



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**ENVIRONMENT AND LAND COURT**  
**CIVIL APPEAL NO. 13 OF 2013**

**PATRICK BWIRE NYABOLA.....APPELLANT/RESPONDENT**

**VERSUS**

**GABRIEL PETER MBINDA ..... 1<sup>ST</sup> RESPONDENT**

**CATHOLIC DIOCESE OF BUNGOMA SISENYE PARISH.....2<sup>ND</sup> RESPONDENT/APPLICANT**

**RULING**

1. The application for determination before me is a Notice of Motion dated 14/6/2018 filed here on 21/6/2018. It is brought under Order 42 Rules 35, Order 24 Rules 4, 8 and 9 of Civil Procedure Rules and Section 1A and 3A of the Civil Procedure Act (cap 21). The Applicant – **CATHOLIC DIOCESE OF BUNGOMA** – is the 2<sup>nd</sup> Respondent in the appeal herein filed by Appellant – **PATRICK BWIRE NYABOLA** – who is Respondent in this application. The 1<sup>st</sup> Respondent in the appeal – **GABRIEL PETER MBINDA** – is said to be deceased.

2. The Applicant is seeking the following orders:

1. That this appeal be confirmed dismissed pursuant to directions of 17/5/2017.
2. That the appeal against the first Respondent has abated.
3. That the appeal against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be dismissed for want of prosecution and failure to comply with orders of 17/5/2017.
4. That the costs of this appeal and application be borne by the Appellant.

3. The application is anchored on grounds, *inter alia*, that the 1<sup>st</sup> Respondent died and has never been substituted; that for a period of over one year the appeal has never been set down for hearing; that the Appellant is not interested in having the appeal heard and concluded; and that the pendency of the appeal is prejudicial to the 2<sup>nd</sup> Respondent.

4. In the supporting affidavit that came with the application, it was deposed, *inter alia*, that the appeal was filed on 6/5/2013, with the memorandum of appeal being served on 22/5/2013. The court issued a Notice dated 5/5/2017 intimating intention to dismiss the matter for want of prosecution unless good cause be shown explaining delay in prosecution. The matter came up for mention on 17/5/2017 and the court directed that the record of Appeal be filed by 22/5/2017. No record of Appeal however was filed by 22/5/2017 and the counsel for the Appellant expressed his intention to cease acting for the Appellant.

5. The Appellant was said to have lost interest in the appeal and the Appellant's side is blamed for not substituting the 1<sup>st</sup> Respondent who is deceased.

6. The Respondent (who is Appellant in the appeal) responded vide a replying affidavit dated 3/10/2018 filed on the same date. It was deposed that it is not the Respondent's mistakes that the matter has not taken off. The lower court file was said to have been missing and efforts to get it were not fruitful. The Respondent asked for time to try and get the file in order to prepare the records of appeal.

7. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 9/11/2018. It was submitted that the Respondent was given up to 22/5/2017 to file the record of appeal failing which the matter would stand dismissed. The record of appeal however was not filed on time. It was instead filed over one year later. And this was done without leave of Court. That is why

dismissal is asked for.

8. The Respondent's submissions were filed on 10/2/2018. It was reiterated that the Respondent is not solely to blame for the delay in this matter. The lower court file was said to have been missing.

9. I have considered the application, the response made, and the rival submissions. The court was told that the 1<sup>st</sup> Respondent is deceased. It is on this basis that the appeal is sought to be declared as having abated. It could well be that the 1<sup>st</sup> Respondent is deceased. But it was not enough to say that he is deceased. The court needed proof. Something like a death certificate or burial permit should have been availed. This was not done. Instead, the information about the death of the 1<sup>st</sup> Respondent was being communicated much the same way that it would in a market place. In a court of law, you say and demonstrate or prove. In a market place, you just say it and whoever wants to believe can do so. The court cannot declare the appeal as having abated in the circumstances. The information given is wanting. The fact of death should have been demonstrated by availing the necessary document(s).

10. It was alleged that the Respondent was supposed to have filed the record of appeal by 22/5/2017 failing which the appeal would stand dismissed. That is not true. The communication given by the court on 17/5/2017 was that the record of Appeal should be filed by 22/5/2017 failing which the court would dismiss the matter. That date came and passed and the appeal was not dismissed. Infact records show that the Applicant's side was represented in court on 22/5/2017 and no request or application was done for dismissal of the appeal. Instead, another date was taken. The appeal was not dismissed and cannot be said to have stood dismissed. The future date given on 22/5/2017 was for an active appeal, not a dismissed one.

11. As regards delay in the prosecution of the matter, I am reasonably persuaded by the argument of the Respondent's counsel that the Respondent is not solely to blame. Correspondence was availed showing that the lower court file was not available. I think it would be unfair to punish the Respondent for shortcomings that are not entirely of his own making.

12. When all is considered therefore, the court is not persuaded that it should allow the application herein. The same is therefore found unmeritorious and is hereby dismissed. No order as to costs. The Respondent herein should now act with all due dispatch to ensure expeditious prosecution of the appeal.

**Dated, signed and delivered at Busia this 10<sup>th</sup> day of September, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Appellant/Respondent: Absent

1<sup>st</sup> Respondent: Absent

2<sup>nd</sup> Respondent/Applicant: Absent

Counsel for the Appellant/Respondent: Present

Counsel for the Respondent/Applicant: Present

CA: Nelson Odame