



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO.144 OF 2012**

**BONAR (E.A.) LIMITED.....1<sup>ST</sup> APPELLANT**

**STEPHEN REUBEN KARUNDITU.....2<sup>ND</sup> APPELLANT**

**ELIUD NJOROGE.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**ASHUT ENGINEERS LIMITED.....RESPONDENT**

(Being an appeal from the Ruling and order of Honourable A.K. Ndungu (Mr) Senior Principal Magistrate's, Milimani Commercial Courts, made in CMCC No. 11381 of 2005 on 29<sup>th</sup> February, 2012)

**RULING**

The appeal herein was filed in the year 2012 and due to the slow pace at which it was being prosecuted, the court listed it for Notice to show cause on the 20<sup>th</sup> July, 2018.

On the said date, counsel for the Appellant sought time to file an affidavit in response to the said notice which he filed on the 20<sup>th</sup> July 2018. The same is sworn by Joseph Wambugu Gaita, the Advocate on record for the Appellant. He depones that on the 27<sup>th</sup> September 2016, he applied for certified copies of the proceedings and the judgment in CMCC No. 11381/2005 for purposes of Appeal and on various dates between 2017 and 2018 he visited the Chief Magistrate's Court Registry and found that the proceedings were not ready.

That, on the 25<sup>th</sup> April 2018, a representative from his firm attended the Civil appeals Registry for purposes of taking a date but he could not be given a date as the lower court file had not been received. Upon following up the proceedings with the lower court, he was informed that the proceedings could not be typed due to illegible handwriting.

He further depones that he wrote a letter to the Deputy Registrar in charge of the Civil Division with a view to having the matter mentioned before a Judge for purposes of explaining their predicament and a request for an order that the executive officer be summoned to explain why the Lower court file and proceedings have not been forwarded to the High Court. That, he followed up the issue with the Deputy Registrar to no avail as every time he visited her in her chambers he was told the shelves had broken down and was asked to check later.

He avers that the Appellant is desirous of prosecuting the Appeal and it's only fair that he be allowed to proceed with the same.

The court has considered the affidavit in response to the Notice to show cause and the annexures thereto. I have also perused the record of the proceedings and I note that the matter was last in court on the 25<sup>th</sup> June, 2012 when a ruling was delivered by Justice Ang'awa which is 6 years ago. The court has looked at annexure 1 which is a letter dated the 27<sup>th</sup> September, 2017 applying for certified copies of the proceedings and the judgment that was delivered on the 29<sup>th</sup> February, 2012. The proceedings were applied for, more than five (5) years from the date of the judgment. No good reason has been given why the Appellant took so long before he could apply for the proceedings. A period of 5 years is indeed unreasonable and especially given the fact that no reason was given for the delay in making the application.

The court has also perused annexure 2 which is a letter dated 20<sup>th</sup> April, 2018 in which counsel for the Appellant had invited counsel for the Respondent to take a hearing date for the matter. This being an Appeal, counsel for the Appellant knows too well that an Appeal cannot be heard before a Record of Appeal has been filed. Counsel ought to have known that the Appeal was not ready for hearing and inviting the other party to fix a hearing date was an exercise in futility.

As for annexure 3, the letter was done six years after the lower court matter was finalized which shows a very high degree of indolence on the part of the Appellant.

The impression the court gets of the Appellant is of a party who is not interested in pursuing the Appeal. Proceedings were applied for, 5 years after the ruling by the trial court. There has to be an end to litigation.

In the end, the court finds that no good reasons have been given why the Appeal has not been prosecuted. The same is hereby dismissed with costs to the Respondent.

**Dated, Signed and Delivered at Nairobi this 8<sup>th</sup> day of November, 2018**

.....

**L. NJUGUNA**

**JUDGE**

In the presence of:-

..... **For the Appellants**

..... **For the Respondent**