



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 181 OF 2013**

**EQUITY BANK LIMITED**

**(FORMERLY EQUITY BUILDING SOCIETY).....APPELLANT**

**VERSUS**

**JAMES MURAYA MAHUGU.....RESPONDENT**

**RULING**

1. The Respondent has filed this Notice of Motion dated 18<sup>th</sup> December, 2014 under Order 42 Rule 35(1) and Order 51 Rule 1 seeking the dismissal of this appeal for want of prosecution. The Respondent vide his supporting affidavit sworn on 18<sup>th</sup> December, 2014 averred that more than one (1) year has lapsed since the filing of the appeal and the Appellant has taken no step to prosecute the appeal. He stated that the Appellant has never taken any directions on this appeal and that the delay in prosecuting it continue to occasion him loss as he cannot proceed with the execution of his judgment.
2. Mr. Gathira learned counsel for the Respondent argued that the only reason advanced by the Appellant is that it was thought that this appeal was in the Court of Appeal and were waiting for the said court to move them which is a pointer that the Appellant was not keen in pursuing the matter. He argued further that the fact that the decretal amount is in a joint interest earning account is not reason enough for not prosecuting an appeal. He lamented that the Respondent's money has been held since the year 1991.
3. The Respondent opposed the application vide a Replying Affidavit of Jillian Ndirangu sworn on 2<sup>nd</sup> March, 2015. She contended that after the filing of the Record of Appeal on 6<sup>th</sup> November, 2013, the Advocate seized of the matter left the employ of the firm of the Appellant's Advocates with notice that the appeal was awaiting a court date and erroneously indicated that the matter was before the Court of Appeal; that the firm were waiting for a hearing notice from the Court of Appeal; that it is upon receipt of this application that the Appellant's counsel were alarmed. The deponent contended that the Advocate's error ought not be visited on the hapless Appellant. She expressed the Appellant's willingness to take an earliest hearing date subject to court's convenience and stated that the Appellant stands to be prejudiced should the appeal not be determined on merit since the subject matter concerned a colossal sum deposited in a joint interest earning account in the names of the advocates for the Appellant and the Respondent.
4. Ms. Michuki learned counsel for the Appellant argued that the filing of the memorandum of appeal and record of appeal soon after the delivery of judgment on 7<sup>th</sup> March, 2013 demonstrates the Appellant's willingness to prosecute the appeal. She submitted that her associates misrepresentation was a genuine mistake.
5. The law on dismissal of an appeal for want of prosecution is found in Order 42 Rule 35 of the Civil Procedure Rules. Under Rule 35 (1), the Appellant must have failed to prosecute the appeal within three (3) months of taking directions while under Rule 35 (2) no steps must have been taken by the Appellant to prosecute the appeal within one year after the service of the memorandum of appeal. In the instant case, no directions have been taken and the applicable provision therefore is Order 42 Rule 35 (2) which provides that upon such failure to prosecute the appeal, it for the deputy registrar to list the appeal before a judge in chambers for dismissal. This is clear from the reading of that provision which provides that:-

***"If, within one year after the service of the memorandum of appeal, the appeal shall not***

***be have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal." (Emphasies own).***

6. In this regard, the application invoked the court's jurisdiction under Order 42 Rule 35 (1), the application cannot lie as no directions has been made in this matter. In any event, the mistake alluded to of holding the appeal as pending before the Court of Appeal whose procedure require that it is that court that fixes its appeals for hearing seems to have been genuine and a plausible explanation. Since the lower court record was forwarded to this Court on 11<sup>th</sup> September, 2014, this appeal is ripe for directions.
7. Accordingly, this application is premature and is dismissed. Costs shall abide the outcome of the appeal. The Appellant however is directed to fix the matter for directions within 60 days.

Dated, Signed and Delivered at Nairobi this 26th day of March, 2015.

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**A MABEYA**

**JUDGE**