



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL APPEAL NO 87 OF 2009**

**SEBASTIAN KIREU MUNGA'ATIA .....APPELLANT**

**VERSUS**

**ROBERT KIBUGI.....1ST RESPONDENT**

**PROVINCIAL LAND DISPUTE APPEALS COMMITTEE-EMBU.....2ND RESPONDENT**

**R U L I N G**

1. This application is dated May, 2013 and seeks orders:-

1. ***This Honourable Court do use its inherent powers to prevent the abuse of the Court process and dismiss the Appellant's Appeal.***
2. ***ALTERNATIVELY AND WITHOUT PREJUDICE this Honorable Court do take up the matter and summarily dismiss the same under Section 79 B of Civil Procedure Act as the Appellant has for 4 years refused to act in terms of Order 42 r. 11 of Civil Produce Rules.***
3. ***This Honourable Court be pleased to dismiss the Appeal for want of prosecution.***
4. ***The costs of this application be provided for:-***

The application is buttressed by the Affidavit of **ROBERT KIBUGI**, the 1st Respondent herein and has the following grounds: -

- a. ***THAT Appellant has intentionally abused the process of the Court by giving the Court wrong dates of the decision appealed from.***
- b. ***THAT the Appeal was 12 months after the decision instead of within 60 days of the decision appealed from.***
- c. ***THAT it is 4 years since the Memorandum of Appeal was served upon the Respondents.***
- d. ***THAT the Appellant has refused to act in terms of Order 42 r.11 of the Civil Procedure Rule.***
- e. ***That although the Deputy Registrar has failed to act in terms of Order 42 r. 35 (2) of Civil Procedure Rules, the Court has powers on receipt of the file to act accordingly to prevent abuse of the process of the Court .***
- f. ***THAT the Appeal is a candidate for dismissal.***

2. The Parties have filed Written Submissions. The Parties Submissions are well argued and proper assertions in proper circumstances
3. *Order 42 rule 35 (1) & (2) of the Civil Procedure Rules States:- 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 be set down for hearing, the registrar shall on notice to the parties list the appeal before a Judge in Chambers for dismissal.*

4. Under Order 42, rule 35 (1) directions must have been given and if within 3 months after directions have been given , the appellant does not set down the suit for hearing, the respondent can either-
  - a. *Set down the appeal for hearing or,*
  - b. *Apply by summons for its dismissal.*

In this application, it is not clear that the application is by summons.

5. Under Order 42, rule 35 (2), it is the duty of the registrar on notice to the parties to list the appeal before a Judge in Chambers for dismissal. Obviously, this application cannot be said to be predicated upon order 42, rule 35 (2).
6. The applicable law and the authorities proffered in support of the parties' respective assertions are good law and authorities in proper circumstances. I do find it has taken too long before this appeal has been heard and determined.
7. However, Considering the totality of the circumstances of this appeal and in view of the fact that directions have not been taken, and in the Interest of Justice, I decline to dismiss the appeal.
8. Instead , I order the appellant to ensure that all processes and procedures necessary to have the appeal expeditiously admitted/heard are undertaken within 60 days of today.
9. It is so ordered.

**DELIVERED IN OPEN COURT AT MERU THIS 30<sup>TH</sup> DAY OF MAY, 2015 IN THE PRESENCE OF:-**

CC: Daniel

Baikiara for 1st Respondent.

Murithi h/b Mwanzia for Appellant

Kimathi for 2nd Respondent

**P.M. NJOROGI**

**JUDGE**