

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCA CASE NO. 5 OF 2018

KENNETH LITSWA ASEGA.....APPELLANT

VERSUS

MARTIN SHIVERE

NATIONAL HOUSING CORPORATIONS

VIHIGA MUNICIPAL COUNCIL.....RESPONDENT

RULING

The application is dated 14th March 2019 and is brought under Order 17 Rule (1), (2) & (3) of the Civil Procedure Rules seeking the following orders;

1. This honourable court be pleased to dismiss the appeal dated 19th July, 2018 for want of prosecution.
2. Costs of this application be provided.

The grounds are that, the appeal was filed against the respondent on 20th July, 2018 and the appellant has failed, neglected and/or never bothered to set down the same for hearing. The statutory period as stipulated by law has elapsed and since then the appellant is not interested prosecuting the appeal. The appellant and the 1st defendant has since assessed the bill of cost at the lower court, abandoning their intention to proceed with appeal. It is just and fair in the interest of justice that the same be dismissed for want of prosecution.

The annexed affidavit in support sworn by Otieno C.O. Ayao states that this appeal was filed against the appellant on the 20th July, 2018 and since then appellant has ignored and/or failed to prosecute the appeal. That the statutory period as stipulated by law has elapsed and since then the appellant has never bothered to set down his case for hearing. That the appellant and the 1st defendant has since assessed the bill of cost at the lower court, abandoning their intention to proceed with appeal. Annexed and marked 'OCA-1' is a copy of 1st defendant's bill of costs dated 20th August, 2018. That in view of the foregoing it is just, fair and expedient that this appeal be dismissed for want of prosecution.

The respondent in this application orally submitted that there was change of advocates in 2019 and there was a delay in typing the proceedings.

This court has considered the application and the submissions herein. No replying affidavit was filed in this matter. I have perused the court file and find that this appeal was filed way back in July 2018. It was on the 14th March 2019 that the present application was filed. I find that there is inordinate delay in prosecuting the appeal. Reasons advanced for not prosecuting are unacceptable. Indeed the respondent in this application did not even bother to file a replying affidavit to oppose the same.

In the case of Utalii Transport Company Ltd & 3 Others vs NIC Bank & Another (2014) eKLR, the court held that it is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court. In this case it was the duty of the appellant. In *Ivita v Kyumbu* (1984) KLR 441, Chesoni J as he then was, stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay. Justice is justice for both the plaintiff and the defendant. I find this application has merit and I grant it with costs to the applicants.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 5TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE