



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC CAUSE NO. 142 OF 2017

FORMERLY NAIVASHA CIVIL APPEAL NO. 26 OF 2015

LUCIA TEEKA.....PLAINTIFF

-VERSUS-

JOEL ZAKAYO NCHOE.....DEFENDANT

RULING

The Application before me is the Notice of Motion dated 5th April, 2017 which was brought under section 3 of the Civil Procedure Act and seeks orders of striking out the purported Appeal and also dismissal of the same. The Application was based on the grounds that the Appellant had failed to comply with the provisions of Section 79 (G) of the Civil Procedure Act, Order 42 Rule (2) of the Civil Procedure Rules and lastly that there is no Appeal on which the court can pronounce itself.

The Application was supported by the Affidavit of Joel Zakayo Nchoe in which he contended that no Appeal was ever filed to date and the Respondent has not adduced sufficient grounds as to why the Appeal was not filed since 4th February, 2014 when Judgment was delivered. He further stated that the Appellant has failed to annex a certified copy of the decree and the same is fatally defective.

The Applicant also averred that no record of Appeal was filed by the Respondent and hence there is nothing for the court to address its mind to as an Appeal.

The Application was opposed by the Respondent who had filed a Replying Affidavit in which he stated that he was required to file a Notice of Appeal which he did but waiting for admission of the Appeal to enable him file a record of Appeal and that the said Appeal was never admitted nor directions given. He further contends that the delay to act was as a result of failure on the part of the previous advocates which led the Applicant to file the instant application and it will serve the interest of justice if the appeal will be heard on merit.

When the Application came before me for hearing the counsel for the respective parties made submissions.

Having read the Application before me and the submissions made by the counsel I find that the Respondent herein had various challenges as to why the record of appeal was not filed. He attributes the mistakes to his previous advocates and even though the courts' have at various times stated that parties have a duty to follow on their matters it will also be unfair to visit the mistake to punish a litigant for the mistakes of his advocates.

From the records and the Replying Affidavit I find that the Respondent has taken stages to fast track the issues. He has obtained a certified copy of the decree, ensured that the lower court file is before the court and lastly filed his record of appeal and having done the above it is my finding that dismissal of the Appeal will be draconian and will not serve the interest of justice as embedded under Article 159 of the Constitution of Kenya.

In view of the above I will exercise my discretion and thus decline to dismiss the appeal as prayed in the application and I grant leave and order that the appeal be heard within 60 days.

Each party will bear the costs of the application.

DATED, SIGNED and DELIVERED in open court at **NAROK** on this **20th** day of **July, 2018**

Mohammed Noor Kullow

Judge

20/7/18

In the presence of:-

Mr Lel holding brief for Simiyu for the Respondent

Mr Kiptoo holding brief for Jaoko for the Applicant

CA:Chuma

Mohammed Noor Kullow

Judge

20/7/18