



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. APPEAL NO. 6 OF 2016**

**KARSANDAS TULSHIDAS & SONS.....APPELLANT**

**VERSUS**

**JOSEPHINE MUTUNGWA MUTUKU.....RESPONDENT**

**RULING**

1. In the Notice of Motion dated 25<sup>th</sup> September, 2018, the Respondent has prayed for the following orders:

**a. That the Appeal herein be dismissed for non-compliance with the Orders and/or directions of the Court made on 22<sup>nd</sup> September, 2017 and for want of prosecution.**

**b. That the Appellant do bear costs of both the Appeal and the Application.**

2. The Application is premised on the grounds that one (1) year has lapsed since the Appellant was ordered by the court to set down the Appeal for hearing; that the Appellant is not desirous of prosecuting the Appeal and that the 120 days within which the Appellant was to fix the Appeal for hearing has lapsed.

3. In reply, the Appellant's Advocate submitted that the court never served him with a notice on the date of the delivery of the Ruling that was delivered on 15<sup>th</sup> January, 2019; that the delay in complying with the orders of the court was not intentional but due to the unavailability of the file; that they have not been able to file the Appeal because of the frustrations experienced at the Business Premises Rent Tribunal in getting typed proceedings and that the Appellant is desirous of prosecuting the Appeal. According to the Appellant, they have filed an Application dated 23<sup>rd</sup> January, 2019 for enlargement of time within which to file the Appeal.

4. Both the Appellant and the Respondent filed submissions which I have considered.

5. The record shows that the Appellant filed his Memorandum of Appeal challenging the decision of the Business Premises Rent Tribunal Case No. 12 of 2015 on 24<sup>th</sup> October, 2016. On the other hand, the Respondent filed a Memorandum of Cross-Appeal challenging the decision of the Tribunal in respect of an Award of costs.

6. After filing the Memorandum of Appeal, the Appellant filed an Application dated 21<sup>st</sup> October, 2016 in which he sought for an order staying execution of the Award of the Tribunal. Although the court was to deliver its Ruling on 29<sup>th</sup> May, 2017, it was not until 22<sup>nd</sup> September, 2017 that the said Ruling was delivered in the presence of the Applicant's advocate. The Appellant's/Respondent's advocate was not present.

7. In its Ruling of 22<sup>nd</sup> September, 2017, this court allowed the Appellant's Application for stay of execution pending the hearing of the Appeal. The court further directed the Appellant to fix the pending Appeal within 120 days of the date of the Ruling.

8. Although the Ruling did not expressly state so, it is obvious that the stay of execution of the Award of the Tribunal was granted by the court on condition that the Appellant fixes his Appeal within 120 days. He has neither filed the Record of Appeal nor fixed the Appeal for hearing within the 120 days as directed by the Court.

9. The Ruling by this court was delivered after a Notice was sent to all advocates by way of email. That explains why the Applicant's advocate was in court. Since 22<sup>nd</sup> September, 2017 when the Ruling was delivered and 25<sup>th</sup> September, 2018, when the Application was filed, the Appellant had neither filed a Record of Appeal nor fixed the same for hearing. Indeed, there is no evidence to show that the Appellant ever applied for proceedings to enable him file the Record of Appeal.

10. Considering that the Appellant was to file and fix the Appeal within 120 days, and the Appellant having not given any plausible reason as why he has never fixed his Appeal for hearing within the said 120 days, I shall set aside the orders granted on 22<sup>nd</sup> September, 2017.

11. For the reasons I have given above, I set aside the orders granted on 22<sup>nd</sup> September, 2017. The Appellant shall pay the costs of the Application.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 4<sup>TH</sup> DAY OF OCTOBER, 2019.**

**O.A. ANGOTE**

**JUDGE**