



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 278 OF 2014

ZABLON MACHUKI MAKORI.....APPELLANT

VERSUS

THE REGISTERED TRUSTEE OF JAMII BORA TRUST.....RESPONDENT

RULING

1. On 29th July 2019, this court issued a notice to show cause directing the parties to attend the court on 4th October 2019 when the appellant was required to show cause why his appeal should not be dismissed for want of prosecution.

2. On the hearing date, learned counsel *Ms Nyabongo* appeared for the appellant while learned counsel *Mr. Kaula* represented the respondent. In her oral submissions and in her affidavit sworn on 24th September 2019 in response to the notice to show cause, *Ms Nyabongo* explained that the delay in prosecuting the appeal has been caused by her inability to contact the appellant who had relocated from his known workplace and residence. She claimed that the appellant's current whereabouts are unknown and urged the court to sustain the appeal to give her time to trace the appellant.

3. In his riposte, *Mr. Kaula* submitted that the reasons given in response to the notice to show cause were not satisfactory. He informed the court that the appeal originates from a suit which had also been dismissed for want of prosecution. He invited the court to note that to date, the record of appeal had not been filed and urged the court to dismiss the appeal for want of prosecution as proposed.

4. I have considered the depositions in the affidavit filed on behalf of the appellant in response to the notice to show cause as well as the rival submissions made by learned counsel. I have also read the court record. The court record reveals that since the appeal was filed on 9th July 2014 over five years ago, the appellant has done nothing to facilitate its hearing. He has not taken even the most basic step of filing a record of appeal despite a promise made by his counsel on 25th October 2018 when she last appeared in court in response to the notice to show cause.

5. It has been contended that the reason for the delay was the inability by counsel to contact the appellant who has relocated from all his known addresses to some unknown destination. In my view, this allegation by itself is a strong indicator that the appellant has lost interest in the prosecution of his appeal because if he had any interest, he would have contacted his advocate to find out the status of his appeal or to follow up on its prosecution.

The fact that he has gone underground and it is his advocate who is now looking for him and not vice versa speaks volumes about his willingness to prosecute this appeal. If the appellant has not surfaced from year 2014 to date, there is no guarantee that he ever will.

6. It is instructive to note as correctly pointed out by learned counsel for the respondent that the appeal originates from a ruling in which the trial court dismissed the suit filed by the appellant in the lower court for want of prosecution.

7. Be that as it may, I note that no reasons have been given by the appellant's counsel to explain why she has not taken any step to facilitate hearing of the appeal including filing a record of appeal despite the confirmation in her affidavit that she had been given instructions by the appellant to prosecute the appeal. Her subsequent inability to contact him should not have prevented her from executing his instructions since prosecuting the appeal did not require the physical attendance of the appellant.

8. In view of the foregoing, I am satisfied that the reasons given by learned counsel for the appellant to explain the prolonged delay in the prosecution of this appeal are not satisfactory. The delay is unreasonable and inordinate.

9. In view of the foregoing, it is my finding that the appellant through his counsel has failed to demonstrate sufficient cause to demonstrate why his appeal should not be dismissed. The appeal is consequently dismissed for want of prosecution with costs to the respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 17th day of October, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Mwaura holding brief for Mr. Kaula for the respondent

No appearance for the appellant

Mr. Salach: Court Assistant