



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO.377 OF 2013**

**SELINAH J.K. KANDIE & MARK KANDIE**

*(suing on behalf of the Estate of the late*

**PHILIP KIMAIYO KANDIE.....APPELLANT**

**VERSUS**

**PETER KIBET BIWOTT.....RESPONDENT**

*(Being an appeal from the judgment and Decree of Hon. Ms. Kipkorir, R.M delivered at Milimani Commercial Courts in Civil Suit No. 1033 of 2009 on 24<sup>th</sup> June 2013)*

**RULING**

The Appeal herein was filed on the 5<sup>th</sup> day of July 2013 and due to the slow pace at which it was being prosecuted, the court on its own notion listed it for Notice to Show Cause on the 28<sup>th</sup> September, 2018 after serving the respective parties with the relevant notices.

In response to the notice to show cause, the Appellant filed an affidavit sworn by Samuel Nyambane on the 11<sup>th</sup> of July 2018. In the said affidavit, he depones that he filed a Record of Appeal on the 18<sup>th</sup> July 2014 and thereafter, he has requested for a date for directions on numerous occasions but the directions have not been issued. He has annexed some letters addressed to the Deputy Registrar.

He avers that the Record of Appeal is complete and the matter ought to be listed for hearing and that the Appellant is desirous of prosecuting the Appeal. That it is in the interest of justice that the Appellant be allowed to prosecute the Appeal as no prejudice will be occasioned upon the Respondent.

The court has considered the contents of the said affidavit together with the annexures. The Appellant has annexed three letters to the Deputy Registrar Milimani High Court. Two of those letters were received at the registry and they are dated 11<sup>th</sup> July 2014 and 16<sup>th</sup> January 2015. In the letter dated 11<sup>th</sup> July 2014, the Appellant forwarded the Record of Appeal for filing and requested for directions and/or hearing date for the Appeal. The letter dated 16<sup>th</sup> January 2015 is a follow up letter to another one dated 17<sup>th</sup> November, 2014 but which is not annexed to the affidavit but which is a part of the record, requesting for a date for directions. The other two letters were not received at the registry and it is difficult to tell when exactly they were written if at all.

From the said annexures, the Appellants cannot be said to have been indolent but they were following up the matter. A record of Appeal was filed on 13<sup>th</sup> July 2014 but the lower court file has not been received to enable the court admit the Appeal and thereafter list the matter for directions to pave way for the hearing of the Appeal.

In the premises, the court will not dismiss the Appeal but since it's an old matter, the same should be prosecuted within 90 days from the date of this ruling failing which, it shall stand dismissed. Since the lower court file is not available, the matter shall be mentioned 29<sup>th</sup> November, 2018 on which date the Executive Officer in charge of Milimani Chief Magistrate's Court shall attend court and explain why the file has not been forwarded to this court. This order be extracted and served upon the Executive Officer by the Appellant.

Dated, Signed and Delivered at Nairobi this 15<sup>th</sup> day of **November, 2018**

.....

**L. NJUGUNA**

**JUDGE**

In the presence of:-

.....**For the Appellant**

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