



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL APPEAL NO.153 OF 2011**

**BETWEEN**

**AWADH YUSUF ..... 1<sup>ST</sup> APPELLANT/RESPONDENT**

**DAVID K. KABESA ..... 2<sup>ND</sup> APPELLANT/RESPONDENT**

**AND**

**PILIPETER RUGWAMBA ..... RESPONDENT/APPLICANT**

*(Being an appeal from part judgment delivered by the Hon. E. Maina, CM, on 30<sup>th</sup> June 2011 in Kisii  
CMCC No.747 of 2008)*

**RULING**

1. The application before court is the Chamber summons dated 26<sup>th</sup> February 2013 seeking orders that:-

*(a) The Honourable Court be pleased to dismiss the appellants' appeal for want of prosecution and*

*(b) In the alternative the court be pleased to strike out the Memorandum of Appeal herein and order execution to issue of the decree appealed from;*

*(c) The costs of the appeal and application be provided for.*

2. The application is brought under **Sections 1A, 1B and 3A** of the **Civil Procedure Act** and **Order 42** of the **Civil Procedure Rules** and on the grounds that the memorandum of appeal herein was filed about 2 years ago and the appellants have never moved the court and/or taken any steps towards the hearing and final disposal of the appeal occasioning an inordinate delay. It is also contended that the appellant, who has a stay of execution pending the hearing and final disposal of the appeals is taking advantage of the same while the applicant is being prejudiced by the said delay and is asking the court to exercise its inherent jurisdiction for the ends of justice and/or to prevent the abuse of court process by dismissing the appeal. Further the applicant submits that the delay in prosecuting the appeal offends the overriding objective of the Honourable court of facilitating the just, expeditious and efficient disposal of proceedings. Lastly the applicant says that there is no certified copy of the decree appealed from on record.

3. The affidavit by Rose Obaga, an advocate of this Honourable Court has been filed in support of the application. In her affidavit she states that the appeal was filed on 29<sup>th</sup> July 2011 and the memorandum

of appeal served on 3<sup>rd</sup> August 2011. On 12<sup>th</sup> August 2011 the appellants' applied for and obtained a stay of execution pending the hearing and disposal of the appeal on condition that the decretal sum be deposited in an interest earning account as security.

4. She also contends that to date the appellants have not complied with the said orders and they have not moved the court and/or taken any steps towards setting the appeal down for hearing and final disposal or at all. That the 2 year delay shows that the appellants have lost interest in the appeal which ought now to be dismissed.

5. Counsel for the applicant also contends that the inordinate delay in prosecuting the appeal has caused a lot of prejudice to the respondent who has been denied the enjoyment of the fruits of his judgment by an indolent appellant. She contends that the reason for filing the appeal was to delay and deny the respondent the fruits of his judgment. She also contends that after perusing the court file she has confirmed that there is no certified copy of the decree appealed from filed in accordance with the provisions of **Order 42 Rule 2** of the **Civil Procedure Rules**.

6. In response Olive Njuguna a Legal Officer at Direct Line Assurance Company Limited filed a replying affidavit on behalf of the appellant now respondent where she states that the failure to comply with the said court order was occasioned by the applicants' failure to supply their advocates on record with the necessary documents required to open a joint account even after having been requested to do so. She has annexed copies of correspondences between the advocates.

7. She also states that the cheque for the decretal amount has gone stale twice due to the failure of the applicants to supply their advocates on record with the necessary documents required to open a joint account. That her advocates on record had requested the court to supply them with typed proceedings and judgment to enable them prepare their record of appeal but the court file has never been traced.

8. In her oral submissions Miss Obaga told the court that the main complaint of the applicant is the delay. On the issue of the respondent's inability to comply with conditions for depositing the decretal sum she submits that there was a time frame for making the deposit. The respondent did not comply and never applied for extension of time. Miss Obaga also submits that the applicant is being denied the fruits of his judgment. She contends that writing letters to court without any follow up amounts to inactivity on the part of the appellants and in any event there is no proof of payment of deposit for the proceedings. She urges the court to allow the application with costs of both the application and appeal.

9. Mr. Odhiambo for respondent in his submissions maintains that even though stay of execution was granted after judgment they have tried every means to have the file retrieved. He submits that the delay was caused by the applicants who failed to supply the necessary documents to enable the opening of the joint account. He submits that the cheque to be banked was issued within the 30 days ordered by the court and further it would be in the interest of the applicants if their advocates responded to the letters sent by the respondent's advocates. That the cheque for the decretal amount became stale due to lack of documentation. He maintains that they followed up on the missing file and at the point of making the replying affidavit, the court file had not been found. He opines that there is no written law that whenever a litigant applies for proceedings they pay for the same. He asks the court to dismiss the application.

10. I have considered the submissions of learned counsel appearing including the authorities cited. I have also gone through the supporting affidavit and the replying affidavit by the applicant and the respondent.

11. The issue this court is to address is about the delay in prosecuting the appeal. **Order 42 Rule 11** provides as follows: "**Upon filing of the appeal the appellant shall within thirty (30) days, cause the matter to be listed before a judge for directions under section 78B of the Act.**" The order gives the appellant thirty days and thereafter **Rule 13 (1)** provides that on notice to the parties delivered not less than 21 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.

12. It is thus the duty of the appellant to cause the appeal to be listed for directions 21 days after service of the memorandum of appeal.

13. Memorandum of appeal in this case was filed on the 25<sup>th</sup> July 2011 and served on the 3<sup>rd</sup> of August 2011 and from the record and the submissions by counsel no dates have been taken by the appellant for any action whatever. The respondents/appellants have not given any reasons as to why they never complied with the rules as set out under **Order 42**. The explanation given by the appellants for their inactivity is that the applicant herein failed to supply the necessary documents required to open a joint account and that their efforts to be supplied with typed proceedings and judgment to prepare their record of appeal failed because the court file was missing. The appellants wrote a letter to the Executive Officer on the 8<sup>th</sup> August 2011 followed by another one on 22<sup>nd</sup> March 2012 and 17<sup>th</sup> August 2012. This to me is not exercising due diligence as is being insinuated by the advocate for the appellant/respondent herein. In any event, no affidavit has been filed by a clerk who has been following up this matter on behalf of the appellants to confirm that the court file has been missing. Further, the rules give the appellants the option to apply for reconstruction of the court file but this option was never exercised by the appellant. I therefore find that there is no reasonable explanation for the delay. The appellant has been guilty of inordinate delay in prosecuting its appeal. The application dated 26<sup>th</sup> February 2013 is allowed in terms of prayers (a) and (c) thereof.

14. It is so ordered.

**Dated, signed and delivered at Kisii this 13<sup>th</sup> day of March, 2014**

**R.N. SITATI**

**JUDGE.**

In the presence of:

M/s Kairu & McCourt (absent) for Appellants/Respondents

Mr. Oguttu-Mboya for Miss Obaga (present) for Respondent/Applicant

Mr. Bibu - Court Clerk