



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

**CIVIL APPEAL NO. 161 OF 2005**

**ROSAVIE (EPZ) LIMITED.....APPELLANT**

**VERSUS**

**STANLEX MBITHI JAMES.....RESPONDENT**

**RULING**

1. The Respondent has filed the Notice of Motion dated 19<sup>th</sup> January, 2015 seeking the dismissal of the appeal for want of prosecution. Vide the Supporting Affidavit of Calleb Jomo Ong'uti sworn on 19<sup>th</sup> January, 2015, it was averred that since the filing of this appeal, it has never been set down for hearing. That there is loss of interest in prosecuting the appeal occasioning prejudice to the Respondent. That in any event, the appeal has no chances of succeeding and is only meant to delay the Respondent from enjoying the fruits of his judgment.

2. Ms. Achola learned counsel for the Respondent submitted that since the filing of this appeal on 16<sup>th</sup> March, 2005 and the Record of Appeal on 3<sup>rd</sup> December, 2008, no step has been taken to prosecute the same. That it was only after the filing of this application that the Appellant woke up. She further submitted that the Appellant has lost interest in prosecuting its appeal and this appeal should therefore be dismissed. She urged that in the alternative, the Deputy Registrar should be directed to act in terms of Order 42 Rule 35 (2).

3. The Respondent filed grounds of opposition dated 9<sup>th</sup> March, 2015 in opposition to the application. The grounds were that this application is an abuse of the due process; that the Application is bad in law and ought to be struck off, that this court has discretion to dismiss the application and allow the appeal to be heard on merit on the grounds that the objective of the court is to do justice and that the Appellant wishes to prosecute its appeal.

4. Mrs. Wambugu, Learned Counsel for the Appellant argued that the Respondent had filed a similar application on 13<sup>th</sup> February, 2009 which was dismissed on 4<sup>th</sup> May, 2009. She submitted that although the Record of Appeal was filed, the trial court file has to-date not been availed to enable the court give directions on the appeal. She urged that the application be dismissed.

5. The law on dismissal of an appeal for want of prosecution is contained in Order 42 Rule 35 of the Civil Procedure Rules. The rule contemplates two scenarios when an appeal can be dismissed. One is where three (3) months after issuance of directions no steps have been taken to prosecute the appeal i.e. Order 42 Rule 35 (1), and the second is where no steps have been taken to prosecute the appeal within one year after the service of the memorandum of appeal i.e. Order 42 (35)(2). Under the first scenario, it is the Respondent to move the Court whilst under the second scenario, the action is by the registrar.

6. In the instant case, no directions have been taken. The applicable provision therefore is Order 42 Rule 35 (2) which specifically 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).***

7. From the above provision, it is clear that it is upon the registrar to list the appeal before a judge in chambers for dismissal. I have taken the liberty to read the record, a similar application was on 13<sup>th</sup> May, 2009 struck out by Lady Justice H. N. Okwengu (as she then was). The reasons advanced then by the Appellant for delay in prosecuting the appeal were similar to the reasons tendered now. Since under Order 42 Rule 35 (1) the appeal cannot be dismissed before directions have been given, the Applicant should have taken advantage of Order 42 Rule 35 (2) and cause the registrar to list the appeal for dismissal. I have not seen any letter to the registrar requesting for the matter to be listed for dismissal. If there had been such correspondence which the registrar ignored, I would have been inclined to accede to the application.

8. Since however, there is no evidence that the Applicant had requested the registrar to list the matter in terms of Order 42 Rule 35 (2) and the later failed, I find it difficult to accede to the application. In the end, the application is without merit and is dismissed. I make no order as to costs.

DATED, Signed and Delivered at Nairobi this 25<sup>th</sup> day of March, 2015.

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**A. MABEYA**

**JUDGE**