



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 597 OF 2012

JOHN N. MUGAMBI 1ST APPELLANT

MUGAMBI & COMPANY2ND APPELLANT

VERSUS

DR. KIAMA WANGAI RESPONDENT

(Being an Appeal against the Judgment and decree of the Chief Magistrate's Court at Milimani (Hon. Obulutsa, SPM) dated and delivered on the 9th October, 2012 in CMCC NO. 5137 of 2010)

RULING

On 9th October, 2012 the lower court delivered a judgment in favour of the respondent herein whereby he was awarded Ksh. 55,000/= plus interest and costs of the suit. The appellants were aggrieved by the said order and filed the present appeal.

The record before me shows that the memorandum of appeal was filed on 8th November, 2012 but the record of appeal was not filed until 16th July 2015. There is now before me an application by the respondent by way of Notice of Motion dated 10th March, 2015 seeking an order that the appeal be dismissed for want of prosecution and that the decretal sum deposited in court be released to the respondent.

The grounds upon which the application is made are that appellants have not taken any step to prosecute the appeal since 8th November, 2012. They have also not complied with Order 42 of the Civil Procedure Rules or at all and therefore it is fair, just and in the interest of justice that the orders sought be granted.

There is also supporting affidavit filed by the respondent herein where he reiterates grounds set out hereinabove and adds that the conduct of the appellants is prejudicial to his interest.

The application is opposed and there is a replying affidavit sworn by the 1st appellant herein setting out several steps said to have been taken to facilitate the hearing of the appeal. After the memorandum of appeal had been filed, the appellants moved the lower court for an order of stay of execution which order was granted on condition that the decretal sum be deposited in court within 21 days. The appellants complied by depositing the decretal sum as ordered which included costs.

Both parties have filed written submissions which I have considered. It would appear the appellants blame their inability to obtain proceedings from the lower court for the delay in prosecuting the appeal. For the applicant to succeed it must be established that delay is inordinate, that it is inexcusable and that

he is likely to suffer prejudice. – See **AGIP (KENYA) LIMITED VERSUS HIGHLANDS KENYA LIMITED (2000) KLR.**

The annexures to the replying affidavit point to the efforts made by the appellants to obtain the lower court record for purposes of moving the proceedings of this appeal forward. When the lower court made the order for a stay of execution the appellants complied therewith without delay. That in my view was a manifestation of their intention to have their day in court in respect of the appeal.

I should point out that the delay of processing lower court record is a systemic shortcoming which is not limited to this appeal but many others pending hearing. As and when such an issue is raised by any party, the blame should be placed squarely on the court and not the parties. I know that parties are inclined to have litigation come to an end but many a times the process may be slow and frustrating.

In the instant case the delay is excusable due to circumstances beyond the appellant's control. Additionally the decretal amount having been deposited in court, the respondent cannot say he is facing any prejudice in the circumstances. Further, the courts should find in favour of sustaining a suit rather than dismissing the same so that no party is driven from the seat of judgment before a hearing.

The order that commends itself in the circumstances of this application is that, the application hereby fails and is dismissed. Each party shall bear their own costs.

The appeal record having been filed, the Deputy Registrar shall now call for the original file from the lower court so that directions are given to facilitate the expeditious hearing of this appeal.

Orders accordingly.

Dated and delivered at Nairobi this 3rd Day of December, 2015.

A.MBOGHOLI MSAGHA

JUDGE