



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**CIVIL APPEAL NO 438 OF 2011**

**GITHUNGURI DAIRY FARMERS**

**CO-OPERATIVE SOCIETY.....APPELLANT**

**VERSUS**

**PETER NG'ANG'A WAWERU & 22 OTHERS.....RESPONDENTS**

**R U L I N G**

1. The Respondent in this appeal has applied by **chamber summons dated 25<sup>th</sup> September 2013** for dismissal of the Appellant's appeal for want of prosecution.
2. The application is brought under **Order 42, rule 35(2)** of the **Civil Procedure Rules** (the **Rules**). Under that subrule, if **within one year after service of 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. I see nothing wrong in a respondent applying under the subrule for dismissal of an appeal for want of prosecution.
3. The operating event under rule 35(2) aforesaid is service of memorandum of appeal. The delay of one year or more must be reckoned from the **date of service** of the memorandum of appeal.
4. The Respondent's application and supporting affidavit have not disclosed when the memorandum of appeal was served upon the Respondent. The Respondent's learned counsel was unable to tell the court at the hearing of the application when the memorandum of appeal was served upon the Respondent.
5. The application did not on the face of it invoke the inherent power of the court. An attempt by learned counsel for the Respondent to do so at the hearing was an unacceptable ambush of the Appellant's learned counsel.
6. In the circumstances I must refuse the chamber summons dated 25<sup>th</sup> September 2013. It is dismissed with costs to the Appellants. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 2<sup>ND</sup> DAY OF APRIL 2014**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 4<sup>TH</sup> DAY OF APRIL 2014**