



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 52 OF 2006

UNICORN INSURANCE BROKERS LTD.....APPELLANT/RESPONDENT

VERSUS

J N (a minor suing through

His next friend and mother L W).....RESPONDENT/APPLICANT

RULING

The Respondent/Applicant herein filed a Notice of Motion dated 3rd June, 2013 under the provisions of Order 42 Rule 36 of the Civil Procedure Rules seeking orders that the Appeal lodged by the Appellant be dismissed for want of prosecution and the costs of the application be borne by the Appellant. The application is supported by the Affidavit of **JUDITH A. GUSERWA**, counsel for the Respondent/Applicant dated 3rd June, 2013 and on the grounds that; since the Memorandum of Appeal was filed on 3rd February, 2006, the Appellant has never taken any steps to set down the appeal for hearing despite the fact that the Deputy Registrar wrote to the two counsels on record on 19th August, 2010 informing them that the proceedings were ready. It is also averred that the Respondent has written several letters to the Appellants inquiring about the Appeal and no attempts to prosecute the same have been made. Annexed to the Affidavit are the letters.

The Appellant did not file a response to this application despite having been served with the same. There is on record an Affidavit of Service to that effect. I have also perused the Court file and realised that the Appellant has on several dates not appeared in Court during the mentions and has also failed to attend the registry for fixing of dates.

The law concerning dismissal of Appeals for want of prosecution is contained in **Order 42 Rule 35** of the revised **Civil Procedure Rules, 2010**. 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.”

My understanding of this rule is that before an Appeal can be dismissed on an application by the Respondent, 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 (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).

In our case, the Appellant has neither filed a Record of Appeal nor set down the Appeal for directions. This is despite the fact that the Deputy Registrar had communicated to both Counsels notifying them that the proceedings were ready and that the lower court file had been forwarded to the High Court way back in the year 2010. By virtue of Order 42 Rule 35 (1), this Court cannot dismiss the Appeal because directions have not been given. However, section 3A of the Civil Procedure Act, 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.*

I note with concern that the Appellant has not been keen in prosecuting this Appeal which was filed 11 years back. I do not see any reason why the Appellant has not been able to file the Record of appeal and set down the Appeal for directions and hearing. The lower court file was forwarded to this court way back on 19/8/2010 which means by then, the proceedings had been typed. There is no reason why the Appellant has not filed a record of Appeal if nothing else. I find that the application has merits and I hereby allow the same with costs to the Applicant.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 27th Day of November, 2017.

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L. NJUGUNA

JUDGE

In the Presence of

..... For the Appellant/Respondent

..... For the Respondent/Applicant