

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 82 OF 2018

CHEMOIYAI LABAN.....APPELLANT

VERSUS

RACHEL AFANDI ONACHA.....RESPONDENT

(An appeal arising from the judgment and decree of Hon. W. Cheruiyot, in Vihiga PMCCC No. 89 of 2016)

RULING

1. The Motion that I am tasked with determining is dated 24th June 2019. It seeks dismissal of the appeal herein for want of prosecution.
2. Dismissal of an appeal can only be sought where the same has matured for hearing. That is where the original record of the trial court has been availed, the record of appeal has been filed and directions have been taken on the disposal of the matter. It is only after all these prerequisites have been met and an appellant has failed to take steps to prosecute his appeal that the respondent would be justified to move for dismissal of the appeal and the court would consider making such an order.
3. In this case the appeal has not matured for hearing. The original trial records have not been availed by the trial court despite this court having called for them by a letter dated 22nd June 2018, which was written just a day after the memorandum of appeal was lodged herein on 21st June 2018. The record of appeal is yet to be filed, I presume the failure to file the record could be connected to the failure to avail the original records. Directions have, therefore, not been taken.
4. Dismissal under Order 42 rule 35 of the Civil Procedure Rules is only feasible where directions have been taken. Otherwise, the matter can only be listed before a Judge for dismissal at the instance of the court through the Deputy Registrar, where it has pending for more than one year after the filing of the memorandum of appeal. That provision says as follows, for avoidance of any doubt:

“(1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

(2) If, within one year after the service of 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.”
5. It follows, therefore, that the Motion is premature. It is, for that reason, hereby dismissed. Costs shall abide the outcome of the appeal.
6. To move the matter forward I hereby direct the Deputy Registrar to follow up the issue of the original records with the Vihiga court. Let a certified copy of this ruling be made available to the Head of Station of the Vihiga court.

DATED, SIGNED and DELIVERED at KAKAMEGA this 31st DAY OF October, 2019

W. MUSYOKA

JUDGE