



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 294 OF 2012

PETER MBAU GAITHOAPPLICANT

VERSUS

ANNA MUNYIUA & JOSEPH MUTUKU.....RESPONDENT

**MBITHI(Suing as the representatives of the
estate of JOB MULINGE MBITHI – Deceased)**

RULING

1. The application dated 29th June, 2017 seeks orders that the Applicant’s appeal be dismissed for want of prosecution.
2. Secondly that the order of stay of execution pending appeal issued by the Chief Magistrate Court on 3rd August, 2012 and reviewed on 19th October, 2012 be discharged and or set aside.
3. Thirdly that the decretal sum deposited and held in the joint interest earning account in the names of Mbigi Njuguna & Co. Advocate and Kefa Ombati & Co. Advocate be released to the Respondents’ Advocates for onward transmission to the Respondents.
4. The application is premised on the grounds stated in the body of the application and is supported by the affidavit in support sworn by, Anna Munyiva Mutua. The gist of the application is that the Respondent herein appealed against the judgment in Nairobi Milimani CMCC. 7729 of 2009 which was delivered on 11th May, 2012. The said judgment for Ksh.1,421,240/=, costs and interest was in favour of the Respondent against Appellant. The Respondent was granted orders of stay of the said judgment pending the hearing and determination of the Appeal on condition that Ksh.500,000/= was paid to the Applicant herein and the balance of the decretal sum be deposited in an interest earning bank account in the joint names of the advocates for the respective parties. This was done.
5. The Applicant’s complaint is the Respondent has gone to sleep and failed to take steps to prosecute the Appeal herein. The Applicant has decried the delay herein and stated that the family left behind by the deceased is prejudiced by the delay.
6. In opposition to the application the Respondent filed the Notice of Preliminary Objection herein dated 4th September, 2017 on the following grounds:

“The motion is premature and misconceived as no directions have been given under Order 42 rule 13 so as to entitle the Applicant to invoke the court’s discretion under order 35.”
7. I have considered the application, the response to the same and the submissions filed herein.
8. A perusal of this file reflects that the application at hand which is dated 29th June, 2017 was first fixed for hearing on 6th November, 2017. The application proceeded *ex parte* and the ruling dated 31st January, 2018 was delivered and the application allowed. Subsequently, the Notice of motion dated 7th March, 2018 was filed seeking orders that the order made on 31st January, 2018 be set aside. In the ruling herein dated 4th December, 2018 the court observed that there was a delay of about 5 years but since the lower court file had been availed, to meet the wider interest of justice, gave the Respondent the chance to compile and serve the Record of Appeal within 90 days.
9. It seems the Respondent again went to sleep and only filed the Record of Appeal herein on 26th August, 2019, long after the lapse of the 90 days period given and long after the application at hand was fixed for hearing. No explanation whatsoever has been given for the failure

to comply with the orders herein made on 4th December, 2018. No extension of the time within which to file the Record of Appeal was sought. Consequently, the appeal herein stood dismissed following the lapse of the 90 days.

10. The Respondent has relied on Order 42 rule 13 Civil Procedure Rules 2010. Rule 13 (1) stipulates as follows:

“On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.”

11. This court is in agreement with the exposition in the case of **Microsoft Corporation v Mitsumi Garage Ltd & another Nairobi HCCC No. 810 of 2001:[2001] 2EA 460**, it was appreciated that:

“Rules of procedure are the handmaids and not the mistresses of justice and should not be elevated to a fetish since theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it...”

12. As stated by this court in the earlier ruling dated on 31st January, 2018 the court has inherent powers under Section 3A Civil Procedure Act to make such orders as necessary to meet the ends of justice or to prevent the abuse of the process of the court. The overriding objective of the Civil Procedure Act and Rules is to facilitate the just, expeditious, proportionate and affordable resolution of Civil disputes. This objective cannot be achieved when a party goes to sleep and fails to comply with the directions given by the court. The position taken by the Respondent herein is an impediment to the efficient use of judicial time and timely disposed of the Appeal herein.

13. In the upshot, I find merits in the application at hand and allow the same with costs.

Dated, signed and delivered in Nairobi this 14th day of Nov., 2019

B. THURANIRA JADEN

JUDGE