



**REPUBLIC OF KENYA**

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

**HCCA NO.12 OF 2017**

**FAMILY BANK LIMITED.....1<sup>ST</sup> APPELLANT**

**ANTOTECH AUCTIONEERS.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**CYRUS IRERI DANIEL.....RESPONDENT**

**R U L I N G**

The application before me is the chamber summons dated 11<sup>th</sup> May, 2018 brought under Order 42 rule 35 of the Civil Procedure Rule and Section 3 and 3A of the Civil Procedure Act.

It seeks orders that the appeal herein be dismissed for want of prosecution in that the appellant has not taken any step to prosecute it one year down the line. It is supported by the affidavit of Cyrus Ileri the respondent/applicant.

Counsel for the appellants Mwangi Wahome filed a replying affidavit in opposing the application on 2 main grounds: -

- i. That the Lower Court proceedings were only ready by February 2018. The decree was not ready by then.
- ii. Directions have not been taken in this appeal as required by the rules.

Ms. Ndegwa argued the application from the applicants, and Mr. Muhoro for the respondents.

The applicant relied on 2 authorities: -

**i. National Bank of Kenya -Vs- Alfred Owino Ballah [2017] eKLR**

**ii. Jurgen Paul Flach -Vs- Jane Akoth Flach [2014] eKLR**

The order 42 rule 35 provides:-

**(1) Unless within 3 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, even to set the appeal for hearing or to apply by summons for its dismissal for want of prosecution.**

The record shows that the appeal was admitted for hearing on 22<sup>nd</sup> May, 2018 when the notice was issued to the appellant to comply with order 45 rule 12.

In view of the above the application was premature as directions have not been given in the matter to warrant the application for dismissal and in any event the appeal was admitted from hearing when this application was already pending before this court for hearing.

On that ground alone the application fails.

The applicant has alluded to orders issued by the subordinate Court for stay on condition that the decretal sum was to be deposited in the joint names of counsel and that respondents had not complied. I can only state here that if indeed those orders were issued and the respondents have not complied, there must be consequences that were to follow the default.

In the upshot the application before me is dismissed with costs to the respondents.

**Dated, delivered and signed this at Nyeri this 21<sup>st</sup> day of September 2018.**

**Mumbua T. Matheka**

**Judge**

In the presence of:

CA albert

N/A for parties or counsel

Date taken in court