

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. 101 OF 2013

SAMUEL MAINA KARANJA.....APPELLANT

VERSUS

ALICE WAITHERA.....RESPONDENT

RULING

By a notice of motion dated 1st July, 2013 said to be brought to court under **Order 42 Rule 11** and **Order 35 Rule (2)** of the **Civil Procedure Rules**, the applicant sought to have the memorandum of appeal filed herein struck out for non-service or be dismissed with costs to the respondent.

The application was supported by the affidavit of Mercy Nduta Mwangi sworn on 1st July, 2013.

According to the applicant, although the memorandum of appeal was filed way back on 27th October, 2011, it has never been served upon the respondent. The applicant argued that the appeal itself has never been placed before the judge for directions. Furthermore, more than one year has lapsed since the appeal was filed yet it has never been set down for hearing. In the face of the appellant's apparent lethargy, the respondent argued that she has been prejudiced and is unable to enjoy the fruits of the judgment given in her favour in the subordinate court.

The record indicates that appellant's advocates were served with the respondent's application on 12th July, 2013 but as at 19th March, 2014 when the application came up for hearing, no response in whatever form had been filed. On that day Mr Karanja for the appellant applied for adjournment on the grounds that he was under the impression that a replying affidavit had been filed. The court rejected the application for adjournment as, in its view, the reason given by the appellant's counsel for the application for adjournment was not plausible.

In his brief response to the applicant's submissions, Mr Karanja argued that the notice for dismissal of the appeal had not been given to the registrar and that in any event the decretal amount had been deposited in court.

Looking at the record, all that was filed by the appellant is the memorandum of appeal; the decree appealed from has never been filed and there is no evidence on the record that any efforts have ever been made to have it extracted and filed pursuant to **Section 79 G of the Civil Procedure Act** and **Order 42 Rule 2 of the Civil Procedure Rules**, which enjoins the appellant to file the memorandum of appeal together with the decree appealed from. Under **Order 42 rule 2** of the **Rules**, if the decree is not filed alongside the memorandum of appeal, the decree or a certified copy thereof must be filed as soon as possible or within such time that the court may direct.

The appellant in this case filed a bare memorandum of appeal and as noted, since 27th October, 2011 when that memorandum of appeal was filed no further step was ever taken to have the decree extracted and filed and thus have the appeal, properly so called and as contemplated under **section 79G** of the **Civil Procedure Act** and **Order 42 Rule 2** of the **Civil Procedure Rules** filed.

The lethargy on the part of the appellant implies that this court cannot even consider whether his appeal is ripe for directions under **section 79 B** of the **Civil Procedure Act**. In the meantime the respondent cannot enjoy the fruits of her judgment which was delivered by the subordinate court in September, 2011.

In the absence of any explanation of all these omissions on the part of the appellant, there is no reason why the respondent should not be allowed to enjoy the fruits of her judgment simply because a memorandum of appeal has been filed.

It is apparent that the appellant has never been diligent in pursuing his appeal. The fact that the decretal sum has been deposited in court, as argued by the appellant's counsel, cannot be said to be a sufficient cause for the delay in taking the appropriate steps to have the appeal heard and determined. For the forgoing reasons, I allow the respondent's motion dated 1st July, 2013 and strike out the appellant's memorandum of appeal dated 26th day of October, 2011 with costs.

Dated, signed and delivered in open court this 9th May, 2014

Ngaah Jairus

JUDGE