



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 216 OF 2018

STANLEY MUGECHA NGURE.....1ST APPELLANT/RESPONDENT

REUBEN WILSON.....2ND APPELLANT/RESPONDENT

VERSUS

JOHN MUTHURI GITI.....RESPONDENT/APPLICANT

RULING

1. John Muthuri Giti, the respondent/applicant herein, took out the Notice of Motion dated 22nd October, 2019 in which he sought for an order to the effect that the appellants'/respondent's appeal be dismissed for want of prosecution, with costs.
2. The Motion is supported by the grounds set out on its face and the facts stated in the affidavit of the respondent's/applicant's advocate, *Nelson Kaburu Felix*.
3. The deponent asserted that since the filing of the memorandum of appeal on 3rd May, 2018 the appellants/respondents have taken no steps to file their record of appeal for more than one (1) year now, hence terming the appeal ripe for dismissal.
4. The appellants/respondents offered no reply to the Motion, neither did they participate in the hearing thereof despite being served with a copy of the Motion through their firm of advocates on 12th November, 2019.
5. When the application came up for hearing before this court on 5th December, 2019 *Miss Kanana* learned counsel for the respondent/applicant chose to rely on the averments made in the affidavit in support and on the grounds set out on the body of the motion which this court has considered. .
6. **Order 42, Rule 35** of the **Civil Procedure Rules, 2010** provides for the circumstances and manner of dismissal of an appeal as follows:

“(1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

(2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”
7. Judging by the record, it is apparent that the appellants/respondents filed their memorandum of appeal on 3rd May, 2018.
8. Thereafter, the Deputy Registrar-Civil Division sent various letters to the Chief Magistrate's Court requesting for the lower court file and certified copies of the proceedings and judgment/decree.
9. The record shows that the lower court file accompanied by the requisite certified documents were forwarded to the Deputy Registrar vide the letter dated 4th December, 2018. Thereafter, the Deputy Registrar vide the notice issued on 5th December, 2018 notified the parties' respective advocates of the availability of the lower court file and directed the appellant to file a record of appeal within 21 days failing which the appeal would be placed before a judge for dismissal.
10. It is apparent from the record that the appellants'/respondents' advocates received the notice on 7th December, 2018.
11. Needless to say that the appellants/respondents have not filed a record of appeal and without explanation. The respondent's/applicant's

advocate deponed that the memorandum of appeal was served upon his client on 4th May, 2018 which goes to show that one (1) year has lapsed since then.

12. When the application came up for hearing neither the appellant nor his Advocate attended court for the hearing of the application. This is notwithstanding that counsel for the appellant was served with a hearing notice notifying him of the hearing of the application. He has not even filed a response to that application. This therefore means that the appellant is no longer interested in pursuing the appeal.

13. There has been prolonged and unexplained delay in filing of the record of appeal and consequently the prosecution of the appeal from the time of service of the memorandum of appeal.

14. In the premises, I find the motion has merits and I proceed to grant the same as prayed.

15. The costs of both the application and the appeal are awarded to the respondent.

Dated, Signed and Delivered at Nairobi this 11th day of December, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellants/Respondents

..... for the Respondent/Applicant