

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO 6 OF 2013

MALUKI MWENGA.....APPELLANT/RESPONDENT

VERSUS

KITHEKA MBUTHI.....RESPONDENT/APPLICANT

RULING

Kitheka Mbuthi who is the applicant in this Notice of Motion is the respondent in the appeal preferred by Maluki Mwenga the respondent. He has brought this application under Order 51 rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. The Notice of Motion is dated 10th January 2014 and seeks to have the appeal dismissed and or the court to give directions in respect of the same as well as costs to the respondent. The application is supported by grounds on the face of the application as well as in the supporting affidavit. The main reason for this application is the contention that the appellant has never taken steps to file the record of appeal and or serve the memorandum of appeal to the respondent and no directions have been sought; that it has been over one year since the appeal was filed yet the appellant has not taken any steps to have the same prosecuted.

The respondent in his replying affidavit deposes that he has been unable to file the record of appeal due to lack of resources to secure legal representation; that he filed a memorandum of appeal in time and that after he managed to get help to prepare his papers he is now ready to prosecute the appeal.

I have perused the court file. I note that the memorandum of appeal was filed on 10th April 2013 and the Deputy Registrar called for the lower court file through a letter dated 2nd May 2013. The file was received at the Registry in Garissa High Court on 10th June 2013. The file was thereafter placed before the Judge for action. The appeal was admitted to hearing on 28th June 2013. After the admission of the appeal by the Court the appellant did not take any action to move the court for mention of the appeal and directions.

Admittedly it seems that the Deputy Registrar failed to notify the appellant that the appeal had been admitted and in his ignorance he did not follow up the matter with the Registry.

I have considered that the appellant now seems ready to move the court to hear this matter. He is not fully to blame in the delay in prosecuting the matter as stated above. I will allow the second option sought by the applicant. Instead of dismissing this appeal for want of prosecution, I wish to have this matter proceeds to full trial and the issues determined substantively. In this regard, the appellant shall serve the respondent with the memorandum of appeal and the proceedings from the lower court on or before 17th June 2014. The respondent shall respond and file any submissions on or before 27th June 2014. This case shall be mentioned thereafter on a date convenient to both parties to be agreed upon on 10th June 2014 after delivery of this ruling with a view to taking a hearing date. It is so ordered. Considering that the appellant is not fully to blame for the delay, I order that each party bears the costs of this application.

Dated, signed and delivered this 10th day of June 2014.

S.N.MUTUKU

JUDGE