



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 96 OF 2011

JAMES NJAGI JOEL.....APPELLANT/RESPONDENT

V E R S U S

JUNIAS NYAGA JOEL.....RESPONDENT/APPLICANT

R U L I N G

1. This is a ruling on an application dated 10/03/2016 seeking for dismissal of this appeal for want of prosecution.
2. It is grounded on the affidavit of the applicant Junias Nyaga Joel. He deposes that the appeal was filed on 4/08/2011 and that the appellant/respondent has never taken any steps to set down his appeal for hearing.
3. The application was opposed by the appellant/respondent who deposes that he instructed M/s H.M.J. Utuku & Co. Advocate to file the appeal for him and it was later confirmed to him that the same had been filed. He was informed that the appeal was admitted and directions taken. From that time he has been waiting to be informed by his advocate on the next step.
4. The respondent states that he was shocked to be served with this application and to learn that his advocate passed on in the year 2013. He urges the court to preserve his appeal because he is keen to proceed with it to its logical conclusion.
5. This appeal is against the judgment of Embu RMCC No.101 of 2005 delivered on 13/07/2011. It was filed on 4/08/2011 by H.M.J. Utuku & Co. advocates for the appellant. The court admitted the appeal on 9/07/2012. The respondent appeared in court on 5/07/2015 and informed the court that he wished to conduct the appeal in person. The appellant took no steps to fix his appeal for hearing leading to the filing of this application.
6. Mr. Kathungu for the respondent filed submissions arguing that the delay to prosecute the appeal was not intentional and that the respondent had agreed with his advocate that he would inform him of the hearing date. Upon being served with this application, the respondent went to his advocate's office just to learn that the counsel had passed on several years ago. He further contended that the applicant herein has not shown that there is a substantial risk to a fair trial or the likelihood of causing prejudice to him. The argument was based on the principles laid down in the case of ***MWANGI S. KIMENYI VS A.G.***

& ANOTHER [2014] eKLR.

7. This application was filed by E.M. Mutahi for the applicant who passed on after directions to file written submissions were taken. The applicant engaged another counsel M/s Munyasia & Co. advocate who failed/neglected to file submissions despite being given time to do so on two occasions.

8. The **MWANGI S. KIMENYI case** is distinguishable from this application in that the delay in that case was a period of two years. The record shows that the appeal was admitted on 9/07/2012. The respondent did not take any action for a period of five years. It was not until he was served with this application that he woke up from slumber and rushed to court to withdraw his advocate from record. The fact that the respondent's advocate passed on and that he did not come to learn of it in good time, is not an excuse in abandoning his case.

9. The applicant was the appellant and it was his case. The advocate was only acting on behalf of the applicant in legal representation. After giving instructions to the counsel, the respondent was under an obligation to follow up his case. It is surprising that his advocate died and it took the applicant a period of three years to learn of it. The conduct of the respondent displays an indolent attitude of a litigant who seem to have lost interest in his appeal immediately it was lodged.

10. It was argued that no prejudice would be caused to the applicant in the event that the application is refused. I do not agree with this argument for the reason that prolonged litigation causes stress to the parties and consumes resources. It is not economical for the parties or even the court to keep a case pending in court for an unreasonably long period. If the respondent was serious about the appeal he ought to have keenly followed it up to its logical conclusion.

11. The appeal challenges the judgment of the lower court which was in favour of the respondent who has waited for six years without enjoying the fruits thus being denied his constitutional rights. The prolonged delay of the appeal is likely to cause prejudice to the applicant.

12. It is my considered opinion that the application is merited and it is hereby allowed with costs to the applicant/respondent.

13. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF DECEMBER, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Kavandi for Munyasia for applicant/respondent

Ms. Bore for Kathungu for respondent/appellant



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