



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL APPEAL NO. 433 OF 2012**

**SURESH RUGINATH RANIGA.....1<sup>ST</sup> APPELLANT**

**RAJIV SURESH RANIGA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**SAGAR MOHAN S.M.RAM.....RESPONDENT**

**R U L I N G**

1. Before the court is a Notice of Motion dated 30<sup>th</sup> March, 2013 and filed on 9<sup>th</sup> May, 2013 by the Respondent praying that this appeal be dismissed for want of prosecution. The Respondent further sought that the order of stay of execution granted on 12<sup>th</sup> October, 2012 by the lower court be set aside or varied. That additionally the amount of Kshs. 1,000,000/= deposited in court in Nairobi CMCC No. 780 of 2012 vide a bank guarantee in favour of the said court be released to the Respondent/Decree Holder by the Guarantor. The application was brought under Order 42 Rule 35 of the Civil Procedure Rules and supported by the affidavit of the Respondent sworn on 13<sup>TH</sup> March, 2014.

2. It was deponed that since the appeal was filed on 16<sup>th</sup> August, 2012, no steps have been taken to prosecute it; that the Appellants have further not applied for proceedings and/or decree and have failed to set the appeal down for hearing and directions. The Respondent also claimed that the appeal is frivolous and that the same should be dismissed.

3. In response to the application, the 1<sup>st</sup> Appellant filed a Replying Affidavit sworn 12<sup>th</sup> November, 2014. According to the Appellants, the application before court lacked merit and was an abuse of the court process. That the appeal had not been admitted nor had directions been taken and that in view of the foregoing a dismissal of the appeal under Order 42 Rule 35 of the Civil Procedure Rules could not apply. The Appellants further contended that they were not lax in prosecuting their appeal, as they had made numerous requests for the proceedings of the lower court to enable them prepare a record of appeal. That despite several demands, the typed proceedings had not been availed. With regard to the prayer to vacate the orders for stay issued in Nairobi CMCC No. 780 of 2012, it was the Appellants contention that the Respondent was seeking a review of the orders of the court through the backdoor without following the proper procedure. It was therefore the Respondent's contention that it was only the court that passed or made the ruling that could exercise a review of its orders and not this court. The Appellants reiterated that the instant appeal has merit and should be allowed to proceed to full hearing.

4. The application was canvassed through oral submissions. Through his Learned Counsel Mr. Ashimosi, the Respondent submitted that the only document that was filed in respect of the appeal was a Memorandum of Appeal filed on 16<sup>th</sup> August, 2012. That since then, no action had been taken by the Appellants because of the conditional stay granted by the Court in Nairobi CMCC No. 780 of 2012. Mr. Ashimosi further argued that the aforesaid stay was working against his client who could not enjoy the fruits of his litigation. The Respondent therefore urged the court to allow the application and grant the prayers as sought.

5. In rebuttal, the Appellants, through Learned Counsel Mr. Waweru, contended that the instant appeal can only be dismissed if it has been admitted and the court has subsequent thereto issued directions. That in the foregoing, the law cited by the Respondent cannot support the prayers sought. Mr. Waweru further explained the various steps that had been taken by the Appellants in this appeal including requesting for typed proceedings which were yet to be supplied by the lower Court. That owing to this situation, the Appellants were unable to file their Record of Appeal. It was also submitted that the Appellants had fulfilled the conditions for the stay granted by the Court in Nairobi CMCC No. 780 of 2012 by depositing Kshs. 1,000,000/= in court. That any variation of that order can only be made by the lower court that issued the same and not the appellate court. Mr. Waweru therefore urged that the application was without merit and should be dismissed with costs.

6. I have read the Application, and the affidavits of the respective parties. I have further considered the submissions of the learned counsel. The issues for determination are whether the appellants have been diligent in prosecuting the appeal; if not, whether the appeal should be dismissed for want of prosecution. The other issue for determination is whether the Respondent has made a case to warrant the court to vacate the orders of stay in place and release the deposited amount of Kshs 1,000,000/= to him.

7. I propose to deal with the first issue of whether the appellant has been diligent in prosecuting the appeal. The provisions concerning dismissal of an appeal for want of prosecution is contained in Order 42 Rule 35 of the Civil Procedure Rules. Under Rule 35 aforementioned, the law contemplates two different situations when an order for dismissal of an appeal for want of prosecution is to be made. These are:-

a. Firstly, where three months after issuance of directions under Order 42 Rule 13, no steps have been taken by the appellant to fix the appeal for hearing. In such a situation, the Respondent has two options that is, to either fix the appeal for hearing or apply by summons for the dismissal of the appeal. This provision is found in Order 42 Rule 35(1) of the Civil Procedure Rules:

b. Secondly, under order 42 Rule 35(2), if, within one year after 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.

8. In this matter, the Appellants have already filed the Memorandum of Appeal. However, Order 42 rule 35 (2) of the Civil Procedure Rules 2010 is not applicable as the Registrar has not sought the dismissal of the appeal. This leaves us with Order 42 rule 35 (1). The Appellants submitted that the instant appeal cannot be dismissed for want of prosecution because directions in respect thereof have not been issued. 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 31 (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 being given the orders sought by the respondent cannot be entertained.”***

9. 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 Ireri**. This Appeal therefore cannot be dismissed to for want of prosecution under Order 42 rule 35(1).

10. However, in case I might be wrong on that front, I have to also assess the merit of the Respondent's argument that this court still has the discretion to dismiss this appeal according to the circumstance of the case. In this regard, the Respondent submitted that the Appellants have not taken any steps since filing the Memorandum of Appeal. I note that the record shows that the Memorandum of Appeal was filed on 16<sup>th</sup> August, 2012. Ever since, no record of appeal has been prepared. The reason for the appellants' apparent failure to prepare the record of appeal has been blamed on the court's failure to supply the appellants and/or its advocates with typed proceedings to enable them to prepare the record of appeal. Indeed several letters to the court requesting for typed proceedings were exhibited in the 1<sup>st</sup> Appellant's Replying Affidavit. Those letters dated 15/8/2012, 8/3/2013, 29/7/2013, 15/10/2013, 8/1/2014, 20/5/2014 and 11/8/2014 are shown to have been were received by the office of the Executive Officer Milimani Chief Magistrate's Commercial Court. These letters did not yield any response from the court hence the Appellants' inability to file the Record of Appeal. In this regard, I am of the opinion that the Appellants are not entirely to blame for the delay in prosecuting their appeal.

11. With regard to the prayer that this court should set aside and/or vacate the order of stay of execution given on 1<sup>2th</sup> October, 2012 in Nairobi CMCC 780/2012, I am of the view that where a lower Court or tribunal grants a conditional stay which conditions any party is aggrieved with, the Court to which the appeal is preferred cannot vary or set aside the said order on an application unless that order is appealed against. In the case before me, no appeal was preferred against the said conditional stay. The aggrieved party can still approach the court that gave the order for review, if the circumstances permit.

12. For the foregoing reasons, I find the application to be without merit and same is dismissed with no order as to costs.

13. In the meantime however, I direct hat the proceedings in CMCC No . 780 of 2012 be typed with speed and be supplied to the parties, in any event within 60 days of this order. The Appellant to extract and serve this order upon the Chief Magistrate Milimani Commercial Courts for compliance.

Orders accordingly.

Dated and delivered at Nairobi this 23<sup>rd</sup> day of January, 2015.

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**A MABEYA**

**JUDGE**