



**REPUBLIC OF KENYA**

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

**ELCA CASE NO. 17 OF 2016**

**INOI FARMERS CO-OPERATIVE SOCIETY LTD.....APPLICANT**

**VERSUS**

**KAITHERI HOUSING CO-OPERATIVE SOCIETY.....RESPONDENT**

**RULING**

The application before me is the Chamber Summons dated 6<sup>th</sup> June 2018 brought under **Order 42 Rule 35 CPR and Section 79B of the Civil Procedure Act**. The Applicant seeks an order that the Appellants Appeal herein be dismissed for want of prosecution. The application is supported by the affidavit of John Ndana Advocate and grounds reflected on the face of the said application. According to the Applicant, the Appellants herein filed Memorandum of Appeal on 17<sup>th</sup> November 2016 and served it upon their advocates. However, the Appellant/Respondent never took any steps to set down the appeal for hearing. He stated that the Appellant/Respondent has not even prepared the Record of Appeal which is a clear indication that they do not have interest to prosecute the appeal herein. He stated that the appeal herein was only filed to delay the Respondent from enjoying the fruits of its judgment in the lower Court.

In reply to that application, the Appellant/Respondent filed a replying affidavit opposing the same and stated that following the filing of their Memorandum of Appeal on 17<sup>th</sup> November 2016, they also filed an application for injunction pending appeal on 1<sup>st</sup> December 2016 which application was allowed on 6<sup>th</sup> October 2017. According to the Appellant/Respondent, the Court in allowing the application for injunction on 6<sup>th</sup> October 2017 ordered the Deputy Registrar to call for the lower Court file so as to expedite the appeal. She attached a copy of the said letter dated 17<sup>th</sup> November 2017. The Respondent further stated that since then, the file has not been forwarded by the lower Court as she has also personally followed the tribunal file to no avail. The Appellant also stated that the tribunal file has been active in that on 22<sup>nd</sup> February 2017, the Applicant/Respondent herein raised their Bill of costs which was taxed on 6<sup>th</sup> October 2017. She also argued that on 1<sup>st</sup> September 2017, the Respondent herein filed Notice to show cause on execution of the taxed costs. On 7<sup>th</sup> November 2017, the Appellant filed an application for stay of execution which is still pending before the tribunal and that could explain the reason why the file has not been forwarded from the Tribunal to this Honourable Court. The Appellant stated that failure to set down the appeal for hearing cannot be her fault but has been caused by the delay in getting the typed proceedings and also having the lower Court file availed to this Honourable Court. The Appellant argued that the application is pre-mature as the appeal has not been admitted for hearing though she has filed Record of Appeal.

**DISPOSITION**

I have considered the affidavit evidence and the submissions by the parties. I have also considered the applicable law. **Section 79 B of the Civil Procedure Act** provides as follows:

***“Before an appeal from a subordinate Court to the High Court is heard, a Judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against, he may, notwithstanding Section 79 C, reject the appeal summarily”.***

The law is categorical that before an appeal from the lower Court to the High Court and by extension Courts of equal status, a Judge must go through the same and make a determination whether to admit it or not. The Judge can only make that determination after perusing through the original file from the subordinate Court. From the Court record, the Deputy Registrar of this Honourable Court on 7<sup>th</sup> November 2017 wrote to the Chief Magistrate reminding him of a letter he had written on 18<sup>th</sup> October 2016 calling for the lower Court file to be forwarded to expedite this appeal. The Appellant also attached a copy of a letter to the Executive officer, Co-operative Tribunal dated 26<sup>th</sup> October 2016 requesting to be supplied with certified copies of the judgment and proceedings in Case No. 10 of 2011 for the purposes of lodging an appeal. That letter was acknowledged by the Co-operative Tribunal on 19<sup>th</sup> October 2016. The Appellant also annexed a copy of an official receipt. From these annexures and explanations given by the Appellant, it is clear in my mind that failure to compile a Record of Appeal and expedite the hearing of this Appeal cannot be attributed to the Appellant in any event. I agree with the submissions by counsel for the Appellant that this application is pre-mature as the Appeal has not even been admitted. In the upshot, the application dated 6<sup>th</sup> June 2018 is hereby dismissed with costs to be in the cause.

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 21<sup>st</sup> day of February, 2020.**

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**E.C. CHERONO**

**ELC JUDGE, KERUGOYA**

**21<sup>ST</sup> FEBRUARY, 2020**

In the presence of:

1. Mr. Ndana for Respondent
2. Mr. Waweru Macharia holding brief for Ms Wangechi Munene