



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL APPEAL NO. 308 OF 2012**

**ELEM INVESTMENT LTD.....APPELLANT/RESPONDENT**

**-VERSUS-**

**JOHN MOKORA OTWOMA.....RESPONDENT/APPLICANT**

**RULING**

Vide a Notice of Motion dated the 23<sup>rd</sup> June 2014 the Respondent herein, John Mokora Otwoma; through his advocate Mr Nelson Kaburu Felix seeks from this court the following orders:

- 1. That this appeal be struck out with costs to the respondent*
- 2. Alternatively the appeal be dismissed for want of prosecution.*
- 3. Costs of the application be to the respondent.*

*On the grounds that-*

- a. The appeal was filed on 15/6/2012*
- b. No certified copy of the decree has been filed within the reasonable time.*
- c. The appellant has not set down the appeal for directions under section 79B of the Civil Procedure Act*
- d. Essential steps have not been taken within the prescribed time or within reasonable time*

The application is brought under the provisions of Order 42 rules 1(1), 2, 11, 12, 13(1), 3 and 35 of the Civil Procedure Rules and section 79G of the Civil Procedure Act

The application is supported by the sworn affidavit of **Nelson Kaburu Felix Advocate**. Mr Kaburu avers that the Memorandum of Appeal was filed on 15/06/2012 which was against the decision rendered on 17/06/2012 in NBI CMCC 4887 of 2009. That the said Memorandum of Appeal was served together with the notice of motion for stay of execution filed on 21/06/2012. He further deposed that a ruling on the application by the appellant for a stay of execution pending appeal was rendered on 16/06/2012 when the stay of execution was ordered on terms.

Thereafter, the appellant was required under **Order 42(2) of the Civil Procedure Rules of 2010** to file a certified copy of the decree appealed from with the Memorandum of Appeal and where that was not possible to file it 'as soon as possible' or within such time as the court may order. The respondent's counsel deposed that the appellant has not complied with those requirements of the law to date.

The respondent further claims that under **Rule 42(11)** of the above rules, the appellant was required upon filing of the appeal, to '*... within thirty days cause the matter to be listed before a judge for directions under sections 79B of the Act.*' The appellant has not done that more than a year since the filing of the Memorandum of Appeal on 7/07/2013 and serving it on the same date. Also under **Order 42, Rule 13(1)** the appellant was required to cause the appeal to be listed for directions. It has not done that to date. It has not even filed with the court the documents listed in **Rule 13(4) of the Order 42** to date.

Further, the respondent's counsel contends that the appellant has not even prepared a draft decree or certificate of the costs and has not even paid further court fees on the decree and certificate of costs. **Order 21, Rules 8(5) and 20 and Order 42, Rule 2**, obliges the appellant to get the decree and certificate of the costs from the lower court. That the new Civil Procedure Rules 2010 relating to appeals drastically shifted from the old rules in relation thereto to expedite the appeals by setting timelines within which an appellant ought to take certain steps in prosecuting the appeal. The Rules Committee cast the burden of prosecuting appeals upon the appellants hence the strict timelines in the new Order 42, as opposed to the former rules where all steps on appeals were to be taken by the Registrars of the Courts.

The respondent invited the court to compare and contrast the old and the new rules in relation to appeals and to hold that the new rules can only aid fair administration of justice by expediting hearing of appeals if the timelines set in the new Order 42 are adhered to and failure to adhere to them renders the appeal a candidate for striking out with costs.

Further the respondent invited the court to find and hold that failure to take any prescribed essential step within the time prescribed renders the appeal liable for striking out within the inherent powers of the Court.

The application is opposed through the replying affidavit of Lillian Muthoni Njuguna Advocate for the appellant. She deposes that the applicant did not mention anywhere in his affidavit the fact that he had information that the lower court file was missing. That all the steps enumerated in his affidavit as having been necessary for the appellant to take, were impossible to take without the lower court file being available. The appellant concedes that truly a Memorandum of Appeal was filed on the 15/06/2012 and an amended one on the 18/06/2012, and that several applications were filed thereafter, numerous correspondence exchanged between the two firms and payments made to the respondent for the awards which were not disputed.

