

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Appeal 90 of 2007

MWANGI KIMANI.....APPELLANT

VERSUS

FELIX MUREITHI KARIUKI.....RESPONDENT

RULING

This appeal was filed way back on 18/12/08 and it has not been prosecuted since. On 28/8/2012, the court took out a notice to show cause to issue on the appellant to show cause why the appeal should not be dismissed under **Order 42 Rule 35(2)** of the **Civil Procedure Rules**. The appellant filed an affidavit dated 25/9/2012 requesting the court to refrain from dismissing the appeal for reasons that despite appellant's efforts to have the appeal heard, the lower court file CMC 731/2003 has been missing. The appellant exhibited correspondences between the firm of Rodi Oregu & Co. Advocates with the Court in which the Advocates were asking for the file CMC 731/03.

I have perused the file and the last time it was before the Deputy Registrar is on 31/7/2009 when directions were taken to the effect that a date for hearing be taken at the registry. The appellant wrote a letter dated 15/11/2010 requesting the respondent's counsel to attend court for fixing a hearing date but it was not fixed because the lower court file was missing. Another letter dated 24/11/2010 by the appellant's counsel addressed to the Executive Officer, Nakuru Court, requested that CMC 731/03 be sent to the High Court so that a hearing date could be taken in this appeal. On 30/11/2010, the appellant's counsel also wanted the respondent's counsel to attend court with a view of fixing a hearing date. On 2/6/2011, the appellant's counsel again wrote to the Chief Magistrate Nakuru requesting that the lower court file be availed. The last letter dated 12/2/2012 does not seem to have been received by the court.

In view of the appellant's efforts disclosed in the correspondences exhibited, I am satisfied that it is not entirely the fault of the appellant that this appeal has not been heard. The court is partially to blame for not availing the lower court file. For that reason, the appellant has sufficiently demonstrated why the appeal should not be dismissed and the Notice to show cause is hereby withdrawn. I direct that the Deputy Registrar do ensure that the lower court file is traced and this matter be mentioned in a month's time after which the parties can take a hearing date for the appeal.

DATED and DELIVERED this 5th day of October, 2012.

R.P.V. WENDOH

JUDGE

PRESENT:

Ms Sieling holding brief for Mr. Oregu for the appellant

N/A for the respondent

Kennedy – Court Clerk