

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HIGH COURT CIVIL APPEAL NO.19 OF 2015

EASTERN PRODUCE (K) LIMITED (KIBWARI TEA ESTATE)....APPELLANT

- V E R S U S -

BEATRICE JUMBA MSEMBI.....RESPONDENT

R U L I N G

1. By an application dated 24th September, 2018 supported by the Affidavit sworn by **BEATRICE JUMBA MUSEMBI**, this Court is asked to dismiss the Appeal filed herein by **EASTERN PRODUCE (K) LIMITED – KIBWARI TEA ESTATE** – Respondent, for want of prosecution. In the alternative that, consequential orders submitting, and adverse to the applicant herein, be discharged forthwith by ordering the release of the funds deposited in both Advocate’s joint interest earning bank account.

2. The basis for these prayers is that the Respondent filed a memorandum of appeal on 5th February, 2015 against the entire judgment and decision of the trial Court. However, the appeal has never been prosecuted in the last three years, which delay is described as inordinate. It is pointed out that not even a record of appeal has ever been prepared and/or filed.

The Respondent/Appellant in opposing the application states that for substantive justice to be achieved then the appeal ought to be determined on merit. Maintaining that after filing the memorandum of appeal, the Court file mysteriously disappeared, the Respondent’s urges this Court not to blame the Respondent/Appellant for facts which were beyond its control.

3. Although reference was made to a replying affidavit, there wasn’t a copy placed in the Court file. It is not clear to me which Court file has been missing – is it the Original Lower Court File or the High Court File. Had there been any correspondence made to the Court in writing regarding unavailability of the Court File? What follow-up has there been in the last 3 years to demonstrate a genuine interest in pursuing the Appeal. What step if any has the Appellant taken towards ensuring the matter moves from its state of dormancy. Even now, no record of appeal has been filed, and equity does not aid the indolent.

4. I hold and find that the application seeking to dismiss the appeal for want of prosecution is merited and is allowed.

The appeal filed herein be and is hereby dismissed with costs to the

Applicant/Respondent.

Costs of this application shall be borne by the Respondent/Appellant.

DELIVERED and **DATED** this 10th day of January 2019 at

ELDORET.

H. A. OMONDI

JUDGE