



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**SUCCESSION CAUSE NUMBER 580 OF 2008**  
**IN THE MATTER OF THE ESTATE OF THE LATE GITHIOMI KIMANI (DECEASED)**

**RULING**

1. On 19<sup>th</sup> January 2017, this court (*A. K. Ndung'u J*) delivered its judgment, whereby it gave the following orders.

***“With the result that the grant herein is confirmed with distribution as follows: -***

- 1. Parcel No. Bahati/Kabatini Block 1/1773 as per the consent recorded on 25/7/2016***
- 2. Parcel number Molo South Kuresoi Block 4/346 (Mwaragania) to be distributed in equal shares to:-***

- 1. Wanjiru Githiomi***
- 2. Kimani Githiomi***
- 3. Rosemary Wanjiku Macharia***
- 4. Joseph Muiruri Maina***

***Each party to bear its own costs.***

***Orders accordingly.”***

2. On 1<sup>st</sup> February 2017, the Petitioner Samuel Kimani Githiomi filed a Notice of Appeal. It was lodged at High Court of Kenya at Nakuru, with the intention to serve the same on Court of Appeal, Nakuru.

3. On 27<sup>th</sup> May 2021 Joseph Muiruri, filed a Notice of Motion dated 24<sup>th</sup> May 2021 brought under Sections 79B, 79G of the Civil Procedure Act, Order 42 rule 1 and Order 51 rule 1 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law seeking the following orders;

*i. THAT the Honourable Court be pleased to strike out the Notice of Appeal filed on 1/2/2017 since the Appellant has never filed any additional pleadings since as by law required.*

*ii. THAT the Honourable Court be pleased to strike out the Notice of Appeal filed on 1/2/2017 for delay.*

4. The grounds for the application are set out on the face of the application thus;

*(a) THAT a period of 4 years 3 months has lapsed since the Notice of Appeal was filed yet the Appellant has never fixed the matter for directions nor have any directions been taken (within 30 days) as required by the mandatory provisions of Order 42 Rule 11 of the Civil Procedure Rules.*

*(b) THAT further a period of 4 years 3 months lapsed since the filing of the Notice of Appeal on 1/2/2017 which delay is inordinate and unexplained to the Appellant.*

*(c) THAT the Applicant/Appellant has lost conceivable interest in the Appeal herein.*

(d) THAT the continued pendency of the suit herein unprosecuted has been prejudicial and vexatious to the respondent.

(e) THAT in principle, and in the wider interests of justice, the Appeal herein should be dismissed for failure to comply with mandatory legal provisions, inexcusable delay and for the Appellant being otherwise guilty of laches.

5. In the affidavit he depones *inter alia* at paragraph 5:

*“THAT a period of almost 5 years has lapsed since this Appeal was filed in Court. It is against the policy of this Honourable Court for litigation to remain pending unprosecuted inordinately and with indefinite inertia but rather proceedings ought to be diligently prosecuted and expeditiously disposed of. Litigation must come to an end to conclusively determine the parties’ interest, restore certainty and ingrain public confidence in the judicial system in this country.”*

6. The petitioner/respondent Samuel Kimani Githiomi filed a Replying Affidavit sworn on 8<sup>th</sup> June 2021 where he deponed that the delay in prosecuting the appeal was not occasioned by his fault. He blamed the court administration for not responding to his application for certified copies of the decree, judgment and proceedings, and accused them for not making the lower court file available to enable him to file a Record of Appeal.

7. The respondent reminded the court that the overriding objective of civil matters, was to do justice, and constitutional right of the respondent to be heard.

8. He accused the applicant of having made it difficult to pursue the appeal by harassing any advocate, family members and friend whose support he, respondent sought in the pursuit of this appeal.

9. It is noted that the respondent did not annex any document to show that he applied for any proceedings or decree or judgment. There is nothing to support the alleged harassment by the applicant of the persons who support his bid to file this appeal, nor is there any evidence that he even filed a Memorandum of Appeal. As his affidavit stands there is nothing to show that the respondent has done anything to pursue the appeal. It is apparent from the record that once he filed the Notice of Appeal he has never filed any other pleading but went back and slept on his rights only to be startled by this application to strike out the notice of appeal. It is also noteworthy that the court in the judgment pointed out that the respondent’s claim was not an issue that could be addressed through this cause, but an issue that was about disputed ownership of land, hence an issue for the court with jurisdiction on such matters.

10. When the matter came for hearing on 28<sup>th</sup> June 2021, the applicant told the court that the application had been filed because the matter was completed in 2017 but since then nothing had been done after the respondent’s Notice of Appeal.

11. The respondent on his part submitted that the delay in pursuing the appeal had been caused by Covid 19 and harassment of witnesses by the applicant.

12. However, Covid affected court and other activities of our lives from March 2020, three (3) years from the date of filing of the Notice of appeal. The time that has lapsed before that has not been explained. That besides, the respondent has not demonstrated that he had done anything to pursue the appeal, and his Replying Affidavit offers no real opposition to the application.

13. The issue then is whether the Notice of Appeal ought to be struck out. **Order 42 rule (4) of the Civil Procedure Rules** provides: *For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court Notice of Appeal has been given.* From the record in this file the respondent has never filed anything in the Court of Appeal. The notice that was lodged in this court has never been filed in the Court of Appeal. In the case of **Eastern Province Kenya Ltd vs Rongai Workshop & Transporters Ltd & Another [2014] eKLR** the court dealt with the issue of delay by laying down the test to be applied.

*“The test to be applied in application for dismissal for want of prosecution is whether the delay is prolonged and inexcusable, and if it is whether justice can still be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of the discretion of the court.”*

14. The court recognizes that the respondent has a right of appeal. The prolonged delay is unexplained and inexcusable. There was no Covid 19 in 2017, 2018, 2019 and the respondent cannot just lay blame on that. Secondly he has not laid any evidence before court about the alleged interference with witnesses. In addition, he has even said that the file has never been made available to him, yet it is this same file that he is speaking where he has filed his response. There is no indication that the file was ever missing from the registry for his perusal. It is evident he is looking for any excuse save for his own fault, his indolence.

15. The question is: Is this a case which deserves the exercise of the discretion of this court in favour of the respondent? The record clearly shows that the grant was confirmed. One of the properties was shared in terms of the consent signed by all the beneficiaries. The other property was shared equally among the children of the deceased who include the applicant. The record also shows that the court found no evidence at all to support the applicant’s claim to ownership and gave him the option of suing the estate. The applicant has not demonstrated any effort to follow this through and having not filed any other pleading in pursuit of the appeal, gives rise to circumstances that do not warrant the favourable exercise of the discretion of this court.

16. I have weighed the factors in this matter and it is my view that the justice of this matter will be served by allowing the application dated 24<sup>th</sup> May 2021 and striking out the Notice of Appeal.

17. Taking into consideration the nature of the matter each party will bear his own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9<sup>TH</sup> DAY OF DECEMBER, 2021.**

**Mumbua T. Matheka**

**Judge**

**In the presence of: -**

C/A Edna

Applicant: Absent

Respondent: Present