



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 162 OF 2016**

**(Being An Appeal from the Judgment of Hon. J.W. Onchuru Ag. Principal Magistrate at Murang'a in Civil Case Number 855 of 2004)**

**1. CLIFF R. NDIRANGU**

**2. RACHAEL WANJIKU.....APPELLANTS**

**VERSUS**

**DOMINIC NJOROGE NGUGI.....RESPONDENT**

**J U D G M E N T**

1. This appeal was filed on 13<sup>th</sup> May 2014. Owing to the failure by the Appellants to prosecute it, this court issued a notice to show cause against them on 8/3/17. On 17/5/17 when the matter came up for the hearing of the notice, the Appellants appeared through their counsel Mr. Waweru, while the Respondent appeared in person. The Appellants were directed to file and serve a complete record of appeal within 39 days. A record of appeal which appears incomplete was filed until 26/9/17. Thereafter the court set the matter down for directions on 18.6.18. On that date, the Appellants were absent.

2. The court ordered the appeal dismissed after confirming that the Appellants' counsel had been served. This dismissal order prompted the present motion filed on 3<sup>rd</sup> July 2018 and expressed to be brought under Section 3A of the Civil Procedure Act, seeking the reinstatement of the appeal on grounds *inter alia* that counsel for the Appellants was prevented by foul weather and traffic congestion on 18/6/18 from reaching the court on time. It is supported by the advocate's affidavit.

3. In his Replying affidavit the Respondent pours cold water on the assertions contained in the said affidavit and accuses the Applicants of indolence. The parties reiterated their depositions during the oral hearing of the application.

4. The court has considered the arguments and contentions of the parties regarding the motion. There is no gain saying the fact that this appeal is now five years old and that the Appellants have been slow in bringing it to conclusion. Even after being granted a chance by the court on 17/5/17 to perfect the appeal, the Appellants moved at their own pace, filing the record of appeal some 4 months after the order, and failing to attend subsequent mention on 27/6/17, 20/9/17 and 7/3/18. On all these occasions, the Respondent was in attendance.

5. There is no explanation for this extended tardiness on the part of the Appellants and their counsel. It seems that the Appellants were only jolted into action by the dismissal of the appeal on 18/6/18. Even so, the explanation given by their counsel for non-attendance on that date defies belief. If indeed he was caught up in bad weather while on the way to court, he could have requested another counsel to request the court to place this matter aside for that reason. Besides the hearing notice filed with the affidavit of service on 30/5/18 contains an endorsement by his office that reads:

**“Received under protest Mr Waweru has another matter Succession No.773/13 at Thika which was fixed earlier.”**

6. This endorsement raises doubts as to the veracity of counsel's explanation for his absence on 18/6/18. No explanation was proffered for the absence of the actual parties to whom this appeal belongs.

7. As matters stand, there is no proper record of appeal filed. Litigation must come to an end. The Appellants who are represented by counsel cannot be allowed to hold the Respondent who acts in person, at ransom. Delay clearly causes him prejudice and unnecessary cost. The court is not persuaded that the Appellants ought to be given any further indulgence in this matter. They are not deserving of this court's exercise of its discretion in light of their tardiness. In the circumstances the motion filed on 3/7/18 is dismissed with costs.

**DELIVERED AND SIGNED AT KIAMBU THIS 5<sup>TH</sup> DAY OF APRIL 2019**

.....

**C. MEOLI**

**JUDGE**

**In the Presence of:-**

Applicants – Absent

Respondent – Present in person

Court Clerk - Kevin