



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO. 52 OF 2008**

**MAINTENANCE LIMITED & ANOTHER.....APPLICANTS**

**VERSUS**

**WINFRED ALUOCH.....RESPONDENT**

*(Being an Appeal from the judgment and Decree of the Senior Principal magistrate's court at Kisii in Kisii SPMCC.NO. 613 of 2005 delivered on the 24<sup>th</sup> April, 2008 by Hon. C.G. Mbogo, SPM).*

**JUDGMENT**

1. Before this court is a Notice of Motion dated 7<sup>th</sup> February, 2013 by the Respondent counsel praying that this appeal be dismissed for want of prosecution. The Respondent further sought for costs of the application. The application was brought under order 42 Rule 35 of the Civil Procedure Rules and supported by an affidavit of the respondent sworn on 7<sup>th</sup> February, 2013.
2. It was deponed that since the appeal was filed on 12<sup>th</sup> May, 2008, no steps have been taken to prosecute it, that the appellants have not applied for proceedings and/or decree and have failed to set the appeal down for hearing and directions, and thus failure to have this appeal heard and determined is in excusable and a conduct of a party who has lost interest in pursuing this appeal even after being given an opportunity.
3. Further the respondent contends that he paid the deposit for proceedings and final payment for the same to enable the Appellants advocates take up steps by attaching a request for proceedings, receipt for deposit and court letter which were all dated and marked 11<sup>th</sup> November, 2010 and SO2 (a)(b)(c) & (d) respectively.
4. In response to the application, the appellant's counsel filed a replying affidavit sworn on 15<sup>th</sup> February, 2013. According to the appellant the delay in filing a record of appeal was caused by unavailability of the certified decree as their efforts to extract a decree for purposes of the appeal have been fruitless since further court fees had not been paid. Hence decree cannot be signed until further court fees have been fully paid to court which was expected to be paid by the respondent who has received part payment.
5. Furthermore, that court fees were payable by the respondent and not the appellant, they (appellant) constantly informed the respondents to effect payment of further court fees to expediate hearing of the appeal and that it is imperative upon the respondents to effect payment of further court fees given the fact that part payment of decretal sum had already been made to them aforesaid.
6. The respondent on their part applied for leave to file a further affidavit. In the said further affidavit dated 22<sup>nd</sup> February, 2013 the respondent contends that further court fees is paid by the party in need of the decree for purposes of either filing an appeal or instituting execution proceedings and thus he (respondent) contended that the failure to pay court fees by the appellant is a clear show that it is not interested in prosecution the appeal.
7. When the matter came before Sitati, J on 29<sup>th</sup> April, 2013 counsels representing both parties orally

submitted on the above application. Mr. Bunde learned counsel representing the respondent submitted by stating that the appellants appeal had taken long to be set down for hearing as the Memorandum of Appeal was filed on 12<sup>th</sup> May, 2008 and thereafter the Record of Appeal was filed on 22<sup>nd</sup> September, 2011 but the same had still not been set down for hearing.

8. He further submitted that the reason why decree is said to have caused delay is because the appellant insists that non-payment of further court fees should be paid to the respondent in whose favour judgment was given. However, in rebutting to the appellant's argument, he states that the person who seeks to appeal against the appeal should have the courtesy to pay further court fees in order to make the decree available for appeal.
9. On the other hand, Miss Koech learned counsel for the appellant submitted by stating that the appellant had not set down appeal for hearing because a certified copy of decree was not availed, that they had paid for the decree but the same could not be issued because of pending further court fees which would be paid by the respondents and even if appellant did not appeal, the respondent would still have to pay further court fees.
10. I have read the application and the affidavits of the respective parties. I have further considered the submissions of both learned counsels and 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.
11. The provisions concerning dismissal of an appeal for want of prosecution is contained in Order 42 Rule 35 of the Civil Procedure Rules. Under Order 35 aforementioned, the law contemplates two different situations when an order for dismissal for 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 to apply by summons for 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.*

12. In this matter, the appellants have filed the memorandum of Appeal. However, order 42 rule 35(2) of the Civil Procedure Rules 2010 is NOT applicable in my humble view as the Registrar has not sought the dismissal of this appeal but instead it is the respondent who has sought for this dismissal. This leaves us then with Order 42 Rule 35(1). In the case of **Kirinyaga General Machinery v. Hezekiel Mureithi Ileri HCCC.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 from 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”.*

13. 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 (supra). This appeal therefore cannot be dismissed for Want of prosecution under Order 42 rule 35(1).
14. On the other hand, the appellants have advanced an argument that the reason why they have failed to extract a decree is because the respondents have failed to pay 'further costs' to enable the appellant to extract the decree in **John Mathenge W. Silas Githinji K. v. Isage Ngatia Ngoro {2008} eKLR Kasago J** again held:

*‘.....I do not accept the argument by the appellant that it is the responsibility of the respondent to extract the decree. The appellant having filed this appeal has a responsibility to extract the decree to be included in the Record of Appeal’.*

15. For the foregoing reasons, I find the application by the respondent to be without merit and the

same is dismissed with no order as to costs.

16. In the meantime however, the appellant has 30 days to pay the said 'further costs' and apply to the Deputy Registrar to put this matter before a judge for directions on how his intended appeal should proceed.

Dated and delivered at KISII this 20<sup>th</sup> day of February, 2015

**C.B. NAGILLAH,**

**JUDGE.**

**In the presence of:**

Moseti holding brief for Bett for the appellants

Bunde for the respondent

Edwin Mongare Court Clerk.