

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.283 OF 2013

STEVEN O. MOGIRE.....APPELLANT

VERSUS

RAPHAEL MUNGUTI MUSYOKA.....1ST RESPONDENT

ESTHER NYANGANYI OKEROSI.....2ND RESPONDENT

(Being an appeal from the judgment of Honourable C. Obulutsa (Mr.) Ag. Chief Magistrate at Milimani Commercial Courts, CMCC No. 2574 of 2008) dated 17th September, 2013)

RULING

The Appeal herein was filed on 26th May, 2013. It was last in court on the 11th November, 2014. The court listed it for Notice to show cause on the 13th day of July 2018 during which date the parties had not been served with the notices and the court stood it over to 20th July 2018 when Counsel for the Appellant sought for time to file an affidavit in response to the Notice to show cause.

In the said affidavit sworn by Owino Opiyo on the 25th July 2018, it is deponed that both parties have filed and served their written submissions to the application dated the 1st October 2013 and what is remaining is the highlighting of the same. That, the matter was handled by Justice Onyancha and it stalled for a while when all matters pending before the Judge were stayed pending his court case regarding retirement.

He further depones that he did write a letter dated the 10th day of March 2015, seeking a mention date for further directions on the matter but the court failed to give a date. That, after the conclusion of the case pertaining to Judge Onyancha, the clerk to the Appellant Advocate visited the court registry several times with a view to getting a mention date for submissions or further directions but he was unable to trace the file. A bundle of the letters aforesaid are annexed to the replying affidavit in response to the notice to show cause.

He avers that the Appellant is keen in having the matter determined on merits as the Appellant deposited the money in compliance to the conditional court orders for stay of execution. That, he only got to know of the availability of the court file when he was served with the Notice to show cause. He avers that the Respondent shall suffer no prejudice if the court proceeds to rule on the application dated the 1st day of October, 2013 but to the contrary, the Appellant is bound to suffer irreparable damage and injustice if the matter is dismissed for want of prosecution for no fault of its making. The Appellant is ready and willing to abide with the conditions that the court may impose for speedy conclusion of the matter.

The court has considered the contents of the affidavit in response to the Notice to show cause. It is noted that the pending application was filed way back on the 2nd day of October, 2013 under certificate of urgency. The reasons given for failure to prosecute the application are that the court file was missing and that there was an order staying all matters which were being handled by Justice Onyancha during the time when his case was in court. I wish to note that no such stay order was annexed to the affidavit in response to the notice to show cause and its doubtful if any such order was issued. Secondly, the court file is said to have been missing. The court has perused the annexed letters and none of them was received in the registry in that they are all not stamped with the registry stamp.

If indeed it's true that the file has been missing since the year 2015 as alleged by the Appellant it is difficult to understand why he did not move the court with an application for reconstruction of the same considering that the application dated 1st October, 2015 has been pending and it was brought under certificate of urgency. The Appellant did not have to wait until he is served with a Notice to show cause for him to indicate to the court that he is still interested in pursuing the Appeal. Supposing he was not served with the notice to show cause by the court, how much longer would he have waited without doing anything at all?

In view of the foregoing, the court strongly believe that the Appellant is no longer interested in pursuing this Appeal and no good reason has been given why no action has been taken since the matter was last in court on 11th November, 2014. Both the application dated 1st October 2013 and the Appeal herein are dismissed for want of prosecution.

Dated, Signed and Delivered at Nairobi this 15th day of November, 2018

.....

L. NJUGUNA

JUDGE

In the presence of:-

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

.....**For the Respondents**