



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL APPEAL NO. 213A OF 2012**

**BENARD KARANJA .....1ST APPELLANT**

**TIMOTHY MUSILA..... 2ND APPELLANT**

**VERSUS**

**JUSTINA MUTIO KAVITA**

**ELENA MBULA NZAU (Suing for and on behalf of the Estate of**

**MICHAEL KAVITA NZAU (Deceased) ..... RESPONDENTS**

**RULING**

The Respondent herein seeks to have the Appeal filed herein by the Appellants dismissed, for reasons that it is now over two years since the appeal was admitted to hearing, and the Appellant has not taken any steps to prosecute the same. Further, that the Appellant is not interested in this matter and is only using the same to keep the Respondents from enjoying the judgment in their favour. These prayers are in an application by way of a Chamber Summons dated 5th October 2015, and in the supporting affidavit sworn on the same date by Judith Nzula Mbindyo, the Respondent's Advocate.

The Respondent explained that the Appellant filed the appeal on 18th December 2012, and that on 15th October 2013 the court wrote to the Appellant's advocates and the Respondent advising them that the appeal had been admitted to hearing and that the Appellant should comply with the requirements of order 42 Rule 13. However, that since then the Appellant has taken no steps whatsoever towards prosecuting the appeal, and that the children of the deceased have continued to suffer while the benefits due to them as dependents are held in an account and while the Appellant takes no steps at all towards closing this matter.

The Respondent's learned counsel, Kalinga & Co Advocates did not file written submissions despite directions and opportunity to do so.

**The Response**

The application was opposed by the Appellants in a replying affidavit sworn on 19th July 2016 by Kinyanjui Theuri, the Appellant's Advocate. He averred that the Appellants had complied with all the steps required on their part in that they filed their Record of Appeal on 17th December 2014 which was annexed, and did request for a date for directions on 12th September 2015. However that they did not receive an indication from the court that it has called for the primary suit file, and/or listed the matter for direction which mandate is out of their purview. Further, that the Respondent cannot seek dismissal before directions are given. In addition the Appellant are ready to proceed with the appeal and

are in the process of preparing written submission for the courts determination after directions.

The learned counsel for the Appellants, Kinyanjui Njuguna & Co Advocates, filed submissions dated 25th October 2016. Reliance was placed therein on the decision in **Kenya Power & Lighting Company Limited vs Esther Wanjiru Wokabi (2014) eKLR** for the argument that that the appeal filed herein is one that is arguable with an overwhelming chance of success. Reliance was also placed on the decisions in **Kirinyaga General Machinery vs. Hezekiel Mureithi Ileri, [2007] eKLR** and **Jurgen Paul Flach vs Jane Akoth Flach, Nakuru Civil Appeal No.119 of 2012** for the position that directions have never been taken under Order 42 Rule 35 of the Civil Procedure Rules and as such the Respondent has prematurely moved this court to dismiss the said appeal.

Lastly, as to whether the Appellants are guilty of laches, it was submitted that they had complied with all that was required on their end in preparation of prosecution of the said appeal, and that the Appellants wrote a letter addressed to the court seeking assistance in tracing the file to enable the same to be fixed for direction before a judge. Therefore that a dismissal of the appeal would be grossly prejudicial to the Appellants herein as there exists a complete record of appeal. Reliance was placed on **Bruce Mutie Mutuku T/A Diani Tour And Travel Center vs Equity Bank Limited, [2014] EKLR.**

### **The Determination**

I have read and carefully considered the pleadings and submissions filed. The issue for determination is whether the appeal herein should be dismissed for want of prosecution. The applicable law in this regard is Order 42 Rule 35 of the Civil Procedure Rules which provides as follows:

**“(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.”**

The processes of giving directions and service of memorandum of an appeal are provided for in Order 42 Rules 11, 12, and 13 of the same Rules, wherein it is provided as follows:

**“11. Upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act.**

**12. After the refusal of a judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.**

**13. (1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.”**

In the present application, the Appellants claim that they have filed the Record of Appeal, but no directions have been given in this matter. The law requires the Appellants to list the appeal for directions within 30 days of filing of the same. The requirements for directions to be given under section 79B of the Civil Procedure Act is that the Appellants should have filed a memorandum of appeal to which should be attached a certified copy of the decree or order appealed against. The Appellants to this extent have therefore been indolent in listing the appeal herein for directions under section 79B of the Civil Procedure Act.

This finding notwithstanding, it is not disputed that directions have not been given in this appeal, and the appeal cannot therefore be dismissed pursuant to Order 42 Rule 35(1) of the Civil Procedure Rules. The

appeal has also not been admitted to hearing, and since Order 42 Rule 12 of the Civil Procedure Rules provide that a memorandum of appeal shall be served after it has been admitted to hearing, this appeal is also therefore not amenable to dismissal under Order 42 Rule 35 (2).

I accordingly hereby decline to issue the orders prayed for by the Respondent in his Chamber Summons dated 5th October 2015 for the foregoing reasons. The Respondent shall however be awarded the costs of the said Notice of Motion as it resulted from the delay to list the appeal for directions on the part of the Appellants.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 31<sup>st</sup> day of January 2017.

**P. NYAMWEYA**

**JUDGE**