



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL 94, 95, 96, 97 & 98 OF 2006

EPHRAIM GATHIGO KARANJA.....APPELLANT

VERSUS

STEPHEN GAKURE KIIRU.....RESPONDENT

AND

Civil Case 95 of 2006

EPHRAIM GATHIGO KARANJA.....APPELLANT

VERSUS

ANTHONY THITU MUTHIRI.....RESPONDENT

AND

Civil Case 96 of 2006

EPHRAIM GATHIGO KARANJA.....APPELLANT

VERSUS

JAMES WERU MAINA.....RESPONDENT

AND

Civil Appeal 97 of 2006

EPHRAIM GATHIGO KARANJA.....APPELLANT

VERSUS

JAMES MWANGI MUIGA.....RESPONDENT

AND

Civil Appeal 98 of 2006

EPHRAIM GATHIGO KARANJA.....APPELLANT

VERSUS

JOSEPH THAMAINI KIBUCHI.....RESPONDENT

(CONSOLIDATED)

RULING

The application dated 14th April 2008 in Civil Appeals No. 94/2006 also applies to Civil Appeal No. 95/2006, 96/2006, 97/2006 and 98/2008. This ruling will therefore apply mutatis mutandis to all the listed appeals. The application is filed pursuant to Order XLI Rule 31(2) (not Rule 32 as cited). The applicants are asking the court to dismiss the Memorandum of Appeal filed on 13/12/2006 for want of prosecution. They are also asking that the decretal sum of Ksh.599,403.45 deposited in the joint account of both counsel and held by Family Finance Bank Othaya be released to M/s V.E. Muguku Muriu & Co. Advocates. They have also asked for costs. The issues herein are very clear. The Appellant herein through M/s Wangai Nyuthe & Co. Advocates filed the 5 appeals on behalf of the respondents who are the applicants herein in respect of some running down matters heard before the Principal Magistrate's Court in Kerugoya. The Memorandum of Appeals were filed on 15/12/2006. Thereafter nothing was done to move the court to hear the appeals- necessitating these applications.

In his replying affidavit dated 26/5/2008 counsel for the respondents has averred that the appellant is still desirous of prosecution the appeals. He states that the delay is not deliberate saying that they applied for the certified copies of the proceedings and Judgment of the lower court but the same was not forthcoming. In support of that averment are annexures '**BM1**', '**BM2**' and '**BM3**'. As rightly submitted by counsel for the applicants however, '**BM1**' is an unsigned letter which does not have the "**receiving**" stamp of the Kerugoya Court. Indeed '**BM1**' is addressed to the **PRINCIPAL MAGISTRATE'S COURT-KERUGOYA LAW COURTS- NAIROBI** – with such an address, one need to wonder why the letter was never received at Kerugoya.

I may also wish to point out that the settled procedure of the courts when one applies for proceedings is to require a deposit of the fees for the same to be paid. There is no copy of such a receipt annexed to these letters to show that indeed any deposit was paid for the typing of the proceedings. In my view, there is no demonstration of any serious attempts to procure the proceedings in this matter with a view to having the appeal heard or even for the record to be prepared. In all fairness what reasons would incline me to exercise my discretion in favour of the appellants herein? The Respondents have not been able to enjoy the fruits of their Judgment 3 years down the line. The decretal amount of 599,403.45 is in respect of all five files. This is not in my view an exorbitant amount and the dictates of justice militate against any further delay in these matters.

Interestingly, although this issue was not brought up, the memoranda of Appeal shows that the judgments appealed against were delivered on 5/7/2006 yet the memoranda of Appeal were filed on 15/12/2006. It is not clear whether the Appeals were filed pursuant to leave granted by the court. If there was leave, the memorandum should clearly indicate that the Appeal was filed "**pursuant to the leave of the court dated.....**" There is a possibility therefore that even the said appeals were filed out of time and without the leave of the court.

In pith and substance, I find the applications before me merited and allow the same with costs to the Applicants herein but Respondents in the Appeals.

W. KARANJA

JUDGE

Delivered, signed and dated at Embu this 6TH day of October, 2009.

In presence of:-

Mr. Mwangi Gathiga for Muguku for applicant present

N/A for Respondent.

W. KARANJA

JUDGE

6/10/2009