



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO.112 OF 2018**

**SIMBA CONSTRUCTION LTD.....APPELLANT**

**VERSUS**

**GEOFFREY GICHURA MUTURA.....RESPONDENT**

*(Being an appeal against the Ruling and Order of the Chief Magistrate's Court at Molo Hon. E.S. Soita) delivered on 16<sup>th</sup> July, 2018 in CMCC No.309 of 2017)*

**RULING**

1. This is a ruling on application dated 21<sup>st</sup> February 2019. It seeks to dismiss this appeal for want of prosecution. Grounds on the face of the application are as set out hereunder:-

- i. That the appellant filed this appeal on 10<sup>th</sup> August 2018 and has never filed a record of appeal.
- ii. That no steps have been taken to set down this appeal for hearing.
- iii. That the appellant has lost interest in prosecuting this appeal.
- iv. That delay is prejudicial to the respondent and it is in the interest of justice to have the appeal dismissed.

2. The application is supported by affidavit sworn by **Geoffrey Gichura Mutura** sworn on 21<sup>st</sup> February 2019. He restated grounds for dismissal.

3. Record show that on 15<sup>th</sup> March 2019 which is after filing of this application, counsel for the appellant wrote to court asking for certified copies of proceedings to enable them prepare record of appeal.

4. Replying affidavit sworn by **Abdiaziz Ahmed Adan** a director of the appellant was filed on 23<sup>rd</sup> April 2019 in response to this application. He denied having lost interest in the appeal and averred that he did not have copies of pleadings and other records due to failure to transfer the court file No.309 of 2017 from Molo court to this court. He attached a letter dated 7<sup>th</sup> November 2017 to the deputy registrar asking for mention for directions as the trial court file had not been sent from Molo. He also attached letter dated 8<sup>th</sup> November sent to Molo court by the deputy registrar calling for the trial court file.

5. He averred that his advocate did not know that the file has been transferred from Molo court until February 2019; and that the Advocate started preparing for appeal by asking for copies of proceeding by letter dated 15<sup>th</sup> March 2019. He averred that the appellant has since filed record of appeal dated 29<sup>th</sup> March 2019 and is ready to prosecute this appeal. He aver that this application be treated as having been overtaken by events.

6. He further averred that the respondent does not intend to delay this matter and if given a chance, will prosecute this matter in a shortest time subject to the convenience of the court. He aver that the respondent did not cause the delay and if there is any, it is not inordinate delay as the trial court file was transferred in year 2019.

7. Respondent aver that this is an appeal against trial court's decision where the respondent was not heard and should not be condemned unheard. He added that the applicant has not shown goodwill by giving true copies of the file nor communicated to the applicant's Advocate to enquire why the record was taking too long to be filed.

**ANALYSIS AND DETERMINATION**

8. I have perused annexures to replying affidavit filed by the respondent. The letter dated 6<sup>th</sup> November 2018 by Advocate for the appellant was follow up of a letter dated 14<sup>th</sup> August 2019 to the deputy registrar asking for the file to be send from Molo court. Memorandum of appeal was filed on 13<sup>th</sup> August 2019 and first letter requesting for the file sent to the registrar the next day with follow up after 2 months.

9. The deputy register sent a letter to Molo after the reminder. This application was filed about two and half months after request of the file from Molo by the deputy registrar. I have not seen any communication from the registrar confirming that she had received the file.

10. From the above, I do not see deliberate attempts by the respondent to delay this matter. The respondent took steps immediately after filing memorandum of appeal to get proceedings. I have also seen record of appeal in the file, which was filed on 3<sup>rd</sup> appeal 2019.

11. I find that no sufficient reasons have been advanced to warrant dismissal of this appeal for want of prosecution.

**12. FINAL ORDERS**

1. Application dated 21<sup>st</sup> February 2019 is hereby dismissed.

2. Costs in the cause.

**Ruling dated, signed and delivered at Nakuru this 19<sup>th</sup> day of Sept. 2019**

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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Jeniffer – Court Assistant

No appearance for Counsel for the appellant

No appearance for Counsel for the Respondent