Mrs Njuguna states that her firm had by a letter dated 4/12/2012 applied for certified copies of the proceedings and judgment but on presenting it to the court registry, the court clerk was informed that the court file was not available and the registry declined to stamp their letter. Further, that the Deputy Registrar also wrote to the lower court notifying it of the lodgment of the appeal herein and calling for various documents in a letter dated 22/11/2012 contained in the court file herein. Further, that numerous attempts by the appellant's court clerk to trace the file were futile. The appellant claims that without the lower court file, it was impossible for them or the Deputy Registrar to have complied with the various Rules cited by Mr. Kaburu in his affidavit.

The appellant contends that it would be unfair and unjust to have the appeal struck out for the reasons given in the application as the delay in prosecuting it has been caused by the missing lower court file, a factor beyond the control of the appellant.

The application was canvassed by way of written submissions. The respondent submitted reiterating his grounds and supporting affidavit that the Appellant's main ground of opposition is that the court file cannot be found. The respondent urged the court to reject the argument because there is no letter from the Chief Magistrate's Court by either the Chief Magistrate or the Executive Officer confirming

unavailability of the file since 2012.

The respondent/applicant also submitted that It has been held that it is not enough to just write letters, file them and then go to sleep. One must personally follow up to ensure that those letters were actually received by the court officer concerned. The respondent relied on the case of **South Coast Fitness and Sports Center Ltd -vs- Clarkson Notcutt Ltd [2000] EA 230.**

The respondent also argued that **the letter attached as Exhibit LMN2'** dated 4/12/2012 was not even filed in court and did not have any court stamp. The respondent claims that the letter that followed was dated 10/9//2014 one year, nine months later. He also stated that that letter does not even refer to the one of 4/12/2012 which suggests the one of 4/12/2012 was not filed yet one is required to apply for and to pay a deposit for the proceedings.

In conclusion, the respondent urged the court to find and hold that the essential steps deposed to in the supporting affidavit have not been taken in time or at all and that the appeal has not been prosecuted reasonably and to dismiss it with costs.

The appellant also submitted reiterating that the gist of all the grounds relied on by the respondent is that the Appellant had not taken relevant steps within the time prescribed in the Rules. The appellant stated that the advocate has deposed to the fact of the lower court file being unavailable and shown the court the letters written to the subordinate court. The appellant argued that the respondent did not state either in the application or his supporting affidavit how possible it is for the Appellant/Respondent to pursue the Appeal without the lower court's file and before the proceedings are availed to the Appellant/Respondent or the Deputy Registrar. The appellant further argued that the fact of the lower court file was missing and brought to their attention when their clerk presented the letter dated 4/12/2012 to the lower court registry and he was told to keep checking for it.

The appellant also submitted that the letter dated annexed as 'LMN 4" was written on 10/9/2014 and it shows that they waited for one year nine months from the first letter to follow up. They also stated that the said letter shows that they were following upon the matter with the registry without success. They argued that if the lower court file was available, there was no reason why the Executive Officer would have ignored both the Deputy Registrar's request for documents and the appellant's inquire. It stated that without the file, they could not have paid for the deposit for proceedings as submitted by the Respondent advocate.

The appellant also submitted that the application is shown as having been brought under **Order 42, Rule 1(1) 2, 11, 12, 13(1) and 35(1)** of the **Civil Procedure Rules and S.79G of the Civil Procedure Act**. It stated that the basis of citing the above Rules and Sections is not clear since there was no provision in the cited provisions of the rules and of the Act which relates to the dismissal of Appeals for want of prosecution. The appellant argued that the cited provisions are irrelevant to the application and urged the court to disregard the same.

The appellant submitted that the only Rule which relates to the dismissal of appeals for want of prosecution is **Order 42, Rule 35(1)** which provides that *'Unless within three months after the giving of directions under Rule 13, the Appeal shall have been set down for hearing by the Appellant, The Respondent shall be at liberty either to set down the Appeal for hearing or to apply for dismissal for want of prosecution.'*

The appellant submitted that the Respondent can only apply for dismissal of this appeal for want of prosecution if the Appellant does not set down the Appeal for hearing within three months after the giving of directions under Order 42 Rule 13 of the Civil Procedure Rules. They stated that no directions have ever been given in this Appeal and therefore the application to have the Appeal dismissed for want of prosecution is premature. The appellant relied on the decision in **KIRINYANGA GENERAL MACHINERY VS.HEZEKIEL MURIITHI IRERI HCCA NO. 98 OF 2003** where the court while making reference to Order XLI Rule 31(1) of old Civil Procedure Rules which is the current Order 42, Rule 35(1) of the Civil Procedure Rules 2010, held that as directions had never been given in an Appeal,

the orders for dismissal sought by the Respondent could not be entertained.

The appellant also relied upon the decision in **CHETAN LALIT KUMAR VAKHARIA & ANOR – VS- DR. S. O. OWINGA HCCC NO. 493 OF 2008** and **JURGEN PAUL FLACH -VS- JANE AKOTH FLACT HCC NO. 119 OF 2012**

The appellant further submitted that the application is wrongly brought by way of Notice of Motion whereas **Order 42, Rule 35(1)** clearly provides that such an application ought to be by summons. The appellant submitted that the application ought to be dismissed based on this ground.

Having set out the different positions taken by the parties in this matter, the sole question arising before the court for determination is ***whether the appeal should be dismissed for want of prosecution.***

The law concerning dismissal of an appeal for want of prosecution is contained in **Order 42 Rule 35 of the Civil Procedure Rules**. The Rule provides:-

**35 (1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.**

**(2) If, within one year after the 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.**

A reading of the above provision shows that it is clear that an appeal can be dismissed for want of prosecution in two instances. Firstly, where there has been failure to list the appeal for hearing three months after directions have been given under Order 42 Rule 13 of the CPR or, secondly, if after one year of service of the Memorandum of Appeal the appeal has not been listed for hearing.

In these two scenarios, the procedure is different. In the first scenario, the Respondent is given the option to either list the appeal for hearing or to apply for its dismissal. Under that scenario however, the appeal can only be dismissed if it has been admitted and directions have been given.

In the instant case the respondent, though not expressly citing rule 35(1), but it is clear from the application that that is the only express provision under the Rules that permit a party to apply for dismissal of the appeal for want of prosecution. The rest of the cited provisions under the rules only provide for specific timelines for the taking of certain steps in an appeal but they do not provide for sanctions for the default.

The record clearly shows that no directions have been given in this matter. In my view the court will not dismiss an appeal for want of prosecution unless directions are issued. In saying so am in agreement with the holdings in many cases of this court including the case of **Suresh Ruginath Raniga & Another v Sagar Mohan S.M.Ram Civil Appeal no. 433 OF 2012**, where the court held that:

***The Appellants' counsel submitted that until and unless directions are issued, an appeal cannot be dismissed for want of prosecution; and that the procedure of dealing with an appeal where directions have not been issued is that contemplated in Order 42 rule 35(2) and not Order 42 rule 35(1). I am in agreement with these submissions. In the case of Kirinyaga General Machinery v. Hezekiel Mureithi Ileri HCC 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 for 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 been given the orders sought by the respondent cannot be entertained.”***

**9. 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 vs. Hezekiel Mureithi Ileri. This Appeal therefore cannot be dismissed for want of prosecution under Order 42 rule 35(1).**

I however agree with the averment by the respondent that under the new rules it is incumbent upon the appellant to take all necessary steps to prepare the appeal for hearing. The appellant has exhibited a letter dated 10/09/2014 written to the Executive Officer of the Subordinate Court before this application to dismiss the appeal was filed, asking the officer of the court to assist in tracing the missing file. In my view the appellant has not been asleep, and cannot therefore fit in the category of indolent litigants who archive pleadings in court and go to slumber.

I find that the appellant is interested in the appeal and it should be given a chance to ventilate its grievance against the decision of the lower court. To fail to accord it that opportunity in the circumstances of this case would be tantamount to ousting it from the judgment seat for no fault of its own making. I find that Mrs Njuguna counsel for the appellant has sufficiently demonstrated to this court that she has made concerted efforts on several occasions by writing to the lower court asking for the file to no avail. It is not clear why the lower court has not responded to any of her correspondence. She cannot be held responsible for the lack of communication from that court.

Indeed, where the appellant files an appeal and goes to sleep, this court can invoke its inherent jurisdiction under section 3A and the Overriding objectives under sections 1A and 1B of the Civil Procedure Act as well as Article 159(2)(b) of the Constitution, which provisions enjoin this court to do all that it can to prevent the abuse of its processes; to expedite the delivery of justice for the parties justly, fairly, proportionately and at a cost that is affordable to all. The Constitution abhors delayed justice and commands that **“justice shall not be delayed.”** Under section 1A and 1B of the CPA parties and their advocates are enjoined to assist the court in achieving the Overriding Objectives of the Act.

Section 3A of Civil Procedure Act gives the court unlimited power and preserves its inherent power to make **such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.** On its part, section 63 of Civil Procedure Act which is the statutory basis of all interlocutory applications gives courts the **discretion**, where it is so prescribed, **in order to salvage justice from defeat** to make such interlocutory orders, *inter alia*, as appear to the court to be **just and convenient.** (Emphasis supplied).

In this case, I find that indeed there has been delay in having this appeal heard and determined. However, the appellant has exonerated itself from absolute blame. It has demonstrated that it has been a helpless party who deserves the assistance of this court and the court must therefore do its part to ensure that parties are not ousted from the seat of justice for no fault of their own.

The respondent on the other hand must be commended for being vigilant as litigation must come to an end, and justice delayed is justice denied. However, in this case, the delayed justice is not because the appellant was indolent. In addition, the prejudice that the Appellant is likely to suffer if this appeal is dismissed is likely to be graver than the prejudice that the Applicant/Respondent would suffer if the appeal is ordered to proceed, given that the appellant has deposited the decretal amount in court and settled some of the undisputed costs. In arriving at that conclusion, am enjoined by the Court of Appeal decision in **Abdurrahman Abdi v Safi Petroleum Products Ltd & 6 others [2011] eKLR, Civil Application No. Nai. 173 of 2010** where the Court stated:

***“The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.”***

Also this court has pronounced itself in the case **Allan Otieno Osula v Gurdev Engineering & Construction Ltd [2015] eKLR** thus:

***“It is therefore on the above grounds that I decline to strike out the appeal as prayed. I employ the principle that the right of appeal is constitutional right and in as much as there has been delay which has not been satisfactorily explained by the appellant, this court has to weigh the cost and prejudice that is likely to be occasioned to the appellant as well as the respondent, if the appeal is struck out at this stage without according the appellant an opportunity to be heard on the merits of the appeal.”***

I think it would be appropriate and in the wider interest of justice to allow the appellant a chance to take appropriate steps to ensure the appeal is set down for directions and hearing expeditiously. In that regard, therefore, I find that the application by the respondent/ applicant for dismissal of this appeal for want of prosecution is not merited and I decline to grant the same. I further order that for expeditious administration of justice to both parties to this dispute/appeal, the Chief Executive Officer of the subordinate Court at Milimani Chief Magistrate’s Commercial Court do appear before this court on 28<sup>th</sup> July, 2015 with or without court file No. CMCC 4887/2009 to explain the whereabouts of the above court file and why there has been no response to the appellant’s inquiries as well as the Deputy Registrar’s requisition for the lower court record, upon which this court shall give further directions as to the disposal of the appeal.

As the delay cannot be solely attributable to the appellant, I order that each party bears its own costs of this application.

Orders Accordingly.

**Dated, signed and delivered in open court at Nairobi this 30<sup>th</sup> day of June, 2015.**

**R.E.ABURILI**

**JUDGE**