



REPUBLIC OF KENYA

High Court at Nakuru

Civil Appeal 232 of 2010

BENSON WAINAINA MBORA.....APPELLANT/APPLICANT

VERSUS

NANCY WANJIKU NG'ANG'A.....RESPONDENT

RULING

By a memorandum of appeal dated 23rd August, 2010, the appellant, Benson Wainaina Mbora, instituted the appeal herein against Nancy Wanjiku Ng'ang'a (the respondent) seeking that the order issued by Hon. Kituyi, Resident Magistrate, Nakuru, dismissing the applicant's application dated 26th March, 2010 be set aside and/or varied.

Pursuant to the provisions of **Order 42 Rule 35(2)** of the **Civil Procedure Rules, 2010**, on 3rd October, 2012, a notice was issued to the appellant to show cause why the appeal should not be dismissed.

In response to the notice, the advocate for the appellant has sworn an affidavit in which he has deposed that after the appellant's application was dismissed his firm filed a memorandum of appeal against the decision of the lower court and wrote to the Chief Magistrate requesting to be supplied with certified copies of the proceedings to prepare the record of appeal; that upon receiving the certified copies of the proceedings his firm expeditiously prepared the record of appeal and filed it on 2nd July, 2012; that the appeal could not be admitted to hearing as the lower court file had not been forwarded to the High Court. While his firm was waiting for confirmation that the lower court file had been availed, they were served with the notice herein.

The respondent has maintained that the appeal ought to be dismissed as the appellant has neither exhibited seriousness in prosecuting it nor demonstrated the prejudice he would suffer if the appeal is dismissed.

By dint of of **Order 42 rule 35(2)** aforementioned, an appellant must set down the appeal within 1 year from the date the memorandum of appeal is served. If within that period the appeal is not set down as aforesaid then the same will be dismissed after a notice has been issued to parties and no explanation offered by the appellant.

I have considered the arguments by the parties and the explanation given by the appellant for the delay in fixing the appeal for hearing. That explanation includes the delay by the court below in supplying typed proceedings for the purpose of preparation of the record and the failure by the same court to forward its file to the High Court.

From the explanation offered by the appellant, I am persuaded that the appellant took

sufficient steps towards prosecution of the appeal. The delay is not inordinate and cannot solely be blamed on the appellant. The appellant has demonstrated that he is still keen to pursue the appeal.

For the foregoing reasons I decline to dismiss the appeal and give the appellant 45 days from the date hereof, with the assistance of the registry, to list the appeal for hearing.

The costs of this application to abide the outcome of the appeal.

Dated and Signed at Nakuru this 17th day of January, 2013.

**W. OUKO
JUDGE**

Dated, Signed and Delivered at Nakuru this 29th day of January, 2013 by Hon. Justice M. J. Anyara Emukule.

JUDGE