3A of the **Civil Procedure Act** and is premised on the grounds that the appellant has failed to prosecute his appeal for almost six years. The application is supported by the affidavit of **Don Z. Ogweno** (advocate for the respondent), who has deposed that the appeal was filed on 22nd July 2005 following the judgment delivered in favour of the plaintiff by the lower court in **Kisii CMCC No. 627 of 2005** delivered on 30th June 2005. He has further deposed that the appeal was dismissed on 10th July 2009 for the appellant's failure to comply with the court's orders of 18th June 2009 but was reinstated on 12th April 2010 following the consent of the parties.

There is a standalone affidavit on record dated 28th July 2011 sworn by one **Jones Nyachiro** advocate and filed on 29th July 2011. It is not stated whether the same is a replying affidavit to the application and neither is there a document setting out the grounds for opposing the application. Be that as it may parties appeared before **Makhandia J.** on 27th July 2011 and agreed to canvass the application through written submissions.

I have considered the application on the basis of the record, affidavits and submissions by respective counsel. The issue for my determination is whether there has been indolence in the part of the appellant which entitles the applicant the order of dismissal sought.

The appeal was filed on 22nd July 2005. It remained dormant until 27th April 2009 when it was admitted for hearing by **Muchelule J.** On 18th June 2009, directions were taken before **Musinga J.** who directed the appellant to comply with Order XLI Rule 1A of the **Civil Procedure Rules** (now repealed) within 14 days. The appellant failed to comply and on 10th July 2009, the appeal was struck out for non-compliance. The appeal was however reinstated on the consent of the parties on 12th April 2010. After reinstatement of the appeal, the appellant filed the Record of Appeal on 27th July 2011 after the applicant

filed the instant application on 10th June 2011.

The respondent has tried to explain the delay by stating that the firm of Kibichy and Company Advocates were initially on record and that at one point the lower court file was missing making it impossible to prepare a Record of Appeal. He has also submitted that no decision has been made by the Court as to admission of appeal or summary dismissal thereof.

Upon my perusal of the record I find that the appellant's counsel has not been truthful. Firstly, the record indicates that the appeal was admitted on 27th April 2009 by **Muchelule J.** Secondly, there is no record of correspondence to the Executive Officer of the lower court indicating that the file was missing from the registry and thirdly, although another firm of advocates were on record previously, the present advocates came on record way back in September 2009.

For the above reasons, I find that the appellant has handled the appeal casually, while all the time wasting the court's time and denying the respondent the fruits of the judgment in the lower court.

For the above reasons, I allow the applicant's application dated 6th June 2011. The appeal stands dismissed with costs. The appellant shall pay the decretal sum with interest from the date of judgment to date.

It is so ordered.

Ruling dated, signed and delivered at Kisii this 23rd day of August, 2012.

R. LAGAT-KORIR

JUDGE

In the presence of :

Edwin Mongare Court clerk

.....Counsel for the plaintiffs/Appellant

.....Counsel for the defendants/respondent

R. LAGAT-KORIR

JUDGE