



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NUMBER 656 OF 2005**

**MAMBA TRADE LINKS LIMITED.....1<sup>ST</sup> APPELLANT**

**JOSEPH MBOTE KARWENJI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**SOUTHERN CREDIT BANKING CORPORATION LTD.....RESPONDENT**

**R U L I N G**

By way of a Chamber summons dated 7<sup>th</sup> November, 2012, the Respondent/Applicant herein has moved the court under Order 42 Rule 35(1) of the Civil Procedure Rules and has sought the following orders: -

1. The Appeal be dismissed for want of prosecution.
2. The Appellant be ordered to pay costs of this Application as well as costs of the Appeal.

The Application is premised on the grounds set out on the body of the same and on the annexed Affidavit of James Mutua sworn on 7<sup>th</sup> November, 2012.

The summary of the Respondent's/Applicant's case is that the Appeal was filed on the 30<sup>th</sup> August, 2005 and thereafter the Record of Appeal was filed on the 30<sup>th</sup> day of July, 2008 and the same was served upon the advocate for the Respondent. It is further deposed that the Appeal was set for hearing of the notice to show cause why it should not be dismissed for want of prosecution on the 28<sup>th</sup> January, 2009 but on the said date, the matter was no listed.

It is now more than seven (7) years since the Appeal was filed and the Appellant has not taken any steps to prosecute the same. In the circumstances, the Appellants have lost interest in the Appeal and its continued pendency in the court is quite prejudicial to the Respondent.

The Application is opposed vide a Replying Affidavit sworn by Joseph Mbote Karwenji sworn on the 26<sup>th</sup> August, 2015 and filed in court on the 28<sup>th</sup> August, 2015. In summary it is deposed that during the pendency of the matter the Appellants former Advocates on recording from time to time kept on demanding further instructions fees despite having been paid what they had agreed with the Appellant. Since the Record of appeal was filed on 30<sup>th</sup> July, 2008, the Appellant believed that the Appeal was progressing well. His former Advocates did not always keep him posted on the progress until April 2014 when upon visiting his Advocate he learnt that they had filed an Application to withdraw from acting for

him allegedly for lack of instructions on his part despite paying them full legal fees as they had initially agreed.

He was surprised to learn that the Appeal had not been prosecuted and it's at this point that he requested for his file so that he could instruct another Advocate but they declined to hand it over to him. He wrote a letter to his former Advocates informing them to hand over the file to the firm of Hassan N. Lakicha & Co. Advocates, who took over the matter and filed a Notice of Change of Advocates on 28<sup>th</sup> August, 2015. He deposes that he is willing to prosecute the Appeal and urges the court not to visit the mistake of his former Advocate upon him and that he has an arguable Appeal that has high chances of success. He concludes by deposing that he will be greatly prejudiced and suffer irreparable loss if the pending appeal is dismissed.

The Application proceeded by way of written submissions which both parties filed. The Appeal herein was filed way back on the 30<sup>th</sup> August, 2005. No action was taken after the Record of Appeal was filed in the year 2005. The Application before the court was filed in the year 2012 and it was not until 8<sup>th</sup> August, 2015 when a Replying Affidavit was filed in opposition.

The Appellant blames his former Advocate for failure to prosecute the Appeal. He deposes that he visited his Advocate on or about April, 2014 and it is that time that he learnt the Appeal had not been prosecuted. From his Affidavit, it appears that since the Appeal was filed in 2005, he never visited his Advocate to find out the position of the Appeal until April 2014 which was almost nine (9) years later. A period of nine years by any standards is a long time for a litigant to have failed to visit his Advocates offices to know the position of his case. No good reasons have been given by the Appellant as to why he was not following up on his Appeal.

Though he blames his Advocate for failure to prosecute the Appeal, he is more to blame for not following it up and in any case, it was within his right to instruct another Advocate to pursue the Appeal on his behalf if he was not satisfied with the services that his Advocate on record then was offering to him. I find no good reasons why the Appellant has not prosecuted the Appeal for all that time.

However, the Application herein is brought under Order 42 Rule 35(1) which provides: -

***“...unless within three months after the giving of directions under rule (13) the Appeal shall not have been set down for hearing by the Appellant the Respondent shall be at liberty to either set down the Appeal for hearing or to apply by summons for its dismissal for want of prosecution.”***

Under this provision, the Respondent/Applicant can succeed only if directions have been given in the appeal under Rule 13. I have perused the court file and according to the Record the Appeal was admitted on the 7<sup>th</sup> November, 2013, but no directions have been given as required above.

In the circumstances, my hands are tied by the provisions of Order 42 Rule 35(1) and I have no option but to dismiss the Application but I do hereby make the following orders;

- 1. The Application dated 7<sup>th</sup> November, 2012 is hereby dismissed.**
- 2. The Appeal herein be prosecuted within three months that is to say on or before 28<sup>th</sup> April, 2016 failure to which it shall stand dismissed.**
- 3. Costs of the Application shall be in the cause.**

Dated, Signed and delivered at Nairobi this 28<sup>th</sup> day of January, 2016.

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**L. NJUGUNA**

**JUDGE**

***In the presence of***

..... ***for the Appellants***

..... ***for the Respondents***