



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL APPEAL NO. 40 OF 2013**

*(An appeal from the Judgment and orders of the Senior Resident Magistrate,*

*Runyenjes in Succession Cause No. 39 of 1997 dated 24/01/2013)*

**MIKE MUCHUNKU.....APPELLANT**

**V E R S U S**

**KATHUNI NYAGA KIRINDI.....RESPONDENT**

**R U L I N G**

1. This is a ruling on an application dated 12/8/2016 seeking that the appeal herein be dismissed for want of prosecution. The record shows that this appeal was filed on 31/7/2013 and admitted on 26/8/2013. the record of appeal was filed on 18/9/2013 and directions given on 23/6/2015.

2. The application is supported by the affidavit of Kathuni Nyaga Kirindi. In the affidavit, it is stated that the appeal was filed on 9/3/2015 and directions were given on 23/6/2015 after which a year has lapsed without the matter being fixed for hearing. The record is event that the respondent's advocate has invited the appellants advocate severally for purposes of fixing a hearing date but they fail to appear. The directions given were to the effect that the appeal be disposed of by way of written submissions.

3. The applicant did not file submissions but indicated that he wanted to rely wholly on his supporting affidavit.

4. Order 42 rule 35 of the Civil Procedure Rules provides:-

*(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.*

5. In the case of **JURGEN PAUL FLACH VS JANE AKOTH FLACH [2014] eKLR** the court cited the case of **KIRINYAGA GENERAL MACHINERY VS HEZEKIEL MUREITHI IRERI HCC NO 98 OF 2008** where Mary Kasango J interpreting Order 42 Rule 35 held that:-

*“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.”*

6. **PROTEIN & FRUITS PROCESSORS LIMITED & ANOTHER VS DIAMOND TRUST BANK KENYA LIMITED [2015] eKLR** the court held that from the provisions of Order 42 Rule 35 an appeal can only be dismissed for want of prosecution in two instances,

*'Firstly where there has been failure to list the appeal for hearing for three months after directions have been made under Order 42 Rule 13 or ; secondly if after one year of service of the memorandum of appeal the appeal has not been listed for hearing.....Under the first scenario the appeal can only be dismissed if it has been admitted and directions have been given.'*

7. The court proceedings are evident that directions in the appeal were given on 23/6/2015 to the effect that the appeal should be disposed off

by way of written submissions. This application was filed on 12/8/2016 which was not less than one year after the directions were given.

8. It is my finding that the application satisfies the conditions of Order 42 Rule 35 as regards dismissal. I find it merited and allow it as prayed.

9. The appeal stands dismissed with costs for want of prosecution.

10. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 31ST DAY OF OCTOBER, 2016.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Njiru for Andante for Respondent/Applicant**

**Ms. Muriuki for Appellant**