



Editorial Summary

1. *Civil Appeal*
2. *Civil Procedure and Practice*
3. *Subject of Subordinate Court Case*

CONTRACT