



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**

**CHUKA ELC CIVIL APPEAL CASE NO. 10 OF 2017**

**FORMERLY MERU ELC. CASE NO. 06 OF 2017**

**VIRGINIA MUCHANDI MUTHENGI.....APPELLANT**

**VERSUS**

**ELISHA K. NJAGI ..... RESPONDENT**

**RULING**

1. This application states that it has been brought to court under Order 12 Rule 7, Order 42 of the Civil Procedure Rules and Sections 3 & 3A of the Civil Procedure Act.

2. The application seeks the following orders:

- a) **THAT** this Application ought to be certified urgent and service thereof be dispensed with at the first instance.
- b) **THAT** this Honourable court be pleased to order that this Application be heard and determined on priority to any other Application hereof.
- c) **THAT** this Honourable court be pleased to grant a **stay of execution** for costs pending the hearing and determination of this Application.
- d) **THAT** this Honourable court be pleased to set aside its orders of 16<sup>th</sup> March, 2017 and reinstate the Appellant's Appeal dated 3<sup>rd</sup> March, 2014 herein.
- e) **THAT** this Honourable court be pleased to give further directions that it deems fit to grant hereof.
- f) **THAT** the costs of this application be in the cause.

3. The application has the following grounds:

- 1) **THAT** this Application is urgent because the Respondent has applied to have the Applicant committed to civil jail any time from tomorrow for failure to pay a sum of **Kshs. 120,350/=** being costs of the Appeal hereof.
- 2) **THAT** this Appeal was dismissed with costs for want of prosecution on 16<sup>th</sup> March, 2017 by **Hon. Justice P.M. Njoroge**.
- 3) **THAT** the Applicant's current Advocate, **Mr. Henry Kurauka** and who has just been instructed hereof has confirmed that the Appeal was dismissed for want of prosecution on 16<sup>th</sup> March, 2017.
- 4) **THAT** the Applicant's Application was not heard on merits. It was dismissed for want of prosecution. The Applicant is entitled to a fair and just hearing hereof.
- 5) **THAT** the Applicant's had instructed the firm of **M/S Kevin Nyenyire & Company Advocates** to represent her in this Appeal but the said Advocates failed to update and keep her informed of the progress of this Appeal until it was dismissed. The Applicant did not fail to attend Court or take the necessary actions because she did not know the status of her Appeal and she was not given any notice to appear in Court thereof.

6) **THAT** the error, mistake and or oversight by the former Appellant's advocate, **M/S Kevin Nyenyire & Company Advocates** is excusable and ought not to be visited upon innocent litigant hereof.

7) **THAT** the applicant's case falls squarely in the rule in **PYTHON WAWERU MAINA ~VS~ THUKU MUGIRA (1982-1988) 1 KAR, 171.**

8) **THAT** the Applicant's Appeal has merits. The said Appeal is arguable and has overwhelming chances of success.

9) **THAT** the applicant is elderly and sick. Any action to commit her to civil jail will greatly prejudice her.

10) **THAT** the Respondent will not suffer prejudice if this application is allowed.

11) **THAT** unless this application is immediately heard and determined, the applicant will be committed to civil jail, lose my right to appeal and will stand to suffer irreparable loss and damage.

4. The application is supported by the affidavit of Virginia Muchandi Muthengi, the applicant, sworn on **12<sup>th</sup> October, 2020** which states as follows:-

1. THAT I am an adult female of sound mind hence competent to swear this affidavit.

2. THAT I am the Applicant/Appellant herein.

3. **THAT** this Application is urgent because the Respondent has applied to have me committed to civil jail any time from tomorrow for failure to pay a sum of **Kshs. 120,350/=** being costs of the Appeal hereof.

4. **THAT** my Appeal was dismissed with costs for want of prosecution on 16<sup>th</sup> March, 2017 by **Hon. Justice P.M. Njoroge**.

5. **THAT** my current Advocate, **Mr. Henry Kurauka** and who has just been instructed by me has confirmed that the Appeal was dismissed for want of prosecution on 16<sup>th</sup> March, 2017.

6. **THAT** my Application was not heard on merits. It was dismissed for want of prosecution. I am entitled to a fair and just hearing hereof.

7. **THAT** I had instructed the firm of **M/S Kevin Nyenyire & Company Advocates** to represent me in this Appeal but the said Advocates failed to update and keep me informed of the progress of this Appeal until it was dismissed. I did not fail to attend Court or take the necessary actions because I did not know the status of my Appeal and I was never given any notice to appear in Court thereof.

8. **THAT** the error, mistake and or oversight by the former Appellant's advocate, **M/S Kevin Nyenyire & Company Advocates** is excusable and ought not to be visited upon me hereof.

9. **THAT** my Appeal has merits. The said Appeal is arguable and has overwhelming chances of success.

10. **THAT** I am elderly and sick. Any action to commit me to civil jail will greatly prejudice me.

11. **THAT** the Respondent will not suffer prejudice if this application is allowed.

12. **THAT** unless this application is immediately heard and determined, I will be committed to civil jail, lose my right to appeal and will stand to suffer irreparable loss and damage.

13. THAT annexed hereto marked **VMM 1** is a bundle of true copies of the supporting documents to wit; **Notice to Show Cause dated 11<sup>th</sup> September, 2020; Ruling dated 16<sup>th</sup> March, 2017 by Hon. Justice P.M. Njoroge and Memorandum of Appeal dated 3<sup>rd</sup> March, 2014 hereof.**

14. THAT I swear this affidavit in support of this Application.

15. **THAT** what is deponed to hereinabove is true to the best of my knowledge, information and belief.

5. The respondent opposed the application through his affidavit sworn on 22<sup>nd</sup> October, 2020 which states as follows:-

**I, ELISHA K. NJAGI** adult male of P.O. Box 5, Marimanti in the Republic of Kenya do hereby make and solemnly swear as follows:-

1. THAT I have read and understood the notice of Motion herein together with the supporting affidavit, hence my reply.

2. THAT this matter emanated from Marimanti principal Magistrate's Court, Case No 4 of 2010, wherein the applicant/appellant

was the defendant.

3. THAT after she was served with summons to enter appearance, she refused to file defence and judgment was entered against her.
4. THAT thereafter, she made an application to set aside the judgment, blaming her advocate M/S Wanjohi & Co., Advocates for the failure to enter defence.
5. THAT the application to set aside the judgment was rejected by the lower court. Copy of the ruling annexed and marked EKN I.
6. THAT the applicant then filed Meru High Court Civil Appeal No 6 of 2014 challenging the refusal to set aside the judgment.
7. THAT the appeal was admitted for hearing on the 29/9/2014.
8. THAT on the 26/2/2015, my advocate on record herein wrote to the Deputy Registrar of the High Court to inquire whether the appeal had been admitted. Copy of the letter annexed and marked EKN II.
9. THAT after perusal of the court file by my advocate, he confirmed that indeed the appeal had been admitted.
10. THAT subsequent to the confirmation, my advocate wrote to the applicant's advocate then on record M/S KEVIN NYENYIRE & CO. ADVOCATES informing them that the appeal had been admitted and pleaded with them to have the record of appeal filed. Copy of the letter annexed and marked EKN III.
11. THAT the appeal was then transferred from Meru to Chuka ELC Court and the parties were informed of the transfer. Copy of the notice annexed As EKN IV.
12. THAT after a long wait, indeed over 3 years, I instructed my advocate to move the court to have the appeal dismissed for want of prosecution and he filed the application dated 23/2/2017.
13. THAT the application for dismissal was duly served upon the applicant on the 6/3/2017 with a hearing date for 16/3/2017. A copy of the affidavit of service and a copy of the application duly stamped by the applicant's advocates annexed and marked EKN V (a) and (b).
14. THAT the applicant did not oppose the application and did not attend court on the hearing date, leading to the dismissal of the appeal, with costs to me.
15. THAT costs were subsequently taxed and the applicant was informed of the same. A copy of the letter annexed s EKN VI.
16. THAT due Notice of Taxation of costs was served upon the applicant but did not attend the Deputy Registrar to contest the bill. Copy of the Notice of Taxation annexed as EKN VII.
17. THAT the applicant did not attempt to pay the costs or any part thereof and I instructed my advocate to proceed to execute against the applicant
18. THAT the applicant can not now turn around and blame her previous advocate for the dismissal, while she does not state anything that she did to know the status of her appeal for a period of 6 years since it was filed.
19. THAT the applicant had duty to check the position of her appeal with her advocate or with the court if she had any interest in pursuing the appeal. She does not state anything about any efforts she made.
20. THAT the applicant is in the habit of blaming her counsel as she did before the trial court at Marimanti and now before this court, which clearly shows her character, as being a very indolent litigant.
21. THAT she is the only one to blame as she did not make any efforts to have her appeal heard and determined if she believed she had any arguable appeal, as she now alleges.
22. THAT the judgment entered against the appellant by the trial court has been fully executed and to reinstate the appeal would be an exercise in futility and a waste of judicial time.
23. THAT I am informed by my advocate on record herein which I verily believe to be true, that the application herein is incompetent as it is filed by advocate who is not properly on record for the applicant.
24. THAT I am further advised by my advocate on record, which I verily believe to be sound, that no order of stay of any costs can issue and none would issue in the instant case.
25. THAT there I an inordinate delay on the part of the applicant in bringing this application and if it is allowed, it will occasion great prejudice to the respondent.

26. THAT subject matter of the suit herein, was upon the conclusion of the appeal registered in my name, and I have since its registration sold and transferred the suit land to a 3<sup>rd</sup> party. Copy of the title in the name of the purchaser annexed as EKN VIII.

27. THAT the facts the case, the circumstances thereof, the developments since the conclusion of the appeal and the conduct of the applicant militates against the reinstatement of the appeal and th application should be dismissed with costs.

28. THAT what I depone herein is true and within my personal knowledge except where otherwise stated.

6. The application was canvassed by way of written submissions. I opine that in matters canvassed through written submissions, whenever and wherever it is possible, it is more efficient and more comprehensive, so that no issues are left out, to reproduce the parties submissions in full. I do that herebelow:-

7. The applicant's submissions are reproduced in full herebelow without any alterations whatsoever:

### **APPLICANT'S SUBMISSIONS**

#### **YOUR LORDSHIP,**

The Applicant wishes to tender his submissions as hereunder:

#### **A. INTRODUCTION**

The Applicant's Notice of Motion is dated **12<sup>th</sup>** day of **October, 2020** and supported by the Affidavit of the Applicant sworn on the same date. The Respondent has filed an affidavit to oppose the application. The Respondent has raised several issues of facts and which ought to be canvassed at the hearing of the Appeal hereof.

This Honourable Court has unfettered discretion and powers to grant the orders sought in the Application hereof.

#### **B. GROUND OF THE APPLICATION**

1. **THAT** this Application is urgent because the Respondent has applied to have the Applicant committed to civil jail any time from tomorrow for failure to pay a sum of **Kshs. 120,350/=** being costs of the Appeal hereof.
2. **THAT** this Appeal was dismissed with costs for want of prosecution on 16<sup>th</sup> March, 2017 by **Hon. Justice P.M. Njoroge**.
3. **THAT** the error, mistake and or oversight by the former Appellant's advocate, **M/S Kevin Nyenyire & Company Advocates** is excusable and ought not to be visited upon innocent litigant hereof.
4. **THAT** the Applicant's Appeal has merits. The said Appeal is arguable and has overwhelming chances of success.
5. **THAT** the applicant is elderly and sick. Any action to commit her to civil jail will greatly prejudice her.
6. **THAT** the Respondent will not suffer prejudice if this application is allowed.
7. **THAT** unless this application is immediately heard and determined, the applicant will be committed to civil jail, lose my right to appeal and will stand to suffer irreparable loss and damage.

#### **C. CASE LAW**

The Applicant relies on the celebrated case of **PYTHON WAWERU MAINA ~VS~ THUKU MUGIRA (1982-1988) 1 KAR, 171.**

**It was held that the Court has discretion to allow setting aside of a dismissal order.**

Thus a mistake or oversight of a counsel should not be visited upon an innocent party.

In the case of **Ngome ~VS~ Plantex Co. Ltd**

**The Court held that a dismissal order may be set aside if the party can show 'good cause' that the reasons for dismissal was done due to non-attendance or a reason that can well be explained.**

#### **D. PRAYERS SOUGHT IN THE APPLICATION**

The Applicant is seeking the following orders;

a) **THAT** .....spent.....

b) **THAT** this Application ought to be certified urgent and service thereof be dispensed with at the first instance.

c) **THAT** this Honourable court be pleased to order that this Application be heard and determined on priority to any other Application hereof.

d) **THAT** this Honourable court be pleased to grant a **stay of execution** for costs pending the hearing and determination of this Application.

e) **THAT** this Honourable court be pleased to set aside its orders of 16<sup>th</sup> March, 2017 and reinstate the Appellant's Appeal dated 3<sup>rd</sup> March, 2014 herein.

f) **THAT** this Honourable court be pleased to give further directions that it deems fit to grant hereof.

g) **THAT** the costs of this application be in the cause.

## **E. CONCLUSION**

The Applicant has explained the reasons for dismissal and hereby persuades the Honourable Court to exercise its discretion and grant the Application dated 12<sup>th</sup> day of **October, 2020** as prayed.

Dated at Nairobi this 28<sup>th</sup> day of **October, 2020**

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**KURAUKA & CO.**

**ADVOCATES FOR VIRGINIA MUCHANDI MUTHENGI**

**THE APPLICANT/APELLANT**

8. The respondent's submissions are reproduced in full herebelow without any alterations whatsoever:-

### **RESPONDENT'S SUBMISSIONS**

The applicant/appellant has moved this court vide a Notice of Motion dated 12/10/2020, seeking two substantive reliefs:-

***1. That this Honourable Court be pleased to grant a stay of execution for costs pending the hearing and determination of this application.***

***2. That this Honourable court be pleased to set aside its orders of 16<sup>th</sup> March, 2017 and reinstate the appellant's appeal dated 3<sup>rd</sup> March, 2014 herein.***

The application is expressed to be brought under Order 12 Rule 7 and Order 42 of the Civil Procedure Rules, and Sections 3 & 3A of the Civil Procedure Act. It is supported by sworn affidavit of the applicant. The Respondent opposes the application and has filed an affidavit in reply to the one filed by the applicant.

### **APPLICABLE LAW**

The application is expressed to be under Order 12 Rule 7 and Order 42 of the Civil Procedure Act.

Order 12, Rule 7 of the Civil Procedure Rules provides as follows:-

***“Where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”***

The whole of Order 12 is dedicated to hearings and the consequences of non-attendance during hearing. By bringing this application under this part of the law, the applicant appears to state that her appeal was dismissed because of her failure to attend hearing and the appeal was dismissed under the provisions of Order of 12. This is not the position herein. The appeal herein was dismissed pursuant to the provisions of Order 17 Rule 2, of the Civil procedure Rules. Notice was given to appellant to show cause why the appeal should not be dismissed for want of prosecution, through the application dated 22/2/2017. There was no cause shown to the satisfaction of the court at all, and the appeal was dismissed for want of prosecution, and not for the applicant's failure to attend court on the date fixed for hearing.

It is clear therefore that reliance on Order 12 of the Civil Procedure Rules is misplaced and it has no relevance in this case.

Once a suit has been dismissed for want of prosecution under Order 17 of the Civil Procedure Rules, it cannot be reinstated by the court, save for instance where court is shown that due notice was not given or that one year had not lapsed without taking any steps and this can only be done by way of review under Order 45 of the Civil Procedure Rules. There is no provision under order 17 for reinstating the suit, in the manner sought herein.

The applicant has quoted Order 42 generally without specifying the relevant rules. Order 42 deals with various aspects of appeals. The appeal was dismissed. There is no therefore no appeal alive that would enable the court to move under rule 6 to grant stay. The only rule under Order 2 that deals with reinstatement of appeal dismissed is Rule 21. However, this rule only relates to appeals dismissed under Order 20, which provides as follows:-

***“where on the day fixed, or on any other day which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, and has not filed a declaration under rule 16, the court may make an order that the appeal be dismissed.”***

We submit that Rule 21 applies only where the appellant has failed to appear on the date of hearing. This is not the case herein.

We further submit that Section 3 & 3A of the Civil Procedure Act are not applicable in the circumstances of this case. Indeed, Section 3 & 3A were intended to prevent injustice or abuse of the process of court. The applicant’s conduct in filing the appeal in the year 2014, taking no steps for a period of 3 years, even with prompting and pleas from the respondent to have the appeal fixed for hearing, amounts to not only an act of injustice but a clear abuse of the process of the court.

The respondent has filed an exhaustive affidavit setting out the facts, leading to the dismissal. The appeal was admitted for hearing on the 29/9/2014. The respondent’s counsel took the initiative to find out whether the appeal had been admitted not the appellant. We refer your Lordship to the respondent’s s annexure EKN II, paragraph 8 of the affidavit. The discovery of the admissions of the appeal was followed by a letter by respondent’s counsel dated 17/11/2014, annexure EKN III,, referred to in paragraph 10 of the respondent’s affidavit. In the letter, the respondent was literally pleading with the applicant to take steps to have the appeal heard. She was not moved at all and some 3 good years later, the respondent moved the court to have the appeal dismissed. The respondent did not contest the application for dismissal, though properly served. We submit that the provisions of Section 3A work against the applicant who acted indolently. The courts do not assist the indolent, but the vigilant.

In all this, the applicant blames her former advocate, who she says, did not keep her informed of the progress of her appeal. She states, she did not attend court because she did not know the status of her appeal.

The respondent has demonstrated that the applicant has the habit of blaming her counsel and will not be surprised if she turns to blame the present counsel. The respondent has annexed a copy of the ruling made by the trial court, as annexure EKN I wherein she had made similar allegations against her then advocate.

The applicant has not stated what steps she took to check with her advocate the status and progress of her appeal from the date she filed in 2014 till 2020 when she was served with Notice to Show Cause Why Execution should not Issue. This is a period of 6 years of inaction by the appellant. The appeal at all times belonged to the applicant. She had at all times, the obligation to visit the offices of her counsel to check on the position of the appeal. She did not take any step herself for 6 years until she was woken up by execution for costs awarded when the appeal was dismissed some 3 years back. It cannot be said with any stretch of imagination that the counsel for the applicant was solely responsible for non-prosecution of the appeal. She cannot be said to be an innocent party in the circumstances of this case, and the set of facts in the case of **PITHON WAWERU MAINA –vs- THUKA MUGIRA** are completely different and distinguishable from the set of facts in the present case.

In the case of **RICHARD NCHAPI LEIYANGU –V-S IEBC & 2 OTHERS** the court when dealing with the court’s exercise of its discretionary powers, stated inter alia,

***“is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error, but not to assist as person who deliberately seeks to obstruct or delay the course of justice.”***

What would one say of a party who prefers an appeal and takes no steps, shows no interest and does nothing for 6 years? The inevitable conclusion is that such a party obstructed and delayed the course of justice. The appeal was not dismissed because of an error or mistake. It was dismissed for want of prosecution for inordinate delay.

In the case of **HABO AGENCIES LTD –VS- WILFRED ODHIAMBO MUSINGO (20150 eKLR)**, the court stated that:-

***“it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”***

In the case of **MWANGI –VS- KARIUKI (199) LLR 2632 (C.A.K)** the Hon Justice Shah ruled: -

***“mere inaction, by counsel should only support a refusal to exercise discretion if coupled with litigant’s careless attitude. In the instance case, there is nothing on record to show what action the appellant took between 24<sup>th</sup> October, 1988 and 7 April, 2005 to ensure that the suit he had filed at the High Court was prosecuted. There is no credible explanation for the delay.”***

Just as in the **MWANGI** (supra) case, there is no explanation offered by the applicant for inaction from 2014 to 2017 when the appeal was dismissed. There is no explanation for a further delay from 2017 to 2020 when this application was made. Unexplained delay of cumulative 6 years is inexcusable and grossly inordinate.

The court was faced with a similar situation in the case of **MWANGI GACHIENGU & 2 OTHERS –vs- MWAURA GITHUKU & ANOTHER – (2019) eKLR , Hon Justice O.A. Angote**, while dismissing an application to reinstate a suit dismissed for want of prosecution stated:-

***“it is trite law that a matter once filed in court does not belong to the advocate but to the litigant. It is the responsibility of the litigant to be in constant touch with his advocate on the position of the matter. Where a litigant goes to sleep after filing a suit,, he cannot blame his advocate for having not updated him on the position of the matter, or when the matter is dismissed because it has not been prosecuted or fixed for prosecution within one year.”***

The judge proceeded to decline the application to reinstate the suit taking the position that: -

***“it does not matter that their advocate never informed them about the proceedings.”***

The position in the present case is similar with what was obtaining in the **MWANGI GACHIENGU** case, supra.

The applicant went to sleep for 6 years. She cannot be allowed to turn around and blame her advocate for the dismissal of the appeal.

It is our further submissions that, stay prayed herein would serve no purpose, other than delay in realization of costs. We say this because the decree in the lower court has been fully executed. The suit land has already been registered in the name of the respondent. Refer to paragraph 26 of the respondent's affidavit. Indeed, the respondent has deponed and it has not been controverted that he has since sold to a third party. Staying execution of costs and reviving the appeal will serve no purpose other than cause great prejudice to the respondent and to the innocent purchaser of the land.

We further submit that the applicant in her quest for stay of payment of costs, has not satisfied the criteria set out in order 42 Rule 6 (2). She has not demonstrated what substantial loss she stands to suffer by paying the taxed costs. The costs have been ascertained and it has not been alleged that the respondent is incapable of refunding the money in the event of her succeeding, if the appeal is reinstated.

We further submit that the application has been brought after inordinate delay. The appeal was dismissed in the year 2017 and the costs were taxed in 2018. The delay of 3 years is not explained by the applicant.

We further submit that the applicant has not tendered any security for the costs in monetary terms.

It is our submissions that the conduct of the applicant, both after filing this appeal and before the lower court, the delay in filing this application and the fact that the decree in the lower court has been fully executed, militates against the reliefs sought herein. This is not a case of excusable mistake or error. It is a case of the applicant blatant failure to prosecute her appeal for years.

We further submit the entire application is incompetent on account of the fact that the advocate for the applicant is improperly on record. The firm of **KURAUKA & CO. ADVOCATES** did not seek leave of the court before coming on record for the applicant.

Order 9 Rule 9 of the Civil procedure Rules provides:-

***”when there is change of advocate or when a party decides to act in person having previously engaged an advocate after judgment has been passed, such change or intention to act in person shall not become effected without an order of the court:-***

***a) Upon an application with notice to all the parties or***

***b) Upon consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”***

The firm of **KURAUKA & CO. ADVOCATES** did not seek order of the court. The application herein does not seek any leave of the court to come on record. There is no consent between the outgoing advocates and the proposed incoming advocates.

It follows in this case that since judgment had been delivered, dismissing the applicant's appeal, the firm of **KURAUKA & CO. ADVOCATES**, needed leave of the court or consent of the advocates on record before coming on record and filing this application. Moreover, there is no Notice of Appointment of Advocates by the firm of **Kurauka & Co., Advocates**. On this ground alone, the application should be dismissed with costs to the respondent.

**DATED AT MERU THIS...30<sup>TH</sup> ...DAY OF...OCTOBER,...2020**

**FOR: MURANGO MWENDA & CO**

**ADVOCATES FOR THE RESPONDENT**

9. I have considered the pleadings filed by the parties to buttress their diametrically incongruent assertions. I have also considered the authorities proffered by the parties to support their assertions. I opine that the said authorities are good authorities in their facts and circumstances. However, no two cases are congruent in their facts and circumstances to a degree of mathematical exactitude.

10. This suit was first filed at Marimanti Senior Resident Magistrates Court in 2010 as Civil Case No. 4 of 2010. This is roughly 11 years ago. This is an inordinately long period of time for a case to remain unfinished in the judicial pipeline. For the 2<sup>nd</sup> time, the applicant is blaming a former advocate for his woes. I do note that the judgment in Marimanti SRM's Case No. 4 of 2010 has been fully executed and the suit land transferred to a 3<sup>rd</sup> party.

11. In this case, Notice was properly issued for the parties to come to court on **16<sup>th</sup> March, 2017** to show cause why the suit should not be dismissed for want of prosecution. On that day, the applicant was not present in court but her advocate, Mr. Kevin Nyenyire was in court. He told the court that he had lost contact with his client and left it to court to make its own decision. The respondent's advocate in the appeal, Mr. Murango Mwenda, demonstrated his efforts to have the matter proceed to hearing without success. He asked the court to dismiss the case.

12. Although the applicant states on the face of the application that she relies on Order 12 Rule 7 of the Civil Procedure Rules, this is not the correct rule that should be relied upon. This appeal was dismissed on the strength of Order 17 Rule (2) as read with Order 42 Rule 35(1) of the Civil Procedure Rules.

13. I find that the applicant has not demonstrated to the satisfaction of this court that the orders given by the court should be set aside and that the suit should be reinstated.

14. I note that the suit was dismissed on **16<sup>th</sup> March, 2017**, almost **4 years ago**. The reason given to explain this inordinate delay is not convincing. It is clear that the applicant only filed this application after the respondent sought to execute the award of costs. This fact is brought out by the applicant's grounds in the application.

15. I do note that the applicant's advocate did not file a Notice of Appointment. He also did not seek the leave of court to come on record as required by Order 9 of the Civil Procedure Rules.

16. In the circumstances, I issue the following orders:

- a) This application is dismissed.
- b) Costs are awarded to the Respondent.

Delivered in open Court at Chuka this **24<sup>th</sup> day of February 2021** in the presence of:

CA: Ndegwa

Mwiti h/b Karauka for the Appellant

Muthomi Gitari for the Respondent

**HON. JUSTICE Dr. P. M. NJOROGE,**

**ELC JUDGE.**