



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC APPEAL NO. 3 OF 2015**

**JOSEPH GATHUNGU RUGENDO.....1<sup>ST</sup> APPELLANT**

**LUCIA MUTHONI RUGENDO.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**STANLEY KABUGI KAMULWA.....1<sup>ST</sup> RESPONDENT**

**GABRIEL NJIRA-INI KAMULWA.....2<sup>ND</sup> RESPONDENT**

**RULING**

The application for my determination is that by the respondents dated 27th October 2016 seeking the following orders:

- 1. That this Court be pleased to dismiss this appeal for want of prosecution.***
- 2. That the costs of the appeal and the application be provided for.***

The application which is premised on ***Order 42 Rule 35 (1) of the Civil Procedure Rules*** is based on the grounds set out therein and supported by the affidavit of **GABRIEL NJIRAINI KAMURWA** the 2nd respondent herein sworn also on behalf of his brother **STANLEY KABUGI KAMURWA** the 1st respondent.

The gravamen of the application is that this appeal has been in Court for the last 16 years and after it was struck off for want of prosecution by **SERGON J.** on 4th June 2010, that order was reviewed by **OMBWAYO J.** on 11th December 2014 with an order that the supplementary record of appeal be filed and served within 14 days. The appellants did not comply with that direction and instead filed the supplementary record of appeal on 14th June 2016 without the leave of the Court and even after doing so, no step has been taken towards prosecuting this appeal.

The 2nd appellant **LUCIA MUTHONI RUGENDO** filed a replying affidavit to that application in which she deponed, inter alia, that although the ruling by **OMBWAYO J.** was delivered on 11th December 2014, she was not able to comply with it because it was originally due for delivery on 7th June 2013 but it was not ready and the Judge directed that it would be delivered on notice. Notice was subsequently issued that the ruling would be delivered on 20th June 2014 but it was deferred to 27th June 2014 and then to 11th July 2014 when the Judge directed that it would be delivered on notice. So her counsel kept following up on the ruling upto 2015 when he was informed that the Judge had been transferred to another station. It was not until sometimes in 2016 that her counsel came across the ruling in the Kenya Law Reports Website showing that it was delivered on 11th December 2014 and thereafter the file was

transferred to this Court. That although the record of appeal dated 14th June 2016 was filed without leave, an application dated 17th January 2017 was filed to regularize the record and that this application was served on 17th January 2017 the same day she filed her application seeking extension of time to file the supplementary record of appeal.

However, in a supplementary affidavit in response to that replying affidavit, the 2nd respondent deponed that the parties' respective counsels were infact informed about the ruling delivered on 11th December 2014 by a letter addressed to them by the Deputy Registrar Nyeri. A copy of letter dated 2nd December 2014 is annexed (annexture **GNK 1**). That counsel for the parties were also notified by the Deputy Registrar Nyeri about the transfer of this appeal to this Court vide a letter dated 6th February 2015 (annexture **GNK 2**). Therefore the 2nd appellant's replying affidavit is not candid and no explanation has been offered as to why the appellants filed and served the record of appeal 1 ½ years out of time and without the leave of the Court and that is inordinate delay which has not been explained.

It is on record that the appellants have themselves filed an application dated 17th January 2017 seeking the main order that this Court allows them an extension of time within which to file the supplementary record of appeal out of time and that the supplementary record of appeal filed on 14th June 2016 be deemed as filed out of time. That application is however, yet to be prosecuted.

When counsel for the parties appeared before me on 29th March 2017, it was agreed that the application dated 27th October 2016 be canvassed by way of written submissions with each party having 14 days to file and serve. The matter was then set for mention on 27th April 2017 to confirm filing of submissions. When the matter came up on 27th April 2017 to confirm compliance, counsel for the respondents in the appeal **MR. MUCHIRA** informed the Court that although he had filed and served his submissions, he had not been served with the appellants' submissions. He asked the Court to give a date for the ruling and since neither the appellants nor their counsel were in Court, this Court directed that ruling would be on 12th May 2012.

I have considered the respondents' application dated 27th October 2016, the rival affidavits and annextures thereto as well as the submissions by counsel.

The history of this appeal is not in doubt. That it was initially struck out by **SERGION J.** on 4th June 2010 for want of prosecution and that order was reviewed on 11th December 2014 when the appellants were granted 14 days to file a supplementary record of appeal. It is at this point that the parties diverge. The appellants claim that they were not notified about the ruling delivered on 11th December 2014 while the respondents have annexed a copy of letter dated 2nd December 2014 from the Deputy Registrar Nyeri informing the parties that the ruling would be delivered on 11th December 2014 (annexture **GNK 1**). The letter is properly addressed to counsel for both parties and it has not been suggested by the appellants that the address thereon is not that of their counsel. In any event, the postal address of the appellants' advocate on the letter dated 2nd December 2014 is the same one appearing on an earlier notice addressed to both counsels advising them that the ruling would be delivered on 26th June 2014 (Appellants annexture **LMG 1**). This Court has not been provided with any evidence to suggest that the appellants did not receive the notice dated 2nd December 2014 yet the onus was on them to do so. As the letter was correctly addressed to their counsel, this Court can only conclude that it was received but no action was taken by the counsel towards attending the Court for the ruling on 11th December 2014 or sending another counsel to hold his brief. It cannot therefore be true, as deponed by the 2nd appellant, that her counsel only became aware of the ruling dated 11th December 2014 after reading it on the Kenya Law Report Website. The truth of the matter is that a notice dated 2nd December 2014 advising counsel about the delivery of the ruling on 11th December 2014 was issued and posted to the correct address. Counsels for both parties are based in Kerugoya and it is inconceivable that counsel for the respondents received his letter while counsel for the appellants did not. This Court finds that counsel for the appellants was duly notified about the delivery of the ruling by **OMBWAYO J.** on 11th December 2014 but did not attend.

There is also evidence that by another letter dated 6th February 2015, the appellants counsel was notified of the transfer of this appeal from the Environment and Land Court at Nyeri to this Court (annexture

**GNK 2).** That letter is similarly addressed to the counsel's postal address which is **P.O. BOX 802 KERUGOYA** and which has not been disputed. That means that as far back as February 2015, the appellants counsel had been notified about the transfer of this appeal to this Court. Yet it took them upto 14th June 2016 to file the supplementary record of appeal. No explanation has been offered for that delay which is clearly in-ordinate.

It is clear from the record herein that the appellants and their counsel have not been diligent in pursuing this appeal and the application seeking its dismissal is therefore well founded. The record shows that as far back as 27th July 2009, counsel for the appellant was given time to file a supplementary record of appeal within 21 days but that was not done. That resulted in **SERGON J.** dismissing the appeal on 14th June 2010 almost a year later. The appellants have clearly been indolent in pursuing this appeal. While Courts are enjoined to determine disputes expeditiously, parties and their counsel must also play their roles in complying with directions issued by the Courts and keeping time lines. The appellants and their counsel have not played that role and a Court of law is not obliged to indulge a party that does not assist it in meeting its objective. This appeal having first been filed in this Court on 23rd October 2000, the delay in prosecuting it is a cause of immense prejudice to the respondents who must be wondering what became of the slogan "***Justice delayed is justice denied***". This Court must come to their rescue and bring this litigation to an end by dismissing this appeal.

The up-shot of the above is that this appeal is dismissed with costs to the respondents.

**B.N. OLAO**

**JUDGE**

**19<sup>TH</sup> MAY, 2017**

Ruling dated, delivered and signed in open Court this 19<sup>th</sup> day of May 2017

Mr. Muchira for the Applicants present

Ms Kimotho for Mr. Mwai for the Respondents present.

**B.N. OLAO**

**JUDGE**

**19<sup>TH</sup> MAY, 2017**