



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CIVIL APPEAL NO 20 OF 2013

FRANCIS NGAREGA.....APPELLANT

VERSUS

MAINA GATHUTHIRI.....RESPONDENT

RULING

1. This is a *Notice to Show Cause* why the appeal should *not* be dismissed for *want of prosecution*. The notice is dated 8th May 2018. It is issued *suo moto* under Order 42 rule 35 (2) of the Civil Procedure Rules.
2. The appellant opposes the notice. He has filed a lengthy replying affidavit. It is deposed at paragraphs 5 to 13 that the failure to prosecute the appeal lies squarely with the court registry. It is averred that despite many letters to the Deputy Registrar, the lower court file was not made available. Consequently, the matter was not placed before the judge for admission or directions.
3. At the hearing of the matter, the respondent contended that the appellant is *disinterested* in prosecuting the appeal. He submitted that the lethargy is prejudicial.
4. I have considered the rival arguments. I have also paid heed to the records before me, the pleadings, and deposition.
5. The memorandum of appeal was lodged on 7th March 2013. That is *more than five years* ago. The record of appeal was filed soon thereafter on 28th June 2013. I have seen the standard form affixed on page 1 of the court record. The appeal has *not* been admitted.
6. There is thus *no* contest that there has been *delay* in prosecuting the appeal. However, the procrastination *cannot* be wholly attributed to the appellant. On 21st November 2014, the appellant wrote to court to list the appeal for *directions*. A court receipt is annexed marked *FNW2*.
7. There are two other letters dated 26 February 2015 and 22nd February 2015 enquiring about the status of the “*missing*” lower court file. They are both addressed to the Deputy Registrar of the High Court. There is also another letter dated 1st July 2015 to the lower court on the same subject.
8. The Deputy Registrar replied on 1st July 2015 confirming that the records of the lower court were available. On 26th May 2017, the appellant requested the Deputy Registrar to list the appeal for directions. It has not been done.

9. In our adversarial system of justice, it remains the primary obligation of the appellant to follow up on his appeal. See *Anne Chege & another v Peter Musasya*, Nairobi, High Court Civil Appeal 840 of 2003 [2006] eKLR, *Daniel Okoko v Dan Owiti*, Nairobi, High Court Civil Appeal 452 of 2003 [2006] eKLR.

10. The test in a matter of this nature is whether *justice* can still be done. See *Ivita v Kyumbu* [1984] KLR 441. The overriding objective is to do justice to the parties.

11. In the interests of justice I *vacate* the *Notice to Show Cause* dated 8th May 2018. The appellant *shall* however ensure that the appeal is placed before the judge in chambers for *admission* or *directions* within the next *thirty days* of today's date. In default, the appeal shall automatically stand *dismissed*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 7th day of June 2018.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. Waiyaki for the appellant instructed by Ngarega Waiyaki & Company Advocates.

Mr. Gathuthuri, the respondent (in person).

Ms. Dorcas and Mr. Kiberenge, Court Clerks.