



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 94 OF 2011**

ROBIN NJUE NJAGI .....RESPONDENT/APPLICANT

VERSUS

MICHAEL MWANGI JORAM .....APPELLANT/RESPONDENT

**RULING**

This is the application dated 7/10/2013 which has been brought under no provision of the law. The Respondent/Applicant requests that the appeal herein be dismissed for want of prosecution. It is supported by his supporting affidavit sworn on 7/10/2013. The gist of his application is that the appeal having been filed on 1/8/2011 and admitted on 11/4/2012, the Appellant/Respondent ought to have prepared the record of appeal in readiness for the appeal. He finds this to be unfair and that the Court should dismiss the appeal.

The Appellant/Respondent opposed the application saying the delay was due to the illness and death of his former advocate Mr. H.M.J.Utuku. Both parties made oral submissions. The application/Respondent is now represented by Mr.Mugambi.

Though the Respondent/Applicant did not indicate the Provision of the law he was relying on its clear the application is made under Order 42 rule 35(2) Civil Procedure rules. The failure to indicate the provision of the law is excusable as the Respondent/Applicant is unrepresented. The record shows that this appeal was filed on 1/8/2011. The same was admitted on 11/4/2012. As at the time this application was filed on 7/10/2013 the Appellant/Respondent had not prepared records of appeal. It was expected that after admission of the appeal the record of appeal would be filed and served on the Respondent/Applicant and the matter fixed for Directions. This has not been done. The Appellant/Respondent has in paragraph 6-9 and 12 of his replying affidavit explained why he has not prepared the record of appeal and/or prosecuted the appeal.

The late Mr. Utuku was an advocate of the High Court of Kenya and practiced here in Embu. It is common knowledge that he died early 2013 after being unwell for sometime. Prior to his death he was rarely appearing before this Court to prosecute his matters. And following his death no action would be taken on his clients' files before certain procedures were undertaken by the Law Society of Kenya and a grant issued by the Court. All these go in to show that in as much as the Appellant/Respondent may have wanted to move the appeal with speed there were circumstances beyond his control which he could do nothing about.

I am therefore satisfied that the Appellant/Respondent has satisfactorily explained the delay.

The application must fail. I dismiss it. Each party to bear his own costs. The appellant should move the court to have the appeal heard.

**DATED, SIGNED AND DELIVERED AT EMBU IN OPEN COURT THIS 19<sup>TH</sup> DAY OF DECEMBER 2013.**

**H.I. ONG'UDI**

**J U D G E**

**In the presence of:-**

**Applicant**

**Respondent**

**Njue CC**



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