



IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO. 87 OF 2007

LONGONOT HORTICULTURE LTD.....1ST
APPELLANT

WAIGURU WAWERU.....2ND
APPELLANT

VERSUS
JOHN

KANYONI.....RESPONDENT

RULING

On 30th May 2007, the two Appellants filed a Memorandum of Appeal. The appeal sought to challenge the Lower Court's order made on 3rd May 2007 declining to hear the Appellants' application for dismissal for the reason that there was a hearing date on record. On 20th October 2010, this court issued a notice to show cause why the Appeal should not be dismissed pursuant to **Order 41 Rule 31(2) C.P.R.** Counsel for the appellants has filed an affidavit to show cause dated **16th November 2010** in reply. The reasons given for not prosecuting the appeal are that the appellant's counsel applied for certified copies of proceedings and judgment in **Civil Case No. 2317 of 2002** vide letter dated 18th May 2007 (**DPM.I**) and despite reminders, the proceedings and ruling were not forthcoming. Counsel obtained a photocopy of the proceedings and typed them. He submitted them to court as **DPM.II**. The appellants request the court to allow them time to prepare the record of appeal so that the appeal can be heard.

The respondent opposed the notice to show cause. Mr. Gekonga, counsel for the respondent urged that when the appeal that was filed on 30.5.2007, it stayed the proceedings in the lower court. That the lower court proceedings were very brief as evidenced by the annexure **DPM.II** and there is no good reason why proceedings of one line could have taken 4 years to procure.

I am in agreement with the Respondent that the Appellants have not acted diligently to have this appeal heard. The Ruling of the court was one line. The rest of the proceedings before the lower court which included dates, mention dates and quorum comprise 3 pages. Counsel for the appellants wrote to the Chief Magistrate's Court asking for the proceedings and Ruling vide his letter 15.5.2007 even before the appeal was filed. Though Mr. Mahida has deponed that he sent several reminders to the court seeking proceedings, there is no evidence of that. The Appellants have now exhibited the said proceedings as **DPM.II** which they said they got photocopies and typed. That was only done after this notice to show cause was issued. I find that the Appellants have done nothing towards prosecution of this appeal. It is over 4 years ago since the lower court proceedings were stopped and this court finds that the Appellants are not serious or keen on prosecuting this appeal. It would be unfair and an abuse of the court process to let the appeal remain on record and it is hereby struck out with costs to the Respondent.

DATED and DELIVERED this 18th day of November, 2010.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Nyambane holding brief for Mahinda

Mr. Simiyu holding brief for Gekonga for Respondent