



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT EMBU**

**Civil Appeal 34 of 2002**

**KAREMBU MUKONO.....APPELLANT**

**VERSUS**

**JOSPHAT MUNENE MUKONO.....RESPONDENT**

**RULING**

This appeal was filed before this court six years ago. It was admitted on 8/9/2003. The same was not served although there were interim orders for stay in place. The court had to intervene and direct that the same be served on the respondent within 14 days on 22/11/2004. The order appears not to have been complied with and almost 1 year later i.e. on 17/11/2005 Judge Khaminwa gave another order that the record of appeal be served. The issue came up again on 18/12/2006 and counsel for the Respondent informed the court that they were yet to be served with the record of Appeal. The court ordered once again that the record of appeal be served before a hearing date could be taken. Counsel for the Respondent then filed the application dated 21/3/2007 counsel for the appellant asked for leave to file a replying affidavit which he had not filed. Indeed, counsel on record for the Respondent opposed the application for adjournment and submitted that counsel for the appellant/Respondent could reply on points of law which did not need a replying affidavit. Mr. Mogusu did not nonetheless take that option and insisted that he wanted to respond to some matters of fact. The Judge gave him 7 days within which to file the said replying affidavit failing which the court would allow the said application. The replying affidavit was therefore supposed to have been filed by 17/5/2007. It was not filed as ordered by the court but the same was filed on 28/5/2007 which was 18 days later. The Judge refused to extend the time she had given earlier and expunged the replying affidavit and the grounds of opposition from the record. That now is the order Mr. Mogusu is asking this court to review. I have given a history of the matter because in such a case, when a party seeks exercise of favourable discretion by the court, his past and present conduct in the matter must be considered.

This history had indeed shown that the appellant, and Mr. Mogusu by extension have severally failed to comply with orders of the court where the court's discretion has been exercised in their favour. This has always been at the expense of the respondent. Is there any objective justification for me to exercise my discretion in their favour once again or the expense of the Respondent given their past conduct? I think not. Court's discretion has to be exercised judicially and not to oppress one party to the advantage of another. I have seen the proceedings of 10/5/2007 Mr. Mogusu had the option of relying on points of law then which did not need any affidavit. Indeed counsel for the Respondent pointed that out to him. He declined to do so. He cannot therefore come to this court and claim that he had a right to respond on points of law but was denied that chance. Nobody denied him that chance. His conduct of this matter from the word "go" displays a degree of lethargy and lack of seriousness which this court cannot condone at all. He has not acted diligently in this matter. He has failed on several occasions to comply with orders of the court in this matter until it appears like he was telling the court for granted. My sister Judge Khaminwa was justified in refusing to extend the time and expunging the replying affidavit from the record. The appellant does not deserve the discretion of this court being exercised in his favour. Accordingly, this application is hereby dismissed with costs to the Respondent. This court confirms the order of Justice Khaminwa issued on 10<sup>th</sup> May 2007 to the effect failure by the Respondent/Appellant to comply with the order will automatically amount to the application dated 21/3/2001 being allowed. The said application is

therefore allowed and orders granted as prayed.

**W. KARANJA**

**JUDGE**

Delivered, signed and dated at Embu this 30th ..day of July...2008.

In presence of:-