



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO.45 OF 2016**

**PETER MUIGAI.....APPELLANT/RESPONDENT**

**-VERSUS-**

**GEORGE NYAMWEYA.....RESPONDENT/APPLICANT**

**RULING**

1. This is a ruling on application dated 21<sup>st</sup> September 2018. It seeks to dismiss this appeal for want of prosecution. The application is supported by affidavit sworn by Flora Kipchoge on 21<sup>st</sup> September 2018.
2. Grounds on the face of the application are that memorandum of appeal was filed on **25<sup>th</sup> of April 2016** and served on **27<sup>th</sup> May 2016**; that there has been a long period of inaction on part of the appellants/respondents which demonstrate lack of interest in prosecuting this appeal.
3. The averments in the supporting affidavit restate grounds of appeal. Applicant/respondent aver that judgment was entered in favour of the respondent on **23<sup>rd</sup> May 2016 in Molo CMCC No.296 of 2010**.
4. Applicant averred that the appellant sought stay of judgment pending hearing of the application and appeal and on **30<sup>th</sup> June 2016** parties recorded consent that the entire decretal amount be deposited in court pending and determination of this appeal; that the decretal amount of **kshs 773,435** was deposited on **28<sup>th</sup> June 2016**; but it is now one and half years since the appeal was lodged and no action has been taken.
5. The applicant contend that this suit is an abuse of court process as it is intended to deny the applicant/respondent the entire fruits of his judgment.
6. In response, the appellant/respondent filed replying affidavit sworn by **Kelvin Ngure** claims manager Direct line Assurance Company Limited on 7<sup>th</sup> June 2019. He confirmed that the appellant instituted memorandum of appeal on 19<sup>th</sup> April 2016 against the whole judgment delivered in Molo CMCC No.296 of 2010 on 23<sup>rd</sup> March 2016.
7. He averred that he wrote to the executive officer of the lower court requesting for certified copy of decree, judgment and proceedings to enable appellant file record of appeal but the said letter did elicit any response.
8. Further, that the delay is not inordinate or unreasonable to prejudice the respondent and such delay can be compensate by way of damages and costs.
9. He further submitted that the appeal is yet to be admitted under **Section 79B** of the **Civil Procedure Rules** and under **Order 42 Rule 35**, which provide for dismissal for want of prosecution, application can only be made after directions have not been given, the orders sought by the respondent should not be entertained.
10. He averred that the appellant could not comply with mandatory steps provided under **Section 79B** and **Order 42** of the **Civil Procedure Rules** before obtaining copy of decree, judgment and proceedings. He concluded that the appellant has a viable and arguable appeal with high chances of success.

**ANALYSIS AND DETERMINATION**

11. On perusal of the court record, I note that, the memorandum of appeal was filed on 25<sup>th</sup> April 2016. The Deputy Registrar wrote to Molo court on 8<sup>th</sup> December 2016 asking for decree, judgment and proceedings. I have not seen any other action in the file until 8<sup>th</sup> May 2019 when this application was filed.

12. The letter by the Deputy Registrar was done 3 years before this application was filed. The respondent has not shown efforts made in the three years to follow up the matter to ensure that the record is availed and matter listed for directions.

13. There is no doubt that the delay is prolonged. The registrar should have moved the court after one year of inaction to list the matter before a judge in chambers for dismissal. This was not done. In view of the option given to the appellant, which is to seek dismissal after directions have been taken, I believe the appellant should have prompted the Deputy Registrar to list this matter for dismissal. That does not however give excuse for respondent/appellant for delay. An explanation for delay ought to have been given by Appellant. Explanation in the replying affidavit is not satisfactory but in view of the fact that they complied with the court order for deposit and have now obtained lower court record, I am inclined to allow the appellant to prosecute the appeal with conditions.

#### **14. FINAL ORDERS**

1. Application dated 21<sup>st</sup> September 2018 is hereby dismissed.
2. The appellant to file record of appeal and move the court for directions within 30 days from today's date.
3. The appellant to pay respondent thrown away costs of kshs.20,000 within 21 days from today's date.
4. Failure to comply with **Order 2** and **3** above appeal herein to stand dismissed.

**Ruling dated, signed and delivered at Nakuru this 21<sup>st</sup> day of November 2019**

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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Schola/ Jeniffer – Court Assistant

Wairimu holding brief for Ombui counsel for applicant

No appearance for counsel for respondent