



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO. 7 OF 2015**

**CHARITY WANGECHI RUKWARO..... APPELLANT/RESP.**

**VERSUS**

**JOSPHAT M. THIONGO.....RESPONDENT/APPLICANT**

**RULING**

By a motion dated 21<sup>st</sup> July, 2016, the applicant moved this court under order **42 rules, 11, 13 and 35** of the **Civil Procedure Rules** seeking the order for dismissal of the appellant's appeal for want of prosecution.

The motion is based on the grounds that the appellant has not taken any steps to prosecute the appeal for a period of more than one year since the appeal was filed on 19<sup>th</sup> March, 2015. According to the applicant, the delay in the prosecution of the appeal shows that the appellant is not only not interested in the prosecution of the appeal but also the delay in itself constitutes an abuse of the due process of the court.

According to the affidavit sworn by Patrick Benchi who is counsel for the applicant, the impugned judgment was delivered 5<sup>th</sup> March, 2015 and on 19<sup>th</sup> March, 2015, the appellant filed her memorandum of appeal. As at the time of filing his application, a period of more than one year had since lapsed yet the appellant had not filed her record of appeal.

Mr Nderitu F. Kimathi, counsel for the appellant, swore a replying affidavit in which he admitted that indeed the appeal was filed on 19<sup>th</sup> March, 2015 and was served on 23<sup>rd</sup> March, 2015. However, the appellant has not been able to secure certified copies of the proceedings and the judgment ostensibly because the lower court file has been missing from the registry. In these circumstances, the appellant could not list the appeal for directions as is required under order 42 rule 11 of the Civil Procedure Rules.

According to counsel, the prejudice that the appellant is likely to suffer if the appeal is dismissed outweighs any prejudice that the respondent may suffer if the appeal proceeds for hearing. It is therefore meet and just that the appellant is given the opportunity to have the appeal heard and determined on merits.

In **High Court Civil Appeal No. 12 of 2013, Mburu Kenneth & 3 Others versus Josphat W. Kihoro (2017)eKLR** where I dealt with this issue, I noted that there are, at least, two possible scenarios when an appeal can be dismissed for want of prosecution under **order 42 rule 35** of the Civil Procedure Rules. I held the view that according to **rule 35(1)** of the rules, the respondent has the liberty to apply for such dismissal; that rule states:

***35. (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.***

According to this rule, the two options open to the respondent are either to set down the appeal for hearing or to apply for its dismissal for want of prosecution if the appeal has not been set down for hearing within three months after directions have been issued; whichever option that the respondent may want to take, it is mandatory that directions under **rule 13** of **order 42** must have been given.

It is common ground and indeed it is apparent from the record that directions have not been given in the present appeal; as a matter of fact, the appeal itself has not been admitted. It would follow that, in these circumstances, rule 35(1) of the Civil Procedure Rules is not available to the applicant.

Sub-rule (2) of Rule 35, on the other hand, provides that;

***35(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 sub-rule clothes the court with the power to dismiss the appeal where the appellant has not fixed the appeal for hearing within one year after the service of the memorandum of appeal. For this reason, this particular provision is also not available to the applicant.

The appellant has admitted that the memorandum of appeal was served on 23<sup>rd</sup> March, 2015 and therefore by 8<sup>th</sup> August, 2016 when the applicant filed his application for dismissal for want of prosecution, it was over one year since the memorandum of appeal had been served. Since the appeal had not been set down for hearing within one year of the date of service of the memorandum of appeal, its dismissal by the court under rule 35(2) of the Civil Procedure Rules was long overdue.

A question that may arise is this; what if the appeal has not been admitted and directions given within one year of the service of memorandum of appeal? Would the court still dismiss it?

In my humble view, the court is perfectly in order to dismiss the appeal because the burden is always on the appellant to set in motion the necessary steps to have the appeal admitted and directions given in preparation for the hearing of the appeal. The assumption is that a year is time enough to have such steps taken.

I am not satisfied that the appellant took any steps as are necessary to have the appeal set down for hearing. Contrary to the appellant's allegations, there is no evidence that the court file in Nyeri Chief Magistrate's Court Civil Case No. 71 of 2014 had been missing either within the material period or at any other time.

There is nothing exhibited on the replying affidavit of the appellant's counsel to demonstrate that she applied for a certified copy of the proceedings, the judgment and the decree. There is also no evidence of any communication between the appellant's counsel and the court on the availability (or lack thereof) of the court file. In fact, the only communication I note from the record is a letter from the Deputy Registrar addressed to the Chief Magistrate, Nyeri Chief Magistrates' Court, and copied to the parties' counsel informing them that the original lower court file had been forwarded to this Court.

It follows that if the applicant did not apply for a certified copy of the proceedings, the judgment and the decree, then it must be assumed that appellant is not interested in this appeal. I also note that although typed proceedings were ready for collection as early as February, 2017, the appellant has never made any efforts to collect them perhaps because she never applied for them in the first place.

In these circumstances, I am persuaded to invoke the powers given to this court under order 42 rule 35(2) and dismiss the appeal.

I am aware that under this provision, the dismissal is preceded by a notice to the parties that the appeal has been listed for dismissal. I opine that the reason for the notice is simply alert the parties, and in particular the appellant, that the appeal will be dismissed and if they so wish, they can make representations or give cause why the appeal should not be dismissed. In other words, the appellant should not be condemned unheard.

There is no doubt that in the appellant was put on notice of the intention to dismiss her appeal in the present application. Although the notice was by the respondent and not the court itself, it is doubtful that even if the notice had been issued by this court, the appellant would have made different representations from the ones that have been made on her behalf in response to the respondent's application. The reasons given for lack of action on the part of the appellant are not viable irrespective of whether they are in response to an application under **rule 35(1)** or a notice under **rule 35(2)**.

For the foregoing reasons, the appeal is dismissed but with no orders as to costs.

**Signed, dated and delivered in open court this 16<sup>th</sup> March, 2018**

**Ngaah Jairus**

**JUDGE**