



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
(Coram: Ojwang, J.)
CIVIL APPEAL NO. 131 OF 2009

-BETWEEN-

**MUSILI KALEVE.....APPELLANT/
RESPONDENT**

-AND-

**JUMA SWALEH NYUNI.....RESPONDENT/
APPLICANT**

RULING

The respondent moved the Court by Notice of Motion dated **24th March, 2010**, brought under Order XVI, rules 5 and 6 of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap. 21, Laws of Kenya). The application carried one substantive prayer: “THAT the appellant’s appeal filed in this Court be dismissed with costs for want of prosecution”.

The grounds for the application were stated as follows:

- (i) that the appellant has taken no steps to prosecute this appeal in any manner whatsoever;**
- (ii) that the pendency of the appeal and the long delay in prosecuting it, is causing much inconvenience and injustice to the respondent/applicant.**

Evidence in support of the application is set out in the applicant’s affidavit: it is more than one year since the appeal was filed, but the appellant has taken no initiative to serve any papers upon the respondent, or to fix his appeal for hearing, nor taken any action to prepare a record of appeal; since the filing of the appeal the appellant has shown no desire or intention to prosecute his appeal, and has lost interest for a period of over one year.

The respondent filed a replying affidavit on **14th May, 2010** stating his belief in the truth of advice from his advocate, that “the application is premature, misconceived and amounts to an abuse of Court process”; that “the application is fatally defective and.....has been brought under the wrong provisions [of the law]”; that “it is not true that one year has lapsed since I filed the memorandum of appeal, as I did so on or about **22nd July, 2009**”; that the respondent has since filed the record of appeal.

The respondent annexed the said memorandum of appeal prepared by himself in person, dated **20th July**,

2009 and filed on **22nd July, 2009**.

The record shows that the appeal in question is from the decision of the Appeals Committee for Coast Province, in Land Award Case No. 52 of 2008 – the Judgment thereof having been delivered on **8th July, 2008**. In the grounds of appeal it is stated that: the burden of proof had improperly been shifted from the applicant to the respondent; the Appeals Committee erred in law when it upheld the earlier award by the panel of elders, without any reason given; the Appeals Committee was improperly constituted and could not reach a valid decision in law; the Appeals Committee erred in law and acted in contravention of the Land Disputes Tribunal Act, 1990 (Act No. 13 of 1990) by proceeding to hear the dispute afresh, instead of following the grounds of appeal stated by the appellant; the Appeals Committee erred in law and acted in contravention of the Land Disputes Tribunal Act, by proceeding to hear a dispute which emanates from land registered under the Registered Land Act (Cap. 300, Laws of Kenya) and consequently, the decision was a nullity in law.

The Court file shows that on **15th May, 2010** the respondent herein filed the Record of Appeal; and it is on **15th July, 2010** that the applicant herein was fixing a hearing date for the instant application to terminate the appeal for want of prosecution.

Both parties attended in person, on the occasion of the hearing of the application; and the applicant spoke briefly, only asking that the respondent's appeal be dismissed for want of prosecution; he also asked for costs. The respondent spoke equally briefly, stating that he was not late in lodging his appeal.

The attendant facts on the application and the reply have already been set out hereinabove, and what is remarkable about these recorded facts is that the applicant contended in Court that the appeal was filed late, save that the appellant falsified the dates shown.

Quite apart from the fact that such a claim is essentially informal and its validity cannot be ascertained, this Court has its reference for decision-making in the merits of the case. Those merits emerge from the grounds stated in the Memorandum of Appeal which, as already shown, carries eminently triable questions. The conclusion to be drawn is that there is a meritorious appeal, which, by the record, was not filed out of time without leave.

I disallow the respondent's application by Notice of Motion dated **24th March, 2010**, and order that the respondent/applicant shall bear the appellant/respondent's costs.

DATED and DELIVERED at MOMBASA this 12th day of November, 2010.

J. B. OJWANG

JUDGE