



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC. CIVIL APPEAL NO. 5 OF 2015**

**JAMES NGIRINE MUKUARI.....APPELLANT**

**VERSUS**

**MICHAEL KILEMI .....1ST RESPONDENT**

**LAND ADJUDICATION OFFICER MERU NORTH.....2ND RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT**

**R U L I N G**

1. The Chamber Summons dated 29th February, 2016 is brought under Order 42 Rule 35 (1) CPR CAP 21 Article 159(2) of the Constitution and The applicant is the Ag and by extension the 2nd and 3rd Respondents. The orders sought are:-

(a) That the Appeal herein be dismissed for want of prosecution

(b) That the Respondent to bear costs of this application.

2. The application is based on the grounds.

i. That this matter was last in Court on 11/2/2015.

ii. That it is more than one year since the matter was last in Court.

iii. That the Respondent has lost interest with this appeal.

iv. That litigation must come to an end.

3. A Supporting Affidavit has been filed by JUSTIN KIONGO a state counsel where he has deponed as follows:-

(1) That this Appeal was last in court on 11th February, 2015.

(2) That it is now over one year since and the Appellant has not taken any step to prosecute this appeal.

(3) That the litigation must come to an end.

(4) That the Respondents have not been keen to prosecute this appeal.

(5) That The Appeal herein had no chances of success and should be dismissed.

(6) That justice delayed is injustice.

4. The 1st Respondent ( in the appeal) one MICHAEL KILEMI has also filed a Replying Affidavit dated 01.07.16 where he states as follows: -

(1) That this appeal was filed on 11th February, 2015.

(2) That the appellant since filling this appeal has not taken any steps to prosecute the same.

(3) That the appellant filed this appeal after the respondent won the case in Magistrate's Court .

(4) That a successful litigant should be allowed to enjoy the fruits of his judgment and not to be subjected to unwarranted delay.

(5) That the appellant is indolent and is not in hurry to set down the appeal for hearing, more than one and half years since the same was filed.

(6) That the delay in prosecuting the appeal is inordinate, Mischievous and prejudicial to 1<sup>st</sup> Respondent who had won the judgment against the appellant.

(7) That he supports the application by Hon. Attorney General for the dismissal of the appeal for want of prosecution and that in any event the appeal has no chances of succeeding.

5. The Appellant has filed a Replying Affidavit which is rather detailed. He has deposed as follows:-

(1) That he was dissatisfied/aggrieved by the Judgment of Hon. E.W WAMBUGU R.M in MERU CMCC NO. 852 OF 1998 delivered on the 16th Day of January, 2015, hence the filling of the appeal against the said judgment and the proceedings.

(2) That immediately after the Judgment was read he (appellant) advised his advocate on record to apply for typed proceedings for the purpose of instituting an appeal.

(3) That they were provided with a copy of the judgment thereafter which they used to file this Appeal but the proceedings were not availed.

(4) That after filing the Memorandum of Appeal, Appellant wrote a letter to the Chief Magistrates' Court Registry seeking to be provided with typed proceedings for the purpose of preparing a record of appeal

(5) That he was requested to pay Kshs. 1000 being the deposit for the typed proceedings, which amount he promptly paid .

(6) He was then advised to keep on checking with the Registry to confirm whether the typing of proceedings had been completed, and on several occasions he kept on checking with the registry to no avail. He was informed that the file was too bulky seeing that it was a 1998 file that had been heard by almost 5 different Magistrates and over 10 witnesses on record and thus the typing was taking longer than usual.

(7) On 26th August he went to the registry and was told that the proceedings were fully typed and pending proof reading and that Mr. Miriti who had been assigned to proof read was unwell. He was assured that the issue would be attended to.

(8) On 22nd September, 2016, while at the registry, he spoke to a Mr. Namu who informed him that what was pending was proof reading and certification.

(9) Appellant requests the court to ascertain the actual status of the lower court record, whether it is ready or not.

(10) THAT appellant is unable to prepare the record of appeal in absence of the typed lower court record and hence it is not his doing that this appeal has not been prosecuted but rather circumstances beyond his control.

(11) The annexures in support of the appellants claims are;

**a. A copy of memorandum of appeal**

**b. Receipt in respect of monies paid to court for the proceedings**

**c. Letter to the chief magistrate requesting for the Proceedings and Judgment.**

6. On 22:09:16, directions were given for the application to be canvassed by way of Written Submission. All parties have complied with such directions.

7. In their Submissions, the 1st Respondent and the Attorney General state that the appeal is ripe for dismissal as the appeal has remained unprosecuted for a period of over one year and 3 months.

8. On the other hand, Appellant has stated that it is not his doing that the appeal has not been prosecuted. He blames the Court as efforts made to be furnished with the typed record have been futile.

9. Further, appellant has submitted that directions have not yet been issued.

10. In support of his claim . Appellant has relied on the following authorities:-

***I. Jurgen Paul Flach v Jane Akoth Flach [2014] Eklr , Kirinyaga General Machinery v Hezekiel Mureithi Ireri HCC No. 98 of 2008.***

***II. Suresh Ruginath Raniga & another v Sagar Mohan S.M Ram [201, CIVIL APPEAL NO 433 OF 2012.***

***III. Abdirahman Abdi v Safi Petroleum Products Ltd & 6 others [2011] eKLR , Civil Application No. Nai. 173 of 2010***

11. I have found it necessary to respond to the appellant's request made in paragraph 11 of his affidavit. I have therefore taken steps to peruse file No. CMCC No. 852 of 1998. What the Court established in the lower Court file is that even as at now; the proceedings are still not ready.

12. I make reference to the provisions of article 22(3)d of the constitution-

***“ the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities”;***

article 159 (2)(d)-

***“ justice shall be administered without undue regard to procedural technicalities”;***

In essence, this Court is called upon to do substantive justice to the parties without being hindered by procedural technicalities. The appellant has encountered difficulties in obtaining proceedings. Should he be faulted? Certainly not.

13. The other issue the Court has to consider is whether directions were ever given in respect of the admission of the appeal. The Court's record contain a letter dated 19:02:15 from the DR to the C.M

Meru calling for the original record of the lower Court. There is no response or action on that letter.

14. Order 42 Rule 11 contains directions under Section 79B of the Civil Procedure Act. The rules state that:-

***“Upon filing of the appeal the appellant shall within 30 days cause the matter to be listed before a Judge for directions under S. 79 B of the Act”.***

Appellant has not complied with that provision. It is now a practice that the DR in a high court station is the one who presents the file before a Judge for admission or otherwise. These are in my view procedural technicalities which should not be used to hinder the quest for substantive justice.

15. I find that it would not be in the interest of justice to dismiss the appeal at this stage. It is only fair and just that the merits of the appeal be considered.

16. I therefore dismiss the application of dated 29/2/2016 and I proceed to give directions as follows: -

***I. That proceedings in CMCC 852 /1998 be typed and proof read speedily and the same be supplied to the parties.***

***II. That the typing ,proof reading and certification of the proceedings to be conducted within 60 days. In the event that this is not done, the Executive Officer, Meru Law Court to appear before this court to explain the status of the proceedings.***

***III. The orders here in to be served upon upon the CM Meru , Deputy Registrar and the Executive Officer for compliance.***

***IV. Each party to bear their own costs of this application.***

**DELIVERED IN OPEN COURT AT MERU THIS 14TH, MARCH, 2017 IN THE PRESENCE OF:**

CA: Janet

Kiango for 2nd & 3rd Respondents

Kaimenyi h/b for Miss Mutinda for Appellant

1st Respondent in Person

Appellant present

**L.N.MBUGUA**

**JUDGE**