

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO 170 OF 2010

JULIUS KIMANZI.....APPELLANT

VERSUS

DUNCAN P. OCHORO.....RESPONDENT

R U L I N G

1. The Respondent in this appeal has sought by **notice of motion dated 27th September 2013** dismissal of the appeal herein want of prosecution. The application is made under **Order 42, rule 35(1)** of the **Civil Procedure Rules, 2010** (the **Rules**). The inherent power of the court is also invoked.

2. The application is founded on the grounds -

(i) That since the filing of the memorandum of appeal on 13th May 2010 and seeking stay of execution on 28th January 2011, the Appellant has never taken any step towards setting down the appeal for hearing.

(ii) That the Appellant is guilty of laches and inordinate delay in the prosecution of his appeal.

(iii) That the delay has prejudiced the Respondent, and it is only proper and just that the appeal be dismissed.

3. The Appellant has opposed the application by his **replying affidavit filed on 13th May 2014**. He claims that he has not lost interest in the appeal and blames his previous advocates for not setting the appeal down for hearing. He avers that the mistake of his counsel should not be visited on him. He further contends that he has an arguable appeal with chances of success which ought to be disposed of on merit.

4. At the hearing of the application, learned counsel for the Respondent pointed out that the replying affidavit was filed out of time without leave of court. The said affidavit was most certainly filed out of time. On 19th March 2014 the Court gave the Appellant 14 days to file a response to the application; his replying affidavit was only filed the day before hearing -11 days late.

5. Regarding merits of the application, without first taking necessary preliminary steps like filing record of appeal and obtaining directions under Order 42, **rule 13** for hearing of the appeal, the hearing notice dated 17th September 2011 to the Respondent's advocates did not serve any purpose as the appeal could not have been heard. In any case, that hearing notice and a subsequent letter appear to be the only action taken by the Appellant after filing the memorandum of appeal. No other action is disclosed by the replying affidavit or the court record.

6. The inaction by the Appellant's advocates being used as an excuse cannot hold in this day and age. As was stated by the **Court of Appeal** in the case of **Rajesh Rughani vs Fifty Investments Ltd &**

Another [2005] eKLR, it is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. The delay in the present case of two-and-a-half years is inordinate and has not been satisfactorily explained.

7. The Appellant has not even filed the necessary record of appeal has not even been filed to date despite the proceedings of the lower court being ready for collection. It would not be just to deny the Respondent the fruits of his judgment any longer in the circumstances of this case. The appeal is dismissed with costs for want of prosecution. any stay of execution in place is hereby vacated. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF JULY 2014

H P G WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 16TH DAY OF JULY 2014