



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL CASE NO. 56 OF 2017

KIBATHI GITAU.....APPELLANT

VERSUS

JOSEPH KIPLAGAT MAINA.....RESPONDENT/APPLICANT

RULING

The application before this court seeks dismissal of Civil Appeal No. 56 of 2017, filed on 28th April 2017, for want of prosecution. The applicant also prays that the sum of Kshs. 533,501/- held as security by the counsels on record and deposited with the Trans National Bank Eldoret pending the hearing and determination of this appeal be released to his Advocate Ms Ngala and Co. Advocates for onward transmission to him.

The grounds on which the application is founded are that:-

The matter has taken more than one year since filing and the Appellant and/or his counsel has never set it down for hearing as provided for under *Order 42 rule 35 (2)* of the *Civil Procedure Rules 2010*. The delay to prosecute the appeal is prejudicial to the applicant who has waited for long to enjoy the fruits of judgment.

The respondent on his part avers that dismissing the application would be tantamount to defeating his constitutional right and would be unreasonable. His advocate passed on and it was not clear who the law firm's administrator was, and hence the delay.

In determining this application, I have considered the provisions of *Order 42 rule 35* of the *Civil Procedure Rules*. It provides that:-

35(1) – Unless within three months after the giving of directions under *rule 3* 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.

From the above rule, it is clear that on the first instance, under *rule 35 (1)*, it is the Respondent who moves the court and the time lapse is calculated three months after giving of directions under *rule 13*. In this matter directions were not given and so under the said rule the matter cannot validly be dismissed.

The second one 35(2), it is the registrar who moves the court after giving notice to the parties. It is not the Respondent who moves the court. Probably if the Respondent was to do so, would just request the registrar to move the court within the said provision. In this case it is the Respondent who moved the court directly which is not right.

In the case of *Kirinyaga Machinery –vs- Hezekiel Mureithi Ileri HCCC No. 98 of 2008*, the court observed that:-

“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. The directions having not been given, the orders sought by the respondent cannot be entertained”.

The application is not therefore properly before court. It lacks merit and is dismissed with costs to the Respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 17th day of December, 2018.

In the presence of

Ms Kibichii holding brief Ms. Chepkwony for Respondent

And in the absence of the Applicant

Mr. Mwelem - Court assistant