



**REPUBLIC OF KENYA**

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

**HCCA NO. 12 OF 2013**

**PETER GATHURA KAHUHA.....1<sup>ST</sup> APPELLANT**

**JAMES GITHUA WANJIRIRI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**ESTHER NJOKI MUNYEKI.....RESPONDENT/APPLICANT**

**RULING**

By an application dated 13<sup>th</sup> January, 2015, the applicant moved this court vide **order 42 rule 35 (1)** and order 51 rule 1 of the **Civil Procedure Rules** seeking, in the main, that the appeal herein be dismissed for want of prosecution. The motion is supported by the applicant's own affidavit sworn on 13<sup>th</sup> January, 2015.

The applicant has deposed that since the appellants filed their appeal more than a year ago, they have neither sought for directions on the hearing of the appeal nor set it down for hearing. They have also not filed their record or even applied for typed proceedings from the lower court; in a sense the appellants have gone to slumber even after they filed their appeal out of time though with the leave of the court.

The appellants have opposed the motion and filed a replying affidavit sworn by Sandra Nyakweba who is a director with the Directline Assurance Company Limited which is an insurance company that covered the vehicle that was involved in the accident out of which the cause of action in the lower court arose.

The only point that Nyakweba has raised in the replying affidavit worth of note but which is basically an issue of law is that directions under **rule 13** of the **Order 42** of the **Civil Procedure Rules**, on the manner of hearing of the appellant's appeal have not been taken and therefore it is premature to apply to have the appeal dismissed for want of prosecution at this stage.

**Order 42 rule 35(1)** of the rules under which the motion is made provides as follows:-

***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.***

The rule is clear that the two options open to the respondent under these circumstances are either to set down the appeal for hearing or to apply for its dismissal for want of prosecution; whichever option that the respondent may want to take, it is mandatory that directions under rule 13 of order 42 must have been given first.

The applicant has admitted, and indeed the record shows that the though the appeal was admitted way back in 2014, directions have never been given as prescribed by the rules; according to **rule 13(1)** the obligation to set down the appeal for such directions lies on the appellant although there is nothing in that rule that expressly forbids the respondent from taking a similar step, particularly in cases such as this where the appellant has either ignored, neglected or for some reason simply failed to act in time or at all and caused the appeal to be listed for giving of directions before the judge.

Although the lethargy of the appellants in this appeal is quite apparent, their appeal cannot be dismissed

for want of prosecution under rule **35(1)** for the obvious reason that directions have not been taken.

But the appellants cannot be left to their own devices and hold everybody else at ransom because of their reluctance to list their appeal for directions; **rule 35(2)** gives this court power to dismiss the appeal on the same ground of want of prosecution where the appellant has not listed his appeal for hearing a year after the memorandum of appeal was served. Here, the question whether the appellant has set the appeal for directions does not arise because it is presumed that a year is time enough for a vigilant appellant to put in motion the process of hearing and determination of his appeal, including the taking of directions. Accordingly, while I am inclined to dismiss the applicant's application dated 13<sup>th</sup> January, 2015 the appellants are hereby ordered to file and serve their record of appeal within 30 days of the date hereof; they are also ordered to fix the appeal for directions within 30 days of the date hereof failure of which this appeal shall stand dismissed. It is so ordered.

**Signed, dated and delivered in open court this 22<sup>nd</sup> July, 2016**

Ngaah Jairus

**JUDGE**