



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 96 OF 2010**

**JOSEPH GACHECHE KAMAU.....APPELLANT**

**VERSUS**

**NJUE KARURIE.....RESPONDENT**

**R U L I N G**

1. This is a ruling on the application dated 28/03/2018 by the respondent/applicant seeking for dismissal of this appeal with costs for want of prosecution.
2. It is supported by the affidavit of Joe Kathungu, the advocate for the respondent who presents several grounds. He states that there has been inordinate delay in the prosecution of this appeal on part of the appellant. A period of more than one (1) year has elapsed sine the appeal was last fixed for hearing. The last time the appeal was fixed for hearing of an application for dismissal for want of prosecution was on 3/10/2016.
3. The said application was withdrawn with throw away costs of Kshs.10,000/= payable before fixing another hearing date. The said costs were never paid to the respondent nor has the appeal been fixed for any action before the court.
4. The respondent in his own affidavit sworn on 31/05/2018 deposes that he was not aware of the first application to dismiss his appeal and neither was he aware of the order for payment of the throw away costs of Kshs.10,000/=. His counsel on record at that time Momanyi Gichuki & Co. did not inform him of what was happening.
5. The respondent states further that he is ready and willing to pay the said costs and that he is still interested in prosecuting his appeal. It is further stated that it was the mistake of the advocate and ought not to be visited on him.
6. The respondent is convinced that his appeal has merit and he prays that he be given a chance to prosecute it. He further states that the appellant may not suffer any throw away costs for he can be compensated by way of costs in this application.
7. These averments were countered by the supplementary affidavit of Joe Kathungu advocate. He says that the appellant went to slumber and was only awakened by the filing of this appeal. The respondent has already disobeyed the court orders and does not deserve to be given any more time to prosecute his appeal. He has not given any good reason why he has not complied. To say that he did not know what was happening in his case, the appellant is dishonest in his conduct and in his representations to this application.
8. Both parties filed submissions in support of their arguments which I have considered herein.
9. I have perused the record in this appeal and confirm that it was file on 17/09/2010. It was later admitted and thereafter fixed for directions by the firm of Kathungu & Co. on 7/10/2011. The appellant's counsel was served with the date of 1/11/2011 to attend court to take directions. The counsel attended and by consent the matter was given another date 29/11/2011 for taking directions. It appears the matter was not taken before the judge on the day scheduled for directions.
10. The firm of Joe Kathungu took dates for directions twice. The appeal was before the judge on 27/11/2014 when the court directed that a supplementary record of appeal be filed. The supplementary record was not filed until 18/08/2017. This was about three years after the orders of the court and one (1) year after the first dismissal orders which was followed by withdrawing by consent of the parties with throw away costs being awarded. Surprisingly, all other mention dates and the date for hearing this application have been taken by the counsel for the respondent.
11. With those background facts, the appellant cannot convince this court that he is still interested in his appeal.
12. The record is evident that it is the respondent who has been proactive to have this appeal heard and determined. This is because, the firm

of Joe Kathungu & Co. who represent him have fixed all the dates in this appeal.

13. The respondent was quite accommodative to the appellant when he agreed to dispose of the first dismissal application dated 22/08/2016 by consent. The appellant did not pay the respondents his costs and has not done so. He remained unresponsive and has not paid up to date. The filing of this application on 28/03/2018 did not move the respondent. He did not pay even after being served with the application.

14. The applicant states that the delay in prosecuting the appeal was caused by his advocate and that the mistake should not be visited on him.

15. Any party who gives instructions to an advocate to file a suit or to lodge an appeal remains accountable to his case or to his appeal and to all matters incidental thereto. There is no time that the responsibility totally shifts to the advocate as the appellant is trying to argue.

16. The question that arises is what the appellant was doing for eight (8) years knowing very well that he had filed an appeal against the judgment that was in favour of the respondent. I agree with the respondent that the applicant filed this appeal with the intention of denying the respondent the fruits of his judgment. If he had hoped to benefit from the appeal, the appellant would have followed it up to conclusion. The loss in interest in prosecuting the appeal may lead to a conclusion that the appeal has no chances of success.

17. It is my considered opinion that the appellant is substantially to blame for the delay in prosecuting his appeal for eight (8) years since it was filed.

18. The appellant's counsel may have contributed to some extent but this may have been due to lack of instructions. It was said that the file was missing for some time. There was no correspondence to the Deputy Registrar annexed to this application. When the respondent filed his first application for dismissal, the file was available. I do not believe that the file was ever missing. This argument was a sham.

19. The appellant has not explained the cause of delay and has blatantly failed to comply with the consent orders for payment of the throw away costs. This portrays an appellant who is either dishonest in his conduct or one who is indolent to the extreme.

20. I find the application dated 28/03/2018 merited and I allow it with costs to the respondent.

21. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 8<sup>TH</sup> DAY OF OCTOBER, 2018.**

**F. MUCHEMI**

**J U D G E**

**In the presence of: -**

**Mr. Kathungu for Appellant**

**Mr. P.N. Mugo for Ndorongo for Respondent**