



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 577 OF 2015**

**OLIVIA RANGUMA.....1<sup>ST</sup> APPELLANT**

**JACK RANGUMA.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**KERYNE ATIENO OGUTU....RESPONDENT/APPLICANT**

**RULING**

1. The Respondent who is the applicant herein filed a Notice of Motion dated 26<sup>th</sup> February, 2018 seeking orders to have the suit dismissed for want of prosecution and the costs of the application. The application is brought under the provisions of Order 17 Rule 2(3) of the Civil Procedure Rules, 2010. The law governing dismissal of Appeals for want of prosecution is contained in Order 42 Rule 35 of the Civil Procedure Rules. Nonetheless, I will consider the application on its merits in spirit of Article 159 of the Constitution.

2. In a Supporting Affidavit sworn by **STEPHEN GITONGA**, it is deponed that since the Appeal was filed on 1<sup>st</sup> December, 2015, the Appellant has never taken any steps to prosecute the appeal thus occasioning the Respondent/ Applicant unnecessary anxiety and prejudice. It is also deponed that the delay in prosecuting the Appeal is unreasonable, inordinate and has occasioned the Applicant financial loss.

3. The application was opposed by the Respondent who filed a Replying Affidavit dated 11<sup>th</sup> April, 2018 sworn by **FRANCIS ERIC WASUNA**. It is deponed that vide a letter dated 21<sup>st</sup> November, 2017 which is annexed to the affidavit, the Respondents requested the Deputy Registrar to fix the appeal for directions. It is also deponed that one Moses Onyango, the firm's court clerk, proceeded to the registry to deliver the letter and was informed that it was impossible to fix the appeal for directions before filing the record of appeal and subsequently they filed the record of appeal on 27<sup>th</sup> March, 2018. It is further deponed that the application is premature pursuant to provisions of Order 42 Rule 35 (1) of the Civil procedure Rules 2010 as directions have not been given. The Respondents deponed that they are desirous of prosecuting the appeal.

4. The application was canvassed orally in court. The law governing dismissal of Appeals for want of prosecution is contained in **Order 42 Rule 35 of the Civil Procedure Rules**. The Rule provides:-

*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.*

*(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.*

5. My understanding of this rule is that before an Appeal can be dismissed on an application by the Respondent, the same should have been set down for directions and such directions issued in the first instance. This position was elaborated in the case of **Suresh Ruginath Raniga & Another v Sagar Mohan S.M.Ram Civil Appeal no. 433 of 2012**, where the court held that:

*The Appellants' counsel submitted that until and unless directions are issued, an Appeal cannot be dismissed for want of prosecution; and that the procedure of dealing with an Appeal where directions have not been issued is that contemplated in Order 42 rule 35(2) and not Order 42 rule 35(1). I am in agreement with these submissions. In the case of Kirinyaga General Machinery v. Hezekiel Mureithi Ireri HCC No.98 of 2008 while interpreting Order XLI 31 (now Order 42 rule 35), Kasango J., observed:-"It is clearly seen from that rule that before the respondent can move the court either to set the Appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given as provided under rule 8B. Directions have never been given in this matter. The directions having not been given the orders sought by the respondent cannot*

*be entertained.”*

***From the record, I note that no directions have been issued in this Appeal Under Order 42 rule 35(1), I see no reason to deviate from the holding in Kirinyaga General Machinery vs. Hezekiel Mureithi Ireri. This Appeal therefore cannot be dismissed to for want of prosecution under Order 42 rule 35(1).***

6. Nonetheless, this court is also empowered to invoke its inherent jurisdiction and make such orders as are necessary to prevent abuse of Court process and ensure that justice is delivered expeditiously. It is not in contention that in this case, there has been delay in having this Appeal heard and determined which delay has not been satisfactorily explained by the Appellant. There is no evidence that the letter to the Deputy Registrar requesting for directions was ever served. It emerges that the Appellants were awoken by the instant application and filed the Record of Appeal on 27<sup>th</sup> March, 2018 after the application was served upon them. In as much as order 42 Rule 35 provides a condition for applications to dismiss appeals to be brought only after directions have been given, Appellants should not take advantage of the provision and sit pretty on the appeals. This order though meant to ensure orderly procedure in prosecuting appeals it can also be subject of abuse by the Appellant who are not eager to prosecute their Appeals.

7. The appellants have, however, expressed their desire to prosecute the appeal.

8. In spirit of section 3A of the Civil Procedure Act, which preserves the *inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court* I will give the Appellant a chance to take appropriate steps to ensure the Appeal is set down for directions and hearing expeditiously.

9. In that regard, I decline to grant this Application and order that for expeditious administration of justice to both parties, the Appeal be set down for hearing within the next 30 days from the date of this ruling, failure to which it shall stand dismissed. The Applicant will have the costs of this application.

**Dated, Signed and Delivered at Nairobi this 21st Day of June 2018.**

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**L. NJUGUNA**

**JUDGE**

**In the Presence of**

..... *For the Appellant*

..... *For the Respondent*