



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 43 OF 2013

NANCY A. W.GITAU.....1ST APPLICANT/RESPONDENT

MERCY W. NG'ANG'A.....2ND APPLICANT/RESPONDENT

VERSUS

DAVID K. GITAU.....1ST APPELLANT/RESPONDENT

GEORGE KURIA.....2ND APPELLANT/RESPONDENT

RULING

The applicants filed a chamber summons dated 9th September, 2014 seeking for an order that “...*the memorandum of appeal from the judgment of chief magistrate Hon. W.A. Juma dated 28th May, 2013 for the 1st and 2nd appellant/respondents be dismissed for want of prosecution.*” I take this statement to mean that they are seeking to have the appeal dismissed for want of prosecution. The application was filed under sections 3, 3A of the **Civil Procedure Act** and **Order 42 Rule 35(1)** of the **Civil Procedure Rules**.

The application is based on, amongst other grounds; that it is more than one year since the appellants filed their appeal yet they have not taken any steps to prosecute it. The applicants think that since there exists a stay of execution of the judgment appealed against, the appellants have lost interest in the appeal and their apparent lethargy is prejudicial to the applicants who have thereby been deprived of the fruits of their judgment. It is the applicant’s position that the appeal should be dismissed for want of prosecution and bring this litigation to an end.

The applicants swore an affidavit which more or less reiterated the grounds upon which the application is based.

The respondents, on the other hand, have opposed the application; in their affidavit sworn in that regard, they say they have done everything within their power to set the appeal in motion for hearing; for instance, they applied for a certified copy of the proceedings and the judgment and when they received these documents they compiled the record of appeal and filed it two months thereafter.

Counsel for the respective parties picked up the forgoing arguments for and against the application when it came up for hearing *inter partes*; the applicants’ counsel emphasised that under **Order 42 Rule 35** of the **Civil Procedure Rules**, the appeal was ripe for dismissal because no action had been taken to set down the appeal for hearing more than a year after it was filed. And even though the appellants had filed

a record of appeal, they filed it three months after they had been notified of the availability of the certified copy of the proceedings and the judgment.

The appellants' counsel on the other hand submitted that though an appeal could be dismissed for want of prosecution under the rules cited by the applicants, the delay to file the record was not a mistake of their making but the court's. They admitted to have filed the record two months after they were advised that copies of the proceedings and the judgment were made available but that a delay of two months was not inordinate in the circumstances. In any event, so they argued, the appeal itself had not been admitted for hearing and without such admission, it was premature to dismiss it for want of prosecution.

Both counsel are right that the law applicable to dismissal of appeals filed in this court against decisions of the lower court is **Order 42 rule 35** of the **Civil Procedure Rules**; their point of divergence, as far as I understood them, is the proper interpretation of that rule. This rule provides as follows:-

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.

According to this rule, there are two occasions that may invite dismissal of an appeal for want of prosecution; first, if the appeal has not been set down for hearing within three months of the date of the issuing of directions under **rule 13** of the rules, the respondent may take the initiative and have the appeal dismissed. The second scenario is where the appeal has not been set down for hearing within one year of the date of service of the memorandum of appeal; in this latter case it is the court which acts *suo moto* and lists the appeal for dismissal. It is the former instance that concerns the parties and which, for that reason, I will focus on.

A plain reading of **rule 35(1)** presupposes that directions on the hearing of the appeal must have been given before a respondent can initiate an application for its dismissal for want of prosecution; time for initiating such an action starts running only after the directions have been issued. The literal and plain meaning of this rule is that until such a time that directions have been issued, the appeal is not mature for hearing and therefore it would be premature in such a case to dismiss it for want of prosecution; the appeal is simply not yet due for such prosecution.

Apart from **rule 35(1) of the rules**, **section 75B** of the **Civil Procedure Act** has it that even before those directions are given, the judge must have perused the appeal and considered that it is an appeal that deserves to be admitted and heard on merit rather than rejected summarily. That section provides:-

79B. Summary rejection of appeal

Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily.

Considering the forgoing provisions of the law, I would say in conclusion that since the conditions precedent to making the application for dismissal of the appellants' appeal for want of prosecution have not been satisfied, the applicants' application is premature and therefore misconceived. I would dismiss it with costs.

Dated, signed and delivered in open court this 31st day of July, 2015

Ngaah Jairus

JUDGE