



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

**CIVIL APPEAL NO. 210 OF 2011**

**AKAMBA PUBLIC ROAD SERVICES.....1ST APPELLANT**

**TUMBA CHARLES MAUTI.....2ND APPELLANT**

**VERSUS**

**ODHIAMBO ABNER BRIAN OTIENO.....RESPONDENT**

**RULING**

On 7th August, 2013 the respondent, Odhiambo Abner Brian Otieno, filed the notice of motion dated 6th August, 2013 seeking inter alia, the dismissal of the appeal herein for want of prosecution.

The application was brought under Sections 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules respectively.

The motion is premised on the grounds that on 24.11,2011 the appellants filed the appeal herein and subsequently obtained an order of stay of execution of the decree of the lower court pending the hearing and determination of the appeal. As a condition for grant of the order of stay, the appellants deposited the entire decretal sum in an interest earning account. The respondent contends that since the filing of the appeal and obtaining orders of stay of execution, the appellants have taken no step to have the appeal heard and determined; that owing to the appellants' failure to prosecute the appeal, he continues to suffer prejudice as he is denied the enjoyment of the fruits of the decree appealed from; and that the continued delay in prosecution of the appeal is an abuse of the court process.

The application is supported by the affidavit of the respondent and that of the respondent's advocate, Ruth Wanyonyi.

In reply, the appellants filed grounds of opposition in which they contend that the respondent has not given sufficient reasons for exercise of this court's discretion in his favour; that the application lacks merits and that the respondent seeks to dismiss the appeal on a mere technicality.

In addition to the foregoing grounds of opposition, the appellants' advocate, Zehrabanu Janmohamed, filed a replying affidavit in which she has deposed that upon filing the appeal herein the appellants obtained a conditional stay of execution of the decree of the lower court; that in compliance with the condition for stay of execution, they deposited the entire decretal sum in a joint interest earning account and that on 4.7.2012 they wrote to the Executive Officer Naivasha Law Courts requesting to be supplied with certified copies of proceedings and judgment.

The appellant's advocate has further deposed that on 12.6.2013 they received information that proceedings were ready for collection but when they went to collect them, the lower court informed them

that the court file could not be traced. Further, that the delay in compiling the record of appeal is attributable to lack of certified copies of proceedings and that since the proceedings have been typed, the appellants are ready and willing to compile the record of Appeal and list the appeal down for directions and thereafter prosecute it.

On 25/03/2014 the advocates for the respective parties agreed to dispose of the application by way of written submissions. Subsequently, the parties filed submissions, which I have read and considered. From the pleadings hereto and the submissions filed by the respective parties, the sole issue for determination is whether the appeal should be dismissed for want of prosecution.

### **The law applicable to the application**

The law concerning dismissal of an appeal for want of prosecution is embodied 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 **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 2 if, within one year after service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar is obligated, after giving notice to the parties, to list the appeal before a judge in chambers for dismissal.

In the instant application the applicant has pointed out that the appeal has not reached directions stage as contemplated under order 42 Rule 11 as read with section 79B of the Civil Procedure Act. Owing to that state of affairs, the applicant has invoked the powers of the court under Sections 1A, 1B, 3, 3A and 63 of the Civil Procedure Act.

The applicant contends that under the foregoing provisions of the law the court has power to prevent abuse of the court process by dismissing an appeal for want of prosecution. In this regard, reference is made to **F. Ndegwa T/A Kingbull Agencies v. Maloso Investment Co. Ltd (2008) eKLR and Laban Onono & Another v. Dan Owiti eKLR** for the proposition that the court has power to dismiss an appeal for want of prosecution even where directions have not been given. The applicant has also referred to **Anne W. Chege & Another v. Peter Kisuna Musasya (2006) eKLR** where it was observed:-

**"It matters not that requests for copies of proceedings and judgment were made to the executive officer. If there is no evidence of follow up, then obviously the appellants have not done enough .... It is further not an excuse or reprieve to the Applicant that the decretal sum is in an interest earning account. To rely on this would amount to a total misconception of the rights of a successful litigant, as it is no use to the litigant who cannot access the money."**

and **Kinyua & 2 others v. Rubia (2004) eKLR** where Kubo J., dismissed an appeal because the appellants had taken the appeal rather casually.

In reply, the appellants have submitted that the delay in prosecution of the appeal has been sufficiently explained; that its trite law that a court should not exercise its discretion in granting an application for dismissal of an appeal without giving the appellants an opportunity to remedy the default; and that the appellants have demonstrated that the delay in filing the record of appeal has not been intentional, contumelious or inexcusable.

Contending that the delay in prosecuting the appeal is neither attributable to the appellants nor their advocates, the appellants have blamed the lower court for failing to act diligently on their request.

Concerning the authorities cited in support of the application, the appellants have submitted that they are not relevant as the lower court file is yet to be transferred to the High Court. In this regard reference is made to the decisions in **Mohammed Said Mohammed v. Julius Mwangolo Mwatua (2013) eKLR** and **Nyali Construction & Electrical v. Jeremiah Ogendo Nyasani (2013) eKLR** for the proposition that ....It is the appellants contention that no prejudice will be occasioned on the applicant if the orders sought are denied as they can adequately be compensated by way of costs.

It is not in dispute that the directions in respect of this appeal have not been issued as required under Order 42 rule 35. That notwithstanding, I agree with the observation of Law J.A quoted with approval by H.M Okwengu J., (as she then was) in **F. Ndegwa T/A Kingbull Agencies v. Maloso Investment Co. Ltd (supra)** thus:-

**"I am of the opinion that the provisions of the Civil Procedure Rules for the dismissal of suits for want of prosecution do not purport to be exclusive, and do not fetter the court's inherent jurisdiction to dismiss suits in circumstances not falling directly within those provisions, if it is necessary to do so to prevent injustice or abuse of the process of the court."**

### **Whether the appeal herein should be dismissed for want of prosecution?**

In the instant application, the appellants have denied the respondent's contention that since filing of the memorandum of appeal they have not taken any step or shown any interest in prosecuting the appeal.

Although the appellants have blamed the lower court for not being diligent in responding to their request to be supplied with typed proceedings and judgment, it is clear from the affidavit sworn by the appellants advocate that the appellants have not been diligent in following up the typed proceedings. This is borne out by the fact that since 4th July, 2012, when their advocate wrote to the lower court requesting to be supplied with certified copies of proceedings, they never made any follow up to ensure that the proceedings were typed expeditiously.

Be that as it may, given the fact that the appellants have undertaken to compile the record of appeal and list it for directions without any further delay, I hold the view that they should be given an opportunity to remedy their default.

For the foregoing reason I decline to dismiss the appeal and instead direct the appellant, with the help of the lower court, to prepare the record of appeal and fix the appeal for hearing within sixty (60) days from the date hereof and in default the appeal to be automatically dismissed. The Respondent/Appellant shall bear costs of the application.

**Dated, Signed and Delivered at Nakuru this 27<sup>th</sup> day of June, 2014.**

**H.A OMONDI**

**JUDGE**