

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CIVIL APPEAL NO. 13 OF 2012

(Being an appeal from the ruling and order in Civil Suit No. 474 of 2010 of the Principal Magistrate's Court at Kilifi before Hon. J. M. Gandani – PM)

WILLY MWEMA APPELLANT

VERSUS

MNARANI CURIO ASSOCIATION RESPONDENT

RULING

1. The respondent's application filed on 5th July, 2013 seeks that the appeal herein be dismissed for want of prosecution, and is brought under Order 42 rule 35 of the Civil Procedure Rules, principally. It is supported by the affidavit of Omagwa Angima, Advocate for the Respondent. The main ground upon which it is based is that the appellant has since filing the appeal failed to take any steps to prosecute the appeal.
2. The application was opposed by the appellant through his replying affidavit filed on 29th October, 2013. The appellant blames any delay on his part on the delay in the provision of proceedings by the Lower Court. By consent of the parties, the application proceeded by way of written submissions.
3. I have considered the respective material placed before me by the parties with regard to this application. I take the following view. The memorandum of appeal was filed on 27th June, 2012. The record of the Lower Court was sent in on 17th June, 2013 and the appeal duly admitted on 25th June, 2013, about ten days before the respondent filed the present application, under Order 42 rule 35 of the Civil Procedure Rules.
4. There is an admitted lapse of one year between the filing of the appeal and the procurement of the record of the trial. It is not excusable that the appellant sat back all year without making any efforts to have the proceedings supplied. He claims to have carried out "due diligence" in this regard but it is not clear what that entailed. There is no certificate of delay attached to his affidavit hence he cannot hide behind the Lower Court's alleged failure to send the record on time when he has not even shown the efforts he made to pursue the said record.
5. Be that as it may, the appeal having been admitted on 25th June, 2013 ought to proceed to hearing on merit, in the interest of justice. It is now up to the appellant to take necessary steps to prosecute his appeal, within a period of six (6) months of today's date failing which it will automatically stand dismissed for want of prosecution. It is so directed.

The appellant will pay the costs of this application.

Delivered and signed at Malindi this 21st day of **March, 2014** in the presence of Mr. Obaga holding brief for Mr. Angima for respondent. No appearance for appellant.

Court clerk – Samwel

C. W. Meoli

JUDGE