



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

CIVIL APPEAL NO.10 OF 2009

(Appeal from original BGM CM CC NO.503 of 2007)

**ISAAC MUCHUMA WASIKE.....APPLICANT/
RESPONDENT**

VRS

**JOHN BARASA.....RESPONDENT/
APPLICANT**

RULING

This is an application dated 12/08/2009 seeking for orders for dismissal of the application dated 15/01/2009 for want of prosecution. Parties agreed to have the application heard by way of the affidavits sworn by the parties.

The grounds supporting the application are that the Applicant's application dated 15/01/2009 has not been prosecuted for over a period of three months since it was filed. The Respondent depones that he was served with that application on 10/2/2009 and that he filed a replying affidavit within three weeks after service. The Applicant was granted leave to file a supplementary affidavit on 10/02/2009 by 10/03/2009. The court was not sitting on the 10/03/2009 but the Applicant did not bother to attend to fix another date. The Respondent is affected by the stay which has held O.C.S Kimilili not to execute the orders granted by the Principal Magistrate Bungoma for exhumation of the body of one Buluma Wasiuma.

The facts leading to this application are that the applicant obtained an order in Bungoma CMCC No.503 of 2007 to have the body of the deceased one Buluma Wasiuma exhumed from plot no.238, Tongaren. The Respondent intended to file and appeal against that decision but was out of time. The application dated 15/01/2009 seeks for stay of execution and for extension of time to appeal. This is the application which the Respondent has filed to prosecute although it was filed under certificate of urgency.

The certificate of urgency dated 15/01/2009 states:

“.....certify that this application is extremely urgent and in need of immediate disposal, the urgency being that the applicant has been ordered to exhume a dead body which decree may be executed.”

The Applicant in that application has not been keen to have his application heard despite the extreme urgency indicated in the certificate. This is evident in the Applicant's failure to prosecute his application. The Officer Commanding Kimilili Police Station cannot execute the decree in CMCC No.503 of 2007 for the reason that he is still awaiting the determination of the application for stay pending appeal.

In any application brought under certificate of urgency, the Applicant is required to use due diligence to prosecute the application. An application under certificate of urgency ceases to be urgent when the Applicant loses interest in it. The Applicant herein has surely lost interest in his application to appeal out of time and for stay of execution by failing to prosecute it. He depones in his replying affidavit that he is still awaiting to be supplied with a certificate of delay by the Deputy Registrar. I tend to disagree with this explanation in that no effort to follow up the request for issue of the certificate of delay has been demonstrated. No correspondence between the Applicant's counsel and the court was annexed to the replying affidavit.

In his supplementary affidavit the Applicant argues that the Respondent lost interest in the application because his application has no chances of success. I have looked at the affidavit supporting the application dated 15/01/2009 and I tend to agree with the Applicant that the Respondent has developed cold feet due to diminished chances of success in the application.

The Applicant has convinced this court that the application is no longer urgent because the Respondent has failed to prosecute it. There is no stay of execution order granted herein. The application to appeal out of time is supported by flimsy grounds. It is therefore highly unlikely that the application will succeed. Failure to prosecute a certificate of urgency application is an omission for which the Applicant can hardly justify delay on his part. I am not convinced that there is any satisfactory explanation given by the Respondent.

I find the application dated 12/08/2009 merited and allow the orders as prayed. The application dated 15/01/2009 stands dismissed with costs.

F. N. MUCHEMI

JUDGE

Ruling dated and delivered on the 11th day of July, 2011 in the presence of Mr. Situma for Kassim for the Respondent.

F. N. MUCHEMI

JUDGE

