



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NUMBER 213 OF 2009**

**HESBON AMATA. .... 1<sup>ST</sup> APPELLANT**

**TENOLDE KIDANE TEMSEGEN. .... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**DAVID MAINA WAITHAKA. .... RESPONDENT/APPLICANT**

**R U L I N G**

The application before the court is the Notice of Motion filed by the Respondent herein and dated 22<sup>nd</sup> March, 2012. It seeks dismissal of this appeal for want of prosecution on the grounds that although the appeal was filed in a Memorandum of Appeal filed on 28<sup>th</sup> April, 2009 which was served upon the Respondent on 6<sup>th</sup> May, 2009, the Appellant has never taken sufficient or any steps to bring it to a hearing.

Facts on record show that although the Appellants filed the appeal promptly on 28<sup>th</sup> April, 2009, they never sought a copy of certified proceedings and judgment until a year and half later on 5<sup>th</sup> November, 2010. The Appellants' have accordingly not filed any Record of Appeal.

As earlier stated, the Appellant served the Memorandum of Appeal upon the Respondents on 6<sup>th</sup> May, 2009. The appeal has never been placed before a judge for admission and therefore never been admitted. Nor has the appeal been fixed for directions in court.

The Respondent/Applicant case is that after the Memorandum of Appeal was served upon them by the Appellant on 6<sup>th</sup> May, 2009 the latter was under legal obligation to fix the appeal for hearing within one year, as per the provision of order 41 Rule 31(2) of the now replaced Civil Procedure Rules under which the appeal was filed. Order 42 Rule 35(2) is the equivalent in the current Civil Procedure rules, which provides: -

***“If, within one year after the service of the Memorandum of Appeal, the appeal shall not have been set down for a hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”***

The Applicants argued that in tenor with the above provision they wrote to the Registrar of the Court a letter dated 7<sup>th</sup> March, 2012 requesting that the Appeal be placed before a judge in chambers to dismiss the appeal. The Registrar, however, directed the Respondents to file a formal application for the appeal to be dismissal. Those directions led to this application being filed while invoking the provisions of Section 1A, 1B and 3A of the Civil Procedure Act.

The Applicants/Respondents argue that this court has jurisdiction to dismiss the appeal notwithstanding that the appeal may not have been admitted to a hearing or directions not taken in it, more so if the failure leading to failure to admit or take directions, are those of the defendant whose intention may be to delay the timely determination and the justice of the case.

The Appellant/Respondent did not take the above arguments lying down. He averred that this application to dismiss the appeal is premature. The appeal has not been admitted nor the relevant directions taken by the judge, he argued, adding that he has never been supplied with the certified copies of proceedings and judgment which would have enabled him to bind, file and serve the Record Appeal. The Appellant further argued that the appeal is in practice, admitted and directions taken, by the Judge. The court's hands are, therefore, tied and its power to dismiss under the rules, are not exercisable. He also stated that the lower court record is lost or cannot be traced, a fault he shifts to the court.

I have carefully perused the application and grounds it is based on. I have also considered them and the arguments put forward by both sides. The Respondent does not deny the fact that the direct cause of delay to admit the appeal and to give directions thereof, is his failure to file the Record of appeal which he explains cannot be bound and filed without the certified copies of proceedings and judgment. He however did not also deny the fact that he applied for the copies thereof a year and half after the appeal was filed without explaining the reason for such a long and inordinate delay. Furthermore he did not demonstrate adequate personal effort to follow up his written request(s) to get the proceedings and judgment. He neither explained how he knew the lower court file record was missing. He did not state that he sought this court's assistance to get the proceedings and did not explain that he had nothing to do with the disappearance of the file as in the face of things, he appears relaxed and enjoying the fact that the appeal is not anywhere near its final determination due to the mentioned technical reasons.

I have considered the above aspects of this matter and have come to the conclusion that the Appellant carries almost all the fault and blame. That is to say, he could have obtained the copies of proceedings and judgment had put in adequate effort and acted in consultation with this court. That notwithstanding, he sought the documents very late in the day and put in little effort to get them. He, in short, acted without due diligence for which he is not entitled to lay blame on anybody else, especially the lower court.

As to whether this court has jurisdiction to dismiss an appeal which has not been admitted or in respect of which directions have not been given by the judge, various courts have stated that in proper and suitable circumstances, the court always has jurisdiction to do so. The exercise of such power was demonstrated by Maraga J (as he then was) in Mombasa HCCA No. 11 of 1997 – **Kariby Industries Vs Nemcharnd Anand & Co. (unreported)** and by Onyancha, J in **Haron E Ogechi Vs British American Insurance [2012] eKLR**. A search will reveal more instances.

In this case the failure to make progress lies with the Appellant who sought certified copies of proceedings and judgment late and demonstrated little effort to follow up. His arguments that the court has no power to dismiss an appeal for want of prosecution, however great the abuse of process is shown by the Appellant, provided admission and/or directions have not been taken, has no basis, nor substance. It is rejected.

Furthermore the fact that the exercise of court's original jurisdiction has in this case been prompted by the Respondent's and not the Registrar is no big issue. The original request was clearly made to the Registrar who directed that the issue of dismissal be canvassed more widely (favouring of the Appellant) under an application such as this. As I have already expressed herein above, however, the court has independent discretion to determine and dismiss an appeal in the interest of justice as provided in sections 1A, 1B and 3A of the Civil Procedure Act. In that respect I wish to quote Law J.A in **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd [1989] E.A 696**: -

***“I am of the view 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 the provisions, if it is***

***necessary to do so to prevent injustice or abuse of process of the court...”***

In the interest of justice and prevention of abuse of process of court, this application should and is hereby allowed as the appeal is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 18<sup>th</sup> day of September, 2014.

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**D A ONYANCHA**

**JUDGE**