



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 228 OF 2003

JOSEPHINE KALWENGE NZOKA.....APPELLANT

VERSUS

1. KENYA POWER AND LIGHTING CO. LTD
2. BERNARD MUSAU NDEGE.....RESPONDENT

RULING

1. Before me is a Notice of Motion dated 27th May, 2013 seeking that this appeal be dismissed for want of prosecution. The application is premised on the grounds on the face of the application and the supporting affidavit of Caroline W. Warui sworn on 27th May, 2013. Her contention is that directions on this appeal were given on 29th February, 2008 but this appeal has not been fixed for hearing since 6th November, 2008.
2. The application is opposed by the replying affidavit of Stephen Mwaura Muhia sworn on 4th November, 2013. He attributed the delay in setting the matter down for hearing to failed attempts to take dates at the court registry on 26th February, 2011 and 8th April, 2011 due to administrative matters which were being conducted at the registry. He stated that thereafter the file was misplaced in their chambers hence inability to invite the Respondents to fix a date for hearing and that it is on 31st October, 2013 that the said file was traced.
3. The parties herein filed written submissions to the application in which they basically reiterated their averments and cited authorities in regard to their positions. I have considered the said submissions vis a vis the law with regard to dismissal of appeals.
4. The provisions on dismissal of an appeal for want of prosecution is found in Order 42 Rule 35 of the Civil Procedure Rules. Under Rule 35, the law contemplates two different situations when an order for dismissal of an appeal for want of prosecution is to be made. First, 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. This provision is found in Order 42 Rule 35(1) of the Civil Procedure Rules. 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. Under Rule 35(1) the Respondent can either fix the appeal for hearing or apply by summons for the dismissal of the appeal. The Respondent herein has opted for the second option. The Appellant is therefore under obligation to give sufficient reason for the delay in prosecuting this appeal. Although the Appellant explained that it could not get a date at the registry and further the file was misplaced at their office, this court has not been told the exact administrative activity that was going on at the court registry barring the Appellant from fixing a date and secondly, it has merely been alleged that the file was misplaced. It was in my view incumbent upon the Appellant to at least give that evidence on oath

by way of an affidavit of the clerk in their law firm to ascertain that fact. This appeal was filed way back in the year 2003, it is unjust to keep the Respondent in abeyance for such a long period without prosecuting the appeal. Considering that the Appellant's indicate that the file has now been traced and weighing the interest of both parties, I order that this appeal be set down for hearing within the next thirty days from the date of this ruling failure of which this appeal shall stand dismissed. Orders accordingly.

Dated, Signed and Delivered in open court this 13th day of March, 2015.

J. K. SERGON

JUDGE

In the presence of:

Wilson h/b for Muhia for the Appellant.

Mwiti Ngulenyia for the 1st Respondent.

N/A for the 2nd Respondent.