



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

**CIVIL APPEAL NO. 531 OF 2011**

**PETER MWANGI GATHOGO**

**T/A DAYSTAR AUCTIONEERS.....APPELLANT**

**VERSUS**

**ROBERT MWANGI KAMAU.....RESPONDENT**

**RULING**

1. The Respondent's Motion dated 16<sup>th</sup> March, 2015 seeks the dismissal of this appeal for want of prosecution. He stated that following the delivery of judgment the subject of this appeal on 21<sup>st</sup> September, 2011, the Appellant filed this appeal on 19<sup>th</sup> October, 2011. That by an application dated 7<sup>th</sup> May, 2012, the Appellant sought stay of execution of the decree of the said judgment. A consent in respect of the said application was recorded in the terms that a stay of execution be allowed on condition that the Appellant deposited KShs. 800,000/= in court within 60 days from the 3<sup>rd</sup> April, 2014. He contends that the Appellant has not complied with the terms of the consent order and has also not taken any steps to set down the appeal for hearing.
2. It was submitted that the Appellant has failed to cause the appeal to be listed before a judge for directions within thirty (30) days of filing as required under Section 79B of the Civil Procedure Act and Order 42 rule 11 of the Civil Procedure Rules. The Respondent maintained that the same is the duty of the Appellant. To illustrate that the duty is on the Appellant, the Respondent cited **Bruce Mutie Mutuku t/a Diani Tour and Travel Center v. Equity Bank Limited (2014) eKLR**. It was further argued that the Appellant has not given any explanation for the delay in prosecuting this appeal. Citing the pronouncement of the Court of Appeal in **Abdirahman Abdi v. Safi Petroleum Products Ltd & 6 Others (2011) eKLR**, it was argued that the delay of four (4) years in the instant case is long and inordinate and is likely to prejudice the Respondent considering that the Appellant has not complied with the conditions of stay that were granted to him.
3. In response thereto, the Appellant filed a replying affidavit on 3<sup>rd</sup> June, 2015. He admitted that he has not deposited the decretal sum as ordered but contested that his failure to deposit the said sum of money does not take away his right to appeal. That a letter dated 2<sup>nd</sup> November, 2011 was written requesting for the record in the subordinate court and that the role of undertaking directions is bestowed on this court and he has no control over the same. He stated that he is ready and willing to prosecute this appeal whenever this court gives him a green light.
4. I have considered the application, the dispositions therein and the submission on record. The Appellant's submissions are not on record. The law on dismissal of an appeal for want of prosecution is found in Order 42 Rule 35 of the Civil Procedure Rules. The said order 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."*** (Emphasis mine)

5. Under Rule 35 (1), the Appellant must have failed to prosecute the appeal within three (3) months of taking directions while under Rule 35 (2) no steps must have been taken by the Appellant to prosecute the appeal within one year after the service of the memorandum of appeal. In the instant case no directions have been taken, the applicable provision therefore is Order 42 Rule 35 (2).
6. From the above provision, it is clear that it is upon the registrar to list the appeal before a judge in chambers for dismissal. Considering that the provision is couched in mandatory terms, a party filing an application such as this one shall be considered usurping the duties of the deputy registrar. What the applicant should have done was to request the deputy registrar of this court to list down the matter before a judge for dismissal and not for himself to make the present application. It is only the registrar who is mandated to urge the court to dismiss the appeal if no cause is shown. In the circumstances, I find that this application is premature and is ordered struck out with no orders for costs.
7. However, one issue was raised that the Appellant was in breach of the conditions set for the stay granted on 3<sup>rd</sup> April, 2014. He admitted having failed to deposit the sum of Kshs.800,000/= as ordered. In this regard, that stay collapsed upon the expiry of the 60 day period granted and he Respondent is at liberty to execute his decree. There being no application to extend the period of 60 days given for depositing the sum of Kshs.800,000/=, any time after the expiry of 60 days, there was no more stay of execution and the Respondent was and is still at liberty to execute the decree of the lower court.

It is so ordered.

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**A. MABEYA**

**JUDGE**

Dated, Signed and Delivered at Nairobi this 18<sup>th</sup> day of September, 2015.

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**JUDGE**