



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 27 OF 2009**

**EVA MAYAA MANASE (Administrator of the Estate of the Deceased)**

**FRANCIS MUTANDA OCHIENG ..... PLAINTIFF/APPLICANT**

**V E R S U S**

**COAST BUS LIMITED ..... DEFENDANT/RESPONDENT**

**AND**

**COMMERCIAL TRANSPORTERS LTD ..... THIRD PARTY/RESPONDENT**

**RULING**

1. The Plaintiff obtained judgment against the Defendant and third party from this Court by this Court's judgment of 15th March 2012. The Defendant filed a Notice of Appeal to appeal to the Court of Appeal against that judgment on 28th March 2012.
2. The Plaintiff has filed a Notice of Motion dated 29th April 2013. By that application the Plaintiff seeks the dismissal of the Defendant's Notice of Appeal. The Plaintiff seeks the dismissal on the basis that the Defendant has failed to prosecute its appeal.
3. The Defendant in opposing the application raised the ground amongst others that this Court does not have jurisdiction to entertain the application. In the Defendant's submissions were that the statute that provides the procedure for striking out of the Notice of Appeal is the Appellant Jurisdiction Act Cap 9.
4. The Plaintiff's application was brought under Order 42 rule 35 of the Civil Procedure Rules, 2010. The Plaintiff did also invoke Sections 1A & 3A of the Civil Procedure Act, Cap 21. Order 42 Rule 35 provides for the dismissal for want of prosecution of the appeal filed in the High Court and which has not been set down for three months after directions have been given.
5. I believe the one and main issue to be determined before considering the other issues raised is whether this Court has jurisdiction to hear the Plaintiff's application. If this Court does not have jurisdiction to hear the application using the words of Nyarangi, JA in the case **THE MV LILIAN S [1989]KLR 1** this Court will have to '***down tools***'.
6. In that case of **LILIAN S** (supra) the said Judge had this to say-

***“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”***

7. The issue of a Court having to determine whether it has jurisdiction in the first instance was discussed in the case **Diana Kethi Kilonzo & Another -Vs- Independent Electoral & Boundaries Commission & 10 Others [2013]eKLR** where the Court said-

***“Jurisdiction is indeed comparable to a driving licence, for no motorist can lawfully embark on a journey without a valid driving licence. Once a judicial body establishes that it has no jurisdiction to handle a dispute, then it has no business proceeding further with the matter. What also emanates from the Supreme Court decisions is that jurisdiction emanates from express terms of the law.”***

8. Under Rule 80 of the Court of Appeal Rules the only Court that has power to strike out a Notice of Appeal or the Appeal is the Court of Appeal. That Rule is in the following terms-

***“A person affected by an appeal may apply to the Court to strike out the notice of appeal or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time:***

***Provided that an application to strike out a notice of appeal or an appeal shall, not be brought after the expiry of thirty (30) days from the date of service of the record of appeal on the Respondent.”***

9. The Plaintiff was in my view in error in relying on Order 42 Rule 35 and in filing her application in this Court. As stated before Order 42 Rule 35 relates to appeals filed in the High Court. The Defendant's Appeal is in the Court of Appeal. By virtue of Rule 80 this Court has no jurisdiction to entertain the Plaintiff's application dated 29th April 2013. The same accordingly is hereby struck out. The Defendant has on its part failed to act with efficiency in ensuring that its appeal is instituted without delay. For that reason there shall be no orders as to costs in respect of the Notice of Motion dated 29th April 2013.

**Dated and delivered at Mombasa this 28<sup>th</sup> day of November, 2013.**

**MARY KASANGO**

**JUDGE**