



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CIVIL APPEAL NO. 97 OF 2011**

**REUBEN SHIKAMBE SHISAMBO .....APPELLANT/RESPONDENT**

**VERSUS**

**ANTONINA SHILWATSO MATERU .....RESPONDENT/APPLICANT**

*(Being an appeal from the Judgment delivered by Hon. G. Mutiso (Resident Magistrate) in  
Kapsabet Principal Magistrate's Civil Case No. 162 of 2008 on 26th April, 2011)*

**RULING**

The application for determination is Chamber Summons dated 6th February, 2014 brought under Order 42 Rule 31 of the Civil Procedure Rules, 2010. The Respondent, who is the Applicant prays that the appeal herein be dismissed for want of prosecution and for costs.

The said application is premised on the following grounds:-

**(i) That the Principal Magistrate's Court at Kapsabet issued a decree dated 26th day of April, 2011 in the Kapsabet Principal Magistrate's Civil Case No. 102 of 2008 Reuben Shikambe Shisambo Vs. Antonina Shilwatso Materu.**

**(ii) That the Applicant in this Appeal was dissatisfied with the above stated decree hence this Appeal.**

**(iii) That the Appellant has inordinately failed, refused and/or neglected to set his Appeal down for directions and/or hearing to its logical conclusion since the date of the filing of this Appeal.**

**(iv) That the Appellant has not demonstrated any intention and/or willingness to prosecute his Appeal after he got the orders halting the execution of the above stated decree and he has used the same to frustrate the Applicant in an exercise that prejudices the Applicant.**

**(v) That it is therefore fair and just that the Orders sought herein are granted.**

**(vi) That the Appellant shall not suffer any prejudice.**

The Applicant, Antonina Shilwatso Materu swore an affidavit in support of the application on 6th February, 2014. The crux of the supporting affidavit is that the Appellant has inordinately taken too long to set down the appeal for hearing. He depones that Judgment in the Magistrate's court was delivered on 26th April, 2011. The Appeal was filed vide a Memorandum of Appeal dated 17th May, 2011. By a Notice of Motion dated 7th June, 2011, he sought orders for stay of execution of the Magistrate's Court's decree which stay of execution was granted. On 5th October, 2012 the appeal was fixed for mention for purposes of taking directions on the hearing of the appeal on 6th November, 2012, but the directions were not taken as notice to the Respondent had not been served. Other dates for the same purpose were taken for 11th December, 2012 and 25th June, 2013. Again, no directions were given as the Respondent had not been served with the mention notices.

The Applicant stated that no further dates for directions have been fixed. That the Appellant is not desirous of fixing the appeal for hearing as he continues occupying the suit property to his detriment. And that in any event, the appeal has no chances of success.

In opposing the application, the Appellant filed a Replying Affidavit which he swore on 3rd March, 2014. He depones that the application is premature, defective, frivolous and lacks merit as the appeal cannot be heard if directions have not been taken. He states that he, through his advocate, has severally attempted to fix the appeal for directions without success either because the court was not sitting or because the Respondent's counsel failed to attend court. He cited the 11th December, 2012 and 25th June, 2013 respectively as applicable in the two occasions. He also stated that on 21st October, 2013 when his advocate's representative went to the registry to fix a hearing date, he was informed that the diary for the year 2013 was full. He adds that, all along service of court documents was effected upon the Applicant's counsel as the party (Applicant) could not be served directly when he was represented by a lawyer. That by then it was an advocate, Mr. Kiplagat Misoi who would be served and who deliberately delayed the matter.

Finally, the Respondent indicated that he is willing to have the appeal heard and determined expeditiously.

The application was canvassed before me on 11th March, 2014. The Applicant was in person and submitted that she wholly relied on the Supporting Affidavit and the grounds upon which the application is premised.

She also submitted that she did not have any issue with the Applicant occupying the 0.1 acre of land the trial court allocated to him.

Learned Counsel Mr. Aseso submitted on behalf of Mr. Musiega advocate for the Respondent. He emphasized that it was the Applicant's counsel then on record who failed to attend court despite being served with a notice to do so. He submitted that the application was premature as direction on the hearing of the appeal had not been taken. He urged the court to invoke the provisions of Article 159 of the Constitution which calls for court to focus on doing substantive justice as opposed to dwelling on technicalities.

I have accordingly considered the respective submissions and I take the following view of the application.

An application seeking a dismissal of an appeal should be filed pursuant to the provisions of Order 42 Rule 35 (1) of the Civil Procedure Rules which reads as follows;

***“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.”***

Rule 13 on the other hand provides as follows;

**"13. (1) On notice to the parties delivered not less than twenty one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a Judge in chambers.**

**(2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.**

**(3) The Judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.**

**(4) Before allowing the appeal to go for hearing the Judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:**

**(a) the memorandum of appeal;**

**(b) the pleadings;**

**(c) the notes of the trial Magistrate made at the hearing;**

**(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;**

**(e) all affidavits, maps and other documents whatsoever put in evidence before the Magistrate;**

**(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:**

**Provided that -**

**(i) a translation into English shall be provided of any document not in that language;**

**(ii) the Judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f)."**

It can be clearly read from the rule 35 (1)) that before a Respondent can set down the appeal for hearing or apply for its dismissal for want of prosecution, directions as provided by Rule 13 ought to be given first. Unfortunately directions in this matter have never been given. And it follows that, directions having not been given, this application ought not to be entertained.

Be that as it may, it is important to note that the issue of taking of the directions is the borne of contention. Each party throwing accusations at the other and of course counter accusations ensue. What is important for a party to demonstrate before a Judge is that he invited the other party to the registry to fix a mutually convenient date for taking of directions. If the invited party fails to attend the registry, an ex-parte date may be taken. The Judge will then determine whether proper service of the notice to attend court was served.

Of course Rule 13 of Order 42 places the burden of causing the appeal to be placed before a Judge for directions on the Appellant. But where the Appellant is indolent in doing so nothing prevents the Respondent from taking the necessary action.

The appeal herein was admitted way back on 13th July, 2011. There is no good justification given as why directions have not been taken to date. It is my view that this should be done expeditiously so that justice can be dispensed with within a reasonable time.

In the result, I dismiss the application with costs in the cause. I further order that the Appellant must within ninety (90) days from the date hereof cause this appeal to be placed before a Judge for purposes of giving directions. If the Appellant fails to do so, the Respondent shall be at liberty to do so. A hearing date of the appeal may thereafter be fixed.

**DATED and DELIVERED at ELDORET this 23rd day of July, 2014.**

**G. W. NGENYE – MACHARIA**

**JUDGE**

**In the presence of:**

No appearance for Mr. Musiega for the Appellant/Respondent

*In person present - Respondent/Applicant*