



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 24 OF 2018**

**CONSTITUTIONAL PETITION NO E2 OF 2020**

**SAID ADAM KAZUNGU.....APPELLANT**

**VERSUS**

**KIBOKONI PROPERTIES LTD.....RESPONDENT**

**Coram: Hon. Justice R Nyakundi**

**Mr. K'opere for the Respondent**

**Appellant in Person**

**RULING**

The ruling is relation to a Notice to Show Cause (NTSC) date 4<sup>th</sup> May 2020 issued by the Deputy Registrar why the appeal should not be dismissed for want of prosecution under Order 42 rule 53(2) of the Civil Procedure Rules.

When the matter came up for hearing on 21<sup>st</sup> May 2020, only counsel for the Respondent was on record. The court ordered that parties should file submissions.

**Submissions**

In his submissions dated 8<sup>th</sup> June 2020 Mr. K'opere advocate for the Respondent submitted that since the appeal was filed on 27<sup>th</sup> April 2018 and the stay application dismissed in October 2019, the Appellant had taken no steps to file a record of appeal or prosecute the appeal for a period of over 2 years until the court issued a NTSC dated 4th May 2020.

Counsel submitted that despite filing the Memorandum of Appeal and the stay application dismissed, the Appellant lost interest in prosecution of the appeal and urged the court to dismiss the appeal to allow the Respondent Decree Holder to reap the fruits of its judgment.

The Appellant failed to put in his submissions.

**DETERMINATION**

Order 42 rule 35 of the CPR provides for dismissal for want of prosecution and states that: -

**(2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.**

This court in **Rosavie (Epz) Limited v Stanlex Mbithi James [2015] eKLR** stated that: -

**“The law on dismissal of an appeal for want of prosecution is contained in Order 42 Rule 35 of the Civil Procedure Rules. The rule contemplates two scenarios when an appeal can be dismissed. One is where three (3) months after issuance of directions no steps have been taken to prosecute the appeal i.e. Order 42 Rule 35 (1), and the second is where no steps have**

**been taken to prosecute the appeal within one year after the service of the memorandum of appeal i.e. Order 42 (35) (2). Under the first scenario, it is the Respondent to move the Court whilst under the second scenario, the action is by the registrar.”**

The appeal before this court was lodged on 27<sup>th</sup> April 2018 more than two years ago. Thereafter the Appellant filed an application seeking to stay the orders of the lower court on 26<sup>th</sup> October 2018 and which was dismissed on 25<sup>th</sup> September 2019. The Appellant has never filed a record of appeal and has never followed up on his appeal.

The Deputy Registrar initiated the dismissal in accordance to the law. Despite notice been served to his advocate on the NTSC, the Appellant has failed to respond. It is apparent that the Appellant has no interest in pursuing his appeal and has abandoned. In this regard, the appeal stand dismissed.

It is so ordered.

**Ruling delivered, dated and signed at Malindi this 18<sup>th</sup> day of December, 2020.**

.....

**R. NYAKUNDI**

**JUDGE**