



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 11 OF 2014**

**GEOFFREY M. NDEGWA.....APPELLANT**

**VERSUS**

**FRANCIS NJERU MUIRURI (SUING AS LEGAL REPRESENTATIVE OF  
THE ESTATE OF ALEX MUGO MUIRURI).....RESPONDENT**

**RULING**

The Respondent herein seeks to have the Appeal filed herein by the Appellant dismissed with costs for want of prosecution, for reasons that since the filing of the Appeal on 18<sup>th</sup> February 2014 the Appellant has not taken any steps to prosecute the said appeal, and it is now over one year since the appeal was lodged and no other pleading has been filed. It is alleged that the appeal was filed solely to deny the Respondent that fruits of his judgment in Machakos CMCC No. 533 of 2012.

These prayers and averments are in an application by way of a Notice of Motion dated 9<sup>th</sup> November 2015 and in the supporting affidavit sworn by the Respondent on the same date..

The application was opposed by the in a replying affidavit sworn on 18<sup>th</sup> July 2016 by Philip M. Mulwa, the Appellant's Advocate, who gave a chronology of the applications filed and decisions made thereon since the filing of the appeal on 18<sup>th</sup> February 2014. These were an application for stay of execution pending hearing and determination of the appeal filed by the Appellant on 25<sup>th</sup> February 2014 on which a ruling was delivered on 23<sup>rd</sup> May 2015; and an application for review of the said ruling date that was filed by the Respondent on 8<sup>th</sup> August 2014 in respect of which a ruling was delivered on 4<sup>th</sup> February 2014.

Further, that before the appeal could be admitted, the parties began negotiations on an out of court settlement of the appeal, and that the Appellant was also waiting for the lower court proceedings to be typed to enable him file a Record of Appeal. Therefore, that it is clear that the Appellant had not gone to sleep as alleged, nor is he denying the Respondent the fruits of his judgment. The Appellant annexed copies of correspondence on the negotiations, and of a cheque of Kshs 500,000/= paid to the Respondent as ordered in the ruling for stay of execution.

The Respondent's learned counsel, Mutisya & Company Advocates, filed written submissions dated 18<sup>th</sup> May 2016, wherein he reiterated the averments made in the Respondent's pleadings, and in addition stated that their application for review or stalled negotiations which both ended in February 2015 cannot be given as an excuse for the delay in prosecuting the appeal.

Mulwa and Mulwa Advocates for the Appellant on the other hand relied on the decision in **Naftali Opondo Onyango vs National Bank of Kenya (2005) e KLR** to argue that the delay in this matter has

been for 8 months and was not inordinate in the circumstances, as no steps could be taken by the Appellant to prosecute the appeal during the period because of other pending proceedings between the parties. Further, that the Appellant stands to be prejudiced if the appeal is not heard as there is an award of Kshs 2,400,000/= made against him by the trial Court.

### **The Determination**

I have read and carefully considered the pleadings and submissions filed. The issue for determination is whether the appeal herein should be dismissed for want of prosecution. The applicable law in this regard is Order 42 Rule 35 of the Civil Procedure Rules which provides as follows:

**“(1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.**

**(2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”**

The processes of giving directions and service of memorandum of an appeal are provided for in Order 42 Rules 11, 12, and 13 of the same Rules, wherein it is provided as follows:

**“11. Upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act.**

**12. After the refusal of a judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.**

**13. (1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.”**

In the present application, the Appellant claims that there has been no admissions of the appeal as he is yet to be furnished with the certified copies of typed proceedings and judgment of the trial court. The law requires the Appellant to list the appeal for directions within 30 days of filing of the same. There is no requirement for the filing of a record of appeal for such directions to be granted. In this regard the documents that are required when filing of an appeal under Order 42 Rules 1 and 2 of the Civil Procedure Rules are set out as follows:

**(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.**

**(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.**

**2. Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.**

This finding notwithstanding, it is not disputed there were proceedings involving both parties herein on the subject matter of the appeal, which in my view is a reasonable explanation as to why no steps were taken in prosecuting the appeal. In addition, no directions have been given in this appeal, and the appeal cannot therefore be dismissed pursuant to Order 42 Rule 35(1) of the Civil Procedure Rules. The appeal

has also not been admitted to hearing, and since Order 42 Rule 12 of the Civil Procedure Rules provide that a memorandum of appeal shall be served after it has been admitted to hearing, this appeal is also therefore not amenable to dismissal under Order 42 Rule 35 (2).

I accordingly hereby decline to issue the orders prayed for by the Respondent in his Notice of Motion dated 9<sup>th</sup> November 2015 for the foregoing reasons. The costs of the Notice of Motion shall follow the appeal. This Court in addition directs the Appellants to file and serve their Record of Appeal within 60 days, after which this appeal shall be mentioned for direction as to its hearing.

Orders accordingly.

**Dated, signed and delivered in open court at Machakos this 8<sup>th</sup> day of February 2017.**

**P. NYAMWEYA**

**JUDGE**