



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 92 OF 2012

JOSEPH KANYIGI KIIRU.....APPELLANT

VERSUS

CYRUS HIGL.....RESPONDENT

(Being an Appeal from the Ruling/Order of Hon. J. Nthuku, Resident Magistrate delivered in Nakuru on the 27th April, 2012, in Nakuru CMCC No.1512 of 2002)

RULING

1. This is a ruling on Notice to Show Cause why this suit should not be dismissed for want of prosecution. The notice was issued at the instance of the court to the parties herein on 17th January 2019.
2. In response, the appellant filed replying affidavit dated 28th February 2019 sworn by the appellant. He averred that the lower court file could not be traced in the registry warranting delay in prosecuting this appeal. He averred that the High Court registry wrote to the Chief Magistrate a letter dated 22nd April 2016 and a mention date fixed for 27th June 2018 but the matter was not cause listed as the lower court file had not been forwarded to the High Court.
3. He further averred that the High Court sent a reminder to the chief Magistrate's registry via letter dated 3rd October 2018. Appellant averred that he is ready and willing to prosecute the appeal and that he will be greatly prejudiced if the appeal is dismissed. He averred that he is ready to abide by any conditions that the court may impose.
4. The respondent filed an affidavit in support of notice to show cause. He averred that the appeal herein arises from a ruling delivered on 27th April 2012 which the court declined to allow the appellant's application to have the case start *de novo*.
5. The respondent averred that the appellant does not appear to have been sufficiently proactive and diligent in seeking to facilitate the expeditious disposal of this appeal given that the memorandum of appeal was filed on 2nd May 2012 and the High Court wrote to the chief Magistrate on 22nd April 2016 acknowledging receipt of the lower court file as deposited in paragraph 6 of the replying affidavit.
6. He further averred that our legal system being adversarial, it is the primary obligation of the appellant to follow up on his appeal. That the appellant has not tendered reasonable, sufficient and plausible reason for the delay in prosecuting the present appeal.

ANALYSIS AND DETERMINATION

7. I have considered averments by parties herein. I have also perused the court file. I note from record that the appeal herein was filed on 2nd May 2012.
8. The letter addressed to the chief magistrate asking for the lower court record is dated 3rd October 2018 asking for proceedings. The next action is this notice to show cause dated 19th January 2019.
9. The appellant has not attached any communication indicating that the appellant followed up proceedings. There is no request for mention to the court to ascertain position of proceedings and directions on the same by court.
10. Record does not show any activity on part of the appellant. I do agree with the respondent that the appellant should have been proactive to ensure that this appeal is prosecuted and determined.

11. The appellant has given no sufficient explanation for delay. This is an appeal on ruling on court's decision, which declined request to start the case *de novo*. The appellant has not demonstrated in grounds of appeal filed that he stand to suffer any prejudice if the case proceed for hearing to warrant exercise of discretion by this court despite the delay. There is no indication that they never participated in the hearing.

12. From the foregoing, I do dismiss the appeal herein for want of prosecution.

13. FINAL ORDERS

1. This appeal is dismissed for want of prosecution.
2. Costs of the appeal to the respondent.
3. Nakuru CMCC No.1512 of 2002 to be set down for hearing on priority basis.

Judgment dated, signed and delivered at Nakuru this 11th day of July 2019.

.....

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer Court Assistant

Mutai holding brief for Gekonga Counsel for Appellant

Mr. Kimani for Kisila Counsel for Respondent