



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 211 OF 2009

FREDRICK KIMANGA.....APPELLANT/RESPONDENT

- V E R S U S -

SHEILA MCHALE.....1ST RESPONDENT/APPLICANT

WHITE HORSE INSURANCE LIMITED.....2ND RESPONDENT

HYOUNG & CO. (EA) LIMITED.....3RD RESPONDENT

ALEX ISOE KASYOKA4TH RESPONDENT

RULING

1) Sheila Mchale, the 1st respondent/applicant herein took out the motion dated 4/7/16, in which she sought for the following orders:

- i. THAT this honourable court be pleased to dismiss the appeal for want of prosecution.***
- ii. THAT the costs of this application be borne by the appellant/respondent.***

2) The motion is supported by the affidavit of Sheila Mchale. When served, the appellant/respondent filed a replying affidavit to resist the application. When the motion came up for inter partes hearing, learned counsels appearing in this matter recorded a consent order to have the motion disposed of by written submissions.

3) I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavits filed in support and against the motion. I have also considered the rival written submissions.

4) The applicant/1st respondent avers that the appellant lodged an appeal dated 13th January 2014 and it has been more than one year since the appellant took any steps to prosecute the appeal as required by law. The applicant goes ahead to state that it is the duty of the appellant to cause the appeal to be placed before a judge for directions within (30) days of its filing. Further to this is that the typed proceedings were ready for collection but the appellant took no step to follow up on them at the registry. It is the inordinate delay occasioned by the appellant in the prosecution of the appeal that shows his disinterest and this is prejudicial to the applicant and other respondents.

5) The appellant/respondent on the other hand avers that the memorandum of appeal was filed and that he wrote various letters to the court to request for certified copies of judgment and proceedings. It is only on the 6/9/16 that they received a letter from the Deputy Registrar that the proceedings were ready and by

that time the respondent had already filed the application to dismiss the appeal for want of prosecution.

6) The principles to be considered in an application for dismissal of an appeal for want of prosecution is set out under Order 42 Rule 35 of the Civil Procedure Rules.

7) Under Rule 35, the law contemplates two different scenarios for issuance of an order for dismissal of an appeal for want of prosecution. First is a situation where three months after issuance of directions under Order 42 rule 13, no steps have been taken by the appellant to fix the appeal for hearing. In such a situation, the respondent has two options: one, to fix the appeal for hearing or to apply by summons for the dismissal of the appeal. This was further reiterated in the case of **Kirinyaga General Machinery – vs- Hezekiel Mureithi Ileri HCC No. 98 of 2008** where Mary Kasango J, observed that:

“It is clearly seen from that rule (Order 42 rule 35) 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 under Rule 8B.”

8) The second scenario is that contemplated under Order 42 Rule 35(2) which is to the effect that within one year after 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 chamber for dismissal.

9) Having come to the conclusion that no directions were issued in this appeal pursuant to the Provisions of Order 42 rule 35(1) of the Civil Procedure Rules, then the motion lacks any foundation. The same is dismissed with no order as to costs.

Dated, Signed and Delivered in open court this 18th day of August, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant