



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

**CIVIL APPEAL NO. 218 OF 2014**

**WANANCHI GROUP (K) LIMITED.....APPELLANT/RESPONDENT**

**VERSUS**

**MOSES MUHATIA MUKURU.....RESPONDENT/APPLICANT**

**RULING**

1. On 25<sup>th</sup> January, 2017, the Respondent filed a Chamber Summons Application of even date under Order 42 Rule 35 of the Civil Procedure Rules (2010) and section 3A and 79B of the Civil Procedure Act seeking orders that:

(a) The Appeal filed on 10<sup>th</sup> July, 2015 be dismissed for want of prosecution;

(b) That the sum of KShs. 3,557,452.20 plus interest deposited on the account Kembi Gitura & Company Account Number MM1527217339 Stanbic Bank Limited Kenyatta Avenue be released to the Respondent's Advocates Gulyenywa Jonathan & Co. Advocates unconditionally; and

(c) Costs of the Appeal be provided for.

2. The Application is based on the grounds on the face of the Application and the supporting affidavit of Moses Muhatia Mukuru where he avers that the Appellant has not been keen to pursue this matter from the beginning, that the case has been taken over by British-American Insurance Company Limited (BRITAM) who is not a party to the suit, and it has taken over a year without the Applicant taking steps to set down the Appeal for hearing amongst other grounds.

3. In response to the application, the Respondent filed a Replying Affidavit sworn by Edith Gathara, an advocate on record for the Appellant. She states that they have been unable to fix a date for Directions for hearing of the Appeal as the lower court file being Civil Case No. 3754 of 2013 is yet to be forwarded to the High court to complete the record and requests the Court to make an order for the Lower Court file to be availed so that they are able to prosecute the Appeal.

4. The law concerning dismissal of an Appeal 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 struck out, 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 Ileri 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 Ileri. This Appeal therefore cannot be dismissed to for want of prosecution under Order 42 rule 35(1).***

6. When the application came for hearing on 19/4/2017, the Respondent's Advocate argued that they have visited the registry several times in a bid to fix the matter for directions but they were being told that the lower court file was yet to be forwarded. She also submitted that according to the order of 20/5/2015 the Deputy Registrar was to call for the Lower Court file which he has not. I have looked at the said order and it is true that the Deputy Registrar has a role to play in calling for the lower court file which role he has not played therefore the delay cannot wholly be blamed on the Respondent.

7. It is not in contention that in this case there has been delay in having this Appeal heard and determined, however, the Appellant has explained the circumstances occasioning the delay and indeed requested the Court to make an order for the lower Court file to be availed as the fault was not their own. Even though the Applicant has illustrated how the Respondent herein has been indolent in prosecuting this case, the Court cannot ignore the fact that the whole of the decretal amount is well secured in a joint interest earning account. I find that the prejudice that the Appellant is likely to suffer if this Appeal is dismissed is likely to be graver than the prejudice that the Applicant/Respondent would suffer if the Appeal is ordered to proceed, given that the appellant has deposited the decretal amount. This was the position in **Allan Otieno Osula v Gurdev Engineering & Construction Ltd [2015] eKLR** thus:

***“It is therefore on the above grounds that I decline to strike out the Appeal as prayed. I employ the principle that the right of Appeal is constitutional right and in as much as there has been delay which has been satisfactorily explained by the appellant, this court has to weigh the cost and prejudice that is likely to be occasioned to the appellant as well as the respondent, if the Appeal is dismissed at this stage without according the appellant an opportunity to be heard on the merits of the Appeal.”***

8. In the 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 it would be in interest of justice* to allow 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 Deputy Registrar of this Court do liaise with the Chief Executive Officer of the Subordinate Court at Milimani Chief Magistrate's Commercial Court to ensure that court file for Civil

Case No. 3754 of 2013 is availed within the next twenty one (21) days or to explain the whereabouts of the file after which this court shall give further directions as to the disposal of the Appeal.

10. No orders are made on the costs of the application.

**Dated, signed and delivered at Nairobi this 29<sup>th</sup> day of June, 2017**

.....

**L. NJUGUNA**

**JUDGE**

**In the presence of:**

..... **For the Appellant**

..... **For the Respondent**