



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL APPEAL NO. 119 OF 2012**

**JURGEN PAUL FLACH.....APPELLANT**

**VERSUS**

**JANE AKOTH FLACH..... RESPONDENT**

**RULING**

On 4th September, 2013 the respondent, Jane Akoth Flash, filed the chamber summons dated 2nd September, 2013 praying that this appeal be dismissed for want of prosecution.

The application was brought under **Section 1A** and **Order 42 Rule 35** of the **Civil Procedure Act** and **Rules** respectively. The summons is premised on the grounds that for more than a year since the appeal was filed, no step has been taken to prosecute it; that the continued pendency of the appeal is not only against the principles of justice but also prejudicial to the respondent and that even if the respondent was to have the appeal set down for hearing, it will be of no use as the appellant has had the opportunity to prosecute the appeal but spurned. Further even if the appeal were filed for hearing, it is not known whether the Appellant would have seized the opportunity.

The application is supported by the affidavit of the respondent in which she has reiterated the ground enumerated therein.

The Appellant, who is represented by the firm of Olonyi & Company Advocates neither filed a reply to the affidavit nor attended court for hearing of the application on 18th February, 2014. This was so despite an order given by the court on 27th January, 2014 for filing of a response to the application. That being the case and the date of hearing having been given in court in the presence of the advocates for the parties, on application by counsel for the respondent, the application was heard *ex parte*.

Counsel for applicant, Mr. Kahiga, urged the court to allow the application as it was unopposed.

The sole issue for determination is whether the application meets the conditions for granting an order for dismissal of an appeal for want of prosecution.

**The law applicable to the application**

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

Under Rule 35 aforementioned, the law contemplates two different scenarios for issuance of an order for

dismissal of an appeal for want of prosecution. These are:-

A situation where three months after issuance of directions under Order 42 Rule 13, no steps have been taken by the appellant to fix the appeal for hearing. In such a situation, the respondent has two options, one, to fix the appeal for hearing or to apply by summons for the dismissal of the appeal. See Order 42 Rule 35(1). Also see **Kirinyaga General Machinery v. Hezekiel Mureithi Ileri** HCC No.98 of 2008 where while interpreting Order XLI 31 (now Order 42 rule 35), Mary 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 being given the orders sought by the respondent cannot be entertained.”**

The second scenario is that contemplated under **Order 42 Rule 35 (2)**. Unlike **Rule 35(1)** which requires directions to have been issued before the appeal can be dismissed for want of prosecution, under subrule (Rule 35(2), if, within one year after 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.

Noting that no directions were issued in this appeal, and based on the provisions of Order 42 rule 35(1), I have no reason to deviate from the holding in **Kirinyaga General Machinery v. Hezekiel Mureithi Ileri** (*supra*).

The upshot of the foregoing is that the application is dismissed with no orders as to costs.

**Dated, Signed and Delivered at Nakuru this 16th day of May, 2014.**

**H.A OMONDI**

**JUDGE**