



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

**CIVIL DIVISION**

**CIVIL APPEAL NO. 588 OF 2015**

**MICHAEL MUBEA KAMAU.....1<sup>ST</sup> APPELLANT/1<sup>ST</sup> RESPONDENT**

**LOISE NYAKINYUA NJOROGE.....2<sup>ND</sup> APPELLANT/ 2<sup>ND</sup> RESPONDENT**

**ANNE WANJIRU NG'ANG'A.....3<sup>RD</sup> APPELLANT/3<sup>RD</sup> RESPONDENT**

**VERSUS**

**KENYATTA NATIONAL HOSPITAL BOARD.....RESPONDENT/APPLICANT**

**RULING**

***The application***

1. The Applicant has applied by notice of motion dated 1<sup>st</sup> March, 2017 seeking dismissal of the appeal herein for want of prosecution. The appeal itself was filed on 3<sup>rd</sup> December, 2015, The grounds on which the dismissal are sought are that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants have refused, neglected and/or otherwise failed to take any necessary steps to cause the matter to be listed before the court for directions and/or hearing. The motion is supported by the affidavit of Wilberforce Akello dated 1<sup>st</sup> March, 2017.
2. The appeal itself was filed against a judgment of the Principal Magistrate (OburaMrs) delivered on 6<sup>th</sup> November, 2015. The Applicant argues that the Respondent has taken no steps to prosecute the appeal despite Applicant's counsel writing to the Respondent's counsel on 12<sup>th</sup> May, 2016 seeking for the record of appeal and requesting that the matter be fixed for hearing. A letter to that effect was exhibited by the applicant.
3. In response and opposition to the application, the Respondent has filed a replying affidavit of Daniel NgacaGacugia, to which is attached many letters purportedly written to the Executive Officer and variously dated between 16<sup>th</sup> May, 2016 and 29<sup>th</sup> May, 2017. In the letters, the Respondent's counsel seeks inter, alia, copies of the typed judgment, proceedings, and complains that the file is missing. All these, argues the Respondent, reflect efforts made to prosecute the appeal.
4. Counsel urged the court to allow the Respondents to take directions after the judgment and proceedings are availed by the lower court. It was also urged that the application for dismissal is premature
5. The applicant's rejoinder questions and casts doubt on the veracity of the Respondent's said letters alleging that they are either backdated, or unstamped or not genuine. Counsel further submitted that

**Order 42** of the **Civil Procedure Rules** allows dismissal whether or not directions have been sought.

### ***Analysis and Determination***

6. The only question for determination is whether the appeal should be dismissed for want of prosecution. **Order 42 Rule 35** provides as follows on dismissal for want of prosecution:

***“(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.”***

7. From this provision, it is clear that two processes are required to have been taken in respect of appeals before dismissal.

8. First, the respondent can set down an appeal for hearing or apply for its dismissal after three months since the giving of directions under **Rule 13** and the appeal has not been so set for hearing. The application herein does not appear to be premised on this provision, as there is no issue raised concerning the giving of directions.

9. Second, if the appeal is not set down for hearing within one year after service of the memorandum of appeal the registrar must list the appeal before the judge in chambers for dismissal upon notice to the parties. On perusal of the file, I do not see any step that has been taken by the registrar to list the matter for dismissal in pursuance to **sub-rule 2** of **Rule 35**.

10. On its part, **Order 42 Rule 13** requires the court to be satisfied that the can only be satisfied that following court documents are on the record before the giving of directions:

***“(a) the memorandum of appeal;***

***(b) the pleadings;***

***(c) the notes of the trial magistrate made at the hearing;***

***(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;***

***(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;***

***(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.”***

11. I have carefully perused the documents annexed to the respondent’s replying affidavit. The chronological order of events that occurred appears to be as follows.

12. Before filing the Memorandum of Appeal on 3<sup>rd</sup> December, 2015, the Respondents wrote to the Executive Officer on 9<sup>th</sup> November, 2015, asking for a copy of the typed judgment and proceedings for purposes of lodging an appeal. They wrote a reminder on 16<sup>th</sup> May, 2016. There is no response on record by the Executive Officer, until 27<sup>th</sup> September, 2016, when the Respondent received notice from the Senior Executive Officer advising that certified copies of the judgment as well as uncertified copies of proceedings were ready for collection. The Respondent was further required to remit Kshs. 500 being charges for the said copies.

13. On 14<sup>th</sup> October, 2016 the Respondents wrote to the Executive Officer, acknowledging receipt on 7<sup>th</sup> October of his letter of 27<sup>th</sup> September, 2016. they and requested for uncertified copies of the proceedings, certified copy of the judgment, certified copy of the attendant decree and a certificate of delay.

14. On 13<sup>th</sup> March, 2017, the Respondents wrote to the Executive Officer expressing their concern at the unavailability of the file even after receiving communication that the certified copy of the judgment and uncertified copies of proceedings were now ready for collection. In this letter, the Respondents also expressed concern at the missing court file event after being informed that the judgment and proceedings were ready. The Respondents then informed the Executive Officer that they will be applying for the reconstruction of the file.

15. I have noted that, unfortunately, the respondent's counsel failed in the courtesy of copying their letters to the applicant, resulting in the appearance of indolence and unwillingness to prosecute as far as the applicant was concerned.

**Disposition**

16. In light of all the foregoing, I am not prepared to find that the failure to prosecute the appeal can, in the circumstances, be attributed to laxity or indolence on the part of the respondent. Accordingly, I hereby dismiss the application.

17. Instead, I order the Executive Officer, of the Chief Magistrates Court at Milimani Law Courts to produce the file, **Milimani CMCC No. 11687 of 2006, Michael Mubea & 2 Others vs. Kenyatta National Hospital** and further furnish the Respondents with the necessary documents to enable them file their Record of Appeal.

18. In light of the gross failure of the respondent to copy in the applicant, the filing of the application was wholly justified. Although costs normally follow the event, this is one of the situations in which the court is entitled to exercise its discretion to award costs to the losing party. Costs of the application will therefore be for the applicant.

19. Orders accordingly.

**Dated and Delivered at Nairobi this 24<sup>th</sup> Day of July , 2017**

**RICHARD MWONGO**

**PRINCIPAL JUDGE**

Delivered in the presence of:

- 1. ....Applicant
- 2. ....Respondent
- 3. Court Clerk.....