



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 556 OF 2014

STEPHEN NG'ANG'A &

PETER KANYAGIA (*Both suing as Legal Representatives of the*

Estate of FAITH MUTHONI MWANGI (DECEASED)APPELLANTS

VERSUS

JAMES OTIENO.....1ST RESPONDENT

WILLS WANYONYI2ND RESPONDENT

(Being an Appeal from the Judgment of the Honourable N. Murage (Mrs) Chief Magistrate Delivered on the 13th day of November, 2014 in CMCC No. 2953 of 2012)

RULING

This matter was listed for Notice to Show Cause why it should not be dismissed for want of prosecution, on the 31st July, 2019 when counsel for both parties sought time to file affidavits in response to the notice to show cause.

The appellants filed their affidavit on the 30th July, 2019 sworn by Peter Kanyagia Mwangi. In the said affidavit, he depones that they filed the appeal on 14th December, 2014 after their case was dismissed by the trial court. That after the filing of the appeal, they started communication with their advocates on record who kept them updated on the progress made in the appeal and that at some point they had indicated to them that they were waiting for the typed copies of the proceedings to enable them file a record of appeal.

He depones that their advocate further informed them that the process of getting the typed proceedings from the lower court would take time and therefore they waited for further communication from their advocate on the issue. That unfortunately, they did not hear from them for a long time and it's only a few months ago when they were informed that the appeal may be dismissed for want of prosecution as they had not taken steps for a long time.

He avers that as the legal representatives to the estate of the deceased, they are desirous of prosecuting the appeal as they believe that the same has high chances of success. He depones that they are not aware why their advocate has failed to prosecute the appeal and urges the court not to punish them for the mistakes of their advocates. They have asked the court to give them a chance to seek justice on behalf of the estate of the deceased stating that the Respondents will not suffer any prejudice if the appeal is not dismissed.

On their part, the respondents have supported the dismissal vide the affidavit sworn by Della M. Mwanzile, on the 4th October, 2019 in which she has stated that the onus is on the appellants to set down the appeal for mention for directions and accordingly proceed to prosecute the same.

He avers that the appellants took no steps towards prosecuting the appeal for approximately four (4) years prompting the court to issue the parties with a notice to show cause why the appeal should not be dismissed for want of prosecution. He depones that the appellants' allegation that they had a problem obtaining copies of the lower court's typed proceedings is unfounded and that no evidence has been produced before the court as proof thereof.

He further avers that the respondents stand to suffer great prejudice if the appeal is not dismissed as litigation must come to an end.

The court has considered the affidavits sworn by the respective parties to this appeal. The court has also perused the record of the proceedings and it is noted that since the appeal was filed way back in the year, 2014, the appellants have taken no action to prosecute the same prompting the court to list it for Notice to show cause on the 21st June, 2019. The appellants have blamed their advocate for failure to

prosecute the same and have urged the court not to dismiss the Appeal.

The respondents' on their part averred that there is no evidence that has been availed to court to support the appellants' allegations that they had difficulties obtaining the proceedings.

This court is in total agreement with the respondents that there is no evidence tendered by the appellants to support their allegation that they had difficulties obtaining copies of proceedings from the trial court. In fact, the lower court file is available before this court and the proceedings have already been typed.

On the prejudice to be suffered by the respondents, they have not substantiated the nature of the prejudice that they are likely to suffer but have only averred that, litigation must come to an end. I find that the appellants have not satisfactorily explained the delay in prosecuting the appeal but even then, justice can still be served by sparing the appeal as the respondents have not shown the prejudice that they are likely to suffer which cannot be compensated by way of costs.

In the upshot, I do make an order that the appellants do file a record of appeal within 21 days from the date of this ruling and thereafter list the appeal for directions within 14 days from the date of filing of the Record of Appeal failing which, the Appeal shall stand dismissed.

It is so ordered

Dated, Signed and Delivered at NAIROBI this 7TH Day of NOVEMBER, 2019.

.....

L. NJUGUNA

JUDGE

In the Presence of

..... For the Appellants

..... For the Respondents