



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 14 OF 2018**

**NICHOLUS KIURA..... APPELLANT/APPLICANT**

**VERSUS**

**NJIRU M RUMBIA & DOMINIC KATHURI NJIRU**

**(suing as the legal representatives of**

**Stella Mukami Njiru (deceased).....RESPONDENT**

**RULING**

1. The appeal herein was on the 13<sup>th</sup> July, 2021 listed for Notice to Show Cause why it should not be dismissed for want of prosecution. On the said date, counsel for the appellant did not attend the virtual court to show cause why the appeal should not be dismissed and consequently it was dismissed.
2. By way of an application dated the 1<sup>st</sup> day of March, 2021, counsel for the appellant moved the court to have the orders dismissing the appeal reviewed and set aside and for reinstatement of the notice to show cause and for hearing of the same on merits. The said application was allowed by the court vide a ruling delivered on the 7<sup>th</sup> day of June, 2021.
3. Counsel for the appellant was directed to file an affidavit to show cause why the appeal should not be dismissed and following the said directions, he did file the same on the 27<sup>th</sup> June, 2021.
4. In the affidavit to show cause which was sworn by Mr. Eddie Njiru, an advocate of the High Court, he deposed that the appeal has been active by way of interlocutory proceedings, which were fully heard and determined vide the ruling dated 5<sup>th</sup> day of December, 2019 which paved way for the issuance of directions under Order 42 Rule 13 of the Civil Procedure Rules.
5. He further deposed that by the beginning of the year 2020, the ordinary course of live and livelihood was all brought to a grinding halt by the onset of the Covid-19 pandemic which is still ravaging the entire world to date.
6. He urged the court to take judicial notice as to the Covid-19 situation as substantially contributing factor why the appellant could not ordinarily prosecute the appeal from December 2019 to date. He also urged the court to find that sufficient cause has been shown to warrant the hearing of the main appeal on merits and in the interest of justice and fairness.
7. The court has perused the record and the affidavits filed herein by both parties.
8. Counsel for the appellant has deposed that directions have not been given under Order 42 Rule 11 and Section 79B of the Civil Procedure Act and therefore, the appeal was not ready for prosecution.
9. The appeal was dismissed pursuant to the provisions of **Order 42 Rule 35(2) of the Civil Procedure Rules** which provides as follows: -  
  

***“If within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal”.***
10. Though this is the legal position, I am not persuaded that there is any justification, for a party to file an appeal, and thereafter go to sleep.
11. As Justice Musyoka rightly stated in the case of **Abraham Mukhola Asitsa v Silver Style Investment Company Ltd [2020] eKLR**, an appeal is not filed for the sake of it. It should not be parked at the appeals registry for times on end without any action being taken. I believe a

party who files an appeal and goes to sleep and takes no action on it for a long time, cannot hide under the provisions and argue that since directions had not been taken, then the appeal cannot be dismissed. An appeal should not be left to hang over the head of a respondent endlessly, where the appellant is unwilling to take action on it. Justice demands that the same be resolved one way or the other and dismissal of such appeals is one of the resolutions.

12. In the affidavit in support of dismissal filed on the 5<sup>th</sup> day of August, 2021 and sworn by Mr. Don Z. Ogwen, counsel for the respondent, on the 15<sup>th</sup> July 2021, he deposes that, the appeal was filed on the 19<sup>th</sup> April, 2018 and on the 17<sup>th</sup> May 2018, the appellant lodged motion dated the 15<sup>th</sup> day of May, 2017 but presumably dated 15<sup>th</sup> May 2018.

13. He further deposed that, the appellant applied for typed copies of the proceedings which were typed and certified by 29<sup>th</sup> April, 2010 and the same was in appellant's possession as at the 17<sup>th</sup> May, 2018 when the application dated 15<sup>th</sup> May was filed.

14. Further that, the court delivered its ruling on that application on the 17<sup>th</sup> July 2018, in which, the court directed the appellant to file and serve the record of appeal and to list the matter for directions within 60 days, which directions were not complied with. That, to date, no record has been filed despite the orders of the court and the said orders have not been reviewed or set aside.

15. The deponent further deposed that the decree was signed and sealed on the 4<sup>th</sup> day of May, 2018. That the appellant filed another application dated the 28<sup>th</sup> day of August, 2018 which was dismissed vide a ruling dated the 5<sup>th</sup> day of December, 2019 as the same was found to be incompetent and an abuse of the court process. That the appellant continued sleeping on the appeal until it was dismissed on the 24<sup>th</sup> February, 2021 but was later reinstated on the 7<sup>th</sup> June 2021.

16. The respondent urged the court to dismiss the appeal for want of prosecution.

17. As rightly pointed out by the respondent, certified copies of the proceedings and the judgment and the decree were obtained back in the year 2018 and the appellant has not been keen in prosecuting the main appeal.

18. However, in this case, I note that several interlocutory applications have been filed and heard and thus the appeal has been active though on interlocutory applications, at least until 5<sup>th</sup> December 2019 when the court delivered the last ruling in the matter. The court also takes judicial notice of the Covid-9 situation in the country and the world at large.

19. In the premises, and in the interest of justice, the court will not dismiss the appeal but for purposes of expeditious disposal of the same, I hereby order that the same be prosecuted within 60 days from the date of this ruling, failing which, it shall stand dismissed.

20. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF SEPTEMBER, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent