



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL APPEAL NO. 94 OF 2007**

JANE NJOKI KARANJA

JOHN MUGO KARANJA

CECILIA MUTHONI MWAURA.....APPELLANTS

V E R S U S

PAUL KIHARA KURIA

GRACE WAITHERERO KURIA.....RESPONDENTS

*(From the Original Order In Thika CMCC No. 468 of 2006 before P. Kidula Dated 22<sup>nd</sup> January, 2007)*

**RULING**

This is an application by the Respondents in this appeal by Notice of Motion dated 27<sup>th</sup> February 2014 brought under Article 159 of the Constitution; Sections 1A, 3 and 3A of the Civil Procedure Act, (Cap.21), Order 42, Rule 35 of the Civil Procedure Rules (*the Rules*) for an order to dismiss the appeal for want of prosecution.

The grounds for the application as they appear on the face thereof are - that since the filing of the appeal on 22<sup>nd</sup> February 2007 the Appellant has never taken any steps to prosecute it; that the appeal emanates from dismissal of the appellant's application hence the main suit is yet to be determined; that the appellants have taken advantage of this appeal to waste the suit land; that the applicant is desirous to fix the main suit for hearing so that the substantive issues in the dispute can be resolved which cannot happen until dismissal of the appeal.

The application is supported by the affidavit of the Respondent sworn on 27<sup>th</sup> February, 2014.

The Appellants oppose the application upon the grounds set out in the replying affidavit sworn by Paul Kihara, the 1<sup>st</sup> Appellant on 18<sup>th</sup> August 2014 and filed on 20<sup>th</sup> August, 2014. Those grounds are, that the

application is an abuse of court process since the appeal is not ready for hearing as it has neither been admitted nor directions taken; that the Respondent is not prevented from prosecuting the main suit in the lower court since there is no order for stay of proceedings; that since the establishment of the Land and Environment Court the lower court has no jurisdiction to hear and determine this matter; that he is desirous to prosecute the appeal as it raises serious issues bordering on criminal conduct on the part of the Respondent.

Rule 35(1) of Order 42 of the Rules provides for a respondent to either set down the appeal for hearing or apply for its dismissal for want of prosecution if within three months after the giving of directions under rule 13 of the same Order the Appellant shall not have set the appeal down for hearing. Such directions have not been given in this appeal. Indeed, the appeal has not even been admitted to hearing.

But that is not to mean that the court does not have inherent jurisdiction to order dismissal of an appeal for want of prosecution even though directions under Rule 13 have not been given. The court has inherent power which may be exercised as may be necessary to prevent abuse of the process of the court. An appeal which is lodged without the intention of ever prosecuting it but with the intention of delaying or obstructing the cause of justice is an abuse of the process of the court.

However, before a Respondent can invoke the inherent jurisdiction of the court to dismiss an appeal for want of prosecution before directions under Rule 13 are given, he must exhaust the remedies provided under the Rules. For example there is nothing stopping a Respondent from writing to the registrar of the court to request that the appeal be placed before a judge in chambers under Rule 35 (2) for dismissal. A respondent can also ask the registrar to set down the matter for directions under Rule 13. A judge may then direct the Appellant to take appropriate steps towards preparation of the appeal for admission and hearing within a limited period, and prescribe appropriate penalties in default.

A considerable amount of time has passed since the filing of the appeal herein. The application was filed Seven (7) years after filing the memorandum of appeal which is considerably longer than the time prescribed under rule 35(1). There is hence justification in the Respondents' plea that there has been delay in prosecuting the appeal. The fact that there is no stay of proceedings in the main suit in the lower court doesn't give the appellants the right to hold the respondents at ransom while not making any serious efforts to move the appeal forward. They cannot be allowed to use the provisions of Order 42 rule 35(1) as both sword and shield.

In the circumstances of this case, the appellants are directed to take appropriate steps towards the prosecution of this appeal within sixty days of today's date, failing which the appeal shall stand dismissed.

Costs to the applicant. It is so ordered.

**Dated and delivered at Nairobi this 24<sup>th</sup> Day of March, 2015.**

**A.MBOGHOLI MSAGHA**

**JUDGE**