



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**CIVIL APPEAL NO. 14 OF 2012**

ANNAH WANJIKU KAGENYA .....APPELLANT

VERSUS

CECILIA ACHIENG NYAYIEKA .....RESPONDENT

**RULING**

**Cecilia Achieng Nyayieka**, the Respondent herein, took out the Motion dated 21st May, 2013, in which she applied for this appeal to be dismissed for want of prosecution. The Motion was served upon the Appellant's advocate but the same attracted no response, hence the application was prosecuted *exparte*.

The Respondent urged this court to dismiss the appeal on the ground that the Appellant has not taken any step to have the appeal ready for hearing since the appeal was filed. The Respondent further averred that the Appellant has lost interest in pursuing this Appeal. I have perused the recorded proceedings and it is clear that this appeal was filed on 21st March, 2012. On 27th March, 2012 an application for stay of execution was filed and on 28th March, 2012 the parties recorded a consent order to stay execution of the trial court's decree before the same court on condition that the decretal sum is deposited in court. Nothing happened in this appeal until 10th July, 2013 when the Respondent filed the current Motion, the subject matter of this ruling. The motion is premised on the provisions of **Order 42 rules 11,13 and 35** of the **Civil Procedure Rules**. The Appellant has been accused of failing to cause the appeal to be placed before a judge for directions and admission thus making it not ready for hearing. The Respondent is of the view that this is a tactful method to delay the hearing and determination of the Appeal. Despite having been served, the Appellant did not deem it fit to respond to those accusations. Under **Order 42 rule 11**, it is the responsibility of the Appellant to cause the appeal listed before a judge for directions under **Section 79B** of the **Civil Procedure Act** within thirty (30) days from the date of filing of the Appeal. The Appellant is further enjoined to cause the appeal to be listed for directions before a judge within twenty one (21) days from the date of service of the Memorandum of Appeal. The Appellant has not complied with the both the provisions of **Order 42 rules 11 and 13** of the **Civil Procedure Rules**. The Respondent has cited the provisions of **Order 42 rule 35** by asking this court to dismiss the Appeal. Under **Order 42 rule 35(1)**, the Respondent can only apply for the dismissal of the appeal for want of prosecution if three months have lapsed since the giving of directions under **Order 42 rule 13** and appeal has not been set down for hearing. In this case directions have not been taken hence the Provision cannot come to the aid of the Respondent. Under **Order 42 rule 35(2)**, it is only the Registrar who can cause the appeal to be placed before the judge for dismissal if the appeal is not listed for hearing within one year after service of Memorandum of Appeal. This provision cannot therefore assist the Respondent to achieve her objective. In the circumstances of this Appeal, I think the most appropriate provision is **Section 3A** of the **Civil Procedure Act**. The Appellant has simply failed to set in motion the necessary steps to have the appeal ready for hearing. She has not prepared the record of appeal neither has she caused the file to be placed before a judge to give the necessary directions. With respect, I agree with the submissions of the Respondent that the inertia developed by the Appellant could be geared towards the procrastination of the determination of the Appeal. The conduct alone amounts to an abuse of process which this court cannot contenance.

In the end, I find the motion dated 21st May, 2013 to be well founded. It is allowed as prayed.

**Dated, signed and delivered this 4th day of September,2013.**

**J.K. SERGON**

**JUDGE**