



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 67 OF 2016**

**MONICAH WANGUI MWAURA.....APPELLANT**

**VERSUS**

**JOSEPH RUTO CHERUIYOT.....1<sup>ST</sup> RESPONDENT**

**DL FESTIVE LIMITED.....2<sup>ND</sup> RESPONDENT**

**DIAMOND TRUST BANK KENYA LIMITED.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling is premised on the notice to show cause issued on 11<sup>th</sup> December, 2019 requiring the parties to show cause as to why the appeal ought not be dismissed for want of prosecution.
2. *Ondieki Mitambo* advocate for the appellant responded to the notice to show cause by putting in a relying affidavit in which he stated that being aggrieved with the judgment delivered by the trial court on 26<sup>th</sup> January, 2016, the appellant instructed the deponent's firm to institute an appeal against the said judgment, upon which the deponent filed the memorandum of appeal on 24<sup>th</sup> February, 2016.
3. The deponent stated that subsequently, he was unable to reach the appellant for quite some time and that the appellant did not supply him with the requisite documents to enable him facilitate the appeal and that it is only recently, following issuance of the notice to show cause, that the appellant's whereabouts became known.
4. According to the deponent, the appellant has expressed her interest in proceeding with the appeal and he urged this court to grant her the opportunity to pursue her appeal to conclusion.
5. At the oral hearing of the notice to show cause, *Mr. Abiero* counsel for the respondents submitted that the appellant has not sufficiently explained the non-prosecution of her appeal and that this is not the first time a notice to show cause has been issued to the parties.
6. *Mr. Abiero* contended that he has severally communicated to the appellant's advocate, nudging him to file a record of appeal to no avail and further contended that the appellant's advocate should have contacted the appellant's former advocate directly to follow up on the pleadings rather than going through the appellant herself.
7. It was also the learned counsel's submission that the appellant's current advocate is not properly on record since he did not seek leave of the court.
8. In reply, *Mr. Mitambo* advocate acting for the appellant argued that reasons behind the delay were disclosed in his affidavit and that he was previously unable to obtain the appellant's file from the former advocate.
9. The advocate mentioned that his client was recently able to obtain the file from her then advocates and is now ready and willing to prosecute her appeal.
10. *Mr. Abiero* rejoined by submitting that he had previously filed an application to have the appeal dismissed.
11. I have taken into consideration the averments made in the affidavit and reinforced by the rival oral arguments.

12. The record shows that the appeal was last in court on 28<sup>th</sup> November, 2018 pursuant to an application for dismissal of the appeal filed by the respondents, during which time the appellant was notably absent from court. The Deputy Registrar consequently directed that the appeal be fixed ex parte for notice to show cause on 22<sup>nd</sup> January, 2019.

13. It is apparent from the record that a notice to show cause was soon thereafter issued on 29<sup>th</sup> November, 2018 requiring the parties to attend court on 22<sup>nd</sup> January, 2019 to give reasons as to why the appeal is not deserving of dismissal. There is no indication as to whether the notice to show cause was ever heard.

14. No evidence was placed by the appellant's advocate to show any efforts made at contacting the appellant for purposes of obtaining the lower court pleadings. In the same manner, the respondents did not tender any evidence by way of correspondences to support the submission that requests were made to the appellant to file her record of appeal.

15. Needless to say that the record shows that the Deputy Registrar-Civil Division wrote to the Chief Magistrate's Court in Githunguri requesting for the lower court file to be made available for purposes of the appeal.

16. According to the record, the lower court file was forwarded to the High Court-Civil Appeals Division by way of the letter dated 10<sup>th</sup> August, 2016 and received on 15<sup>th</sup> August, 2016. There is no indication that either of the parties was informed on the availability of the lower court file to enable the appellant file a record of appeal.

17. While I am of the view that the appellant's advocate has not brought any credible evidence to support the explanation given for the delay, upon perusal of the lower court file I confirmed that the appellant was represented by a different firm of advocates in the suit thereby making it plausible that the current advocate did not have immediate access to the client's file for further dealing. Furthermore, the respondents' advocate being aware of and acquiescing to the current advocate's participation in the appeal cannot now be heard to raise the issue that the said advocate is not properly on record and in any event, the issue of representation is one which in my view can be remedied.

18. In the interest of justice and for the foregoing reasons, I will spare the Appeal and grant the appellant a chance to prosecute her appeal.

19. It is so ordered.

**Dated, signed and delivered at NAIROBI this 7<sup>TH</sup> day of MAY, 2020.**

**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondents