



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 87 OF 2007

NELSON OKELLO OBILLO.....APPELLANT

VERSUS

TIMSALES LIMITED.....RESPONDENT

RULING

Nelson Okello Obillo filed this appeal against Timsales Ltd on 30/5/2007. On 25/10/2010, the court moved under **Order 41 Rule 3(2)** of the **Civil Procedure Rules** and issued a notice on the appellant to show cause why the appeal cannot be dismissed for want of prosecution.

Alfred Nyagaka Advocate filed an affidavit in which he depones that their efforts to prosecute the appeal have been frustrated by the lack of the lower court file and proceedings. Counsel annexed a letter dated 3/7/2007 addressed to Chief Magistrate Nakuru asking for proceedings in the matter (**FON 1**). They paid for decree and proceedings **FON II – IV** and wrote to the Chief Magistrate on 8/5/2009 and 29/7/2009 (**FON V**) seeking to have the lower court file reconstructed. On 4/2/2010 they wanted to move the court for reconstruction when they were asked to indulge the registry as they searching for the file. Further letter was written on 24/6/2010 (VII).

In opposing the appellant's request to be given more time to prepare the record of appeal, Mr. Mahida, advocate for the respondent filed an affidavit dated 26/11/2010 in which he denies having been served with a memorandum of appeal or the letters which have now been exhibit in court till the appellant was called upon to show cause. Counsel also noted that the application seeking reconstruction was never filed in the lower court.

Having considered the affidavits filed herein, I note that though the appellant made some effort in having the appeal ready for hearing, not enough was done. For the little effort made, this court will allow the appellant 6 months within which to have the file reconstructed if it is true that it cannot be found and prepare the record of appeal for admission and setting it down for hearing. In default the same shall stand dismissed. Costs to the respondent.

DATED and DELIVERED this 20th day of May, 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Onchangu holding brief for Mr. Ombui for the Appellant.

Ms Wanjiru holding brief for Mahida for the Respondent.
Kennedy – Court Clerk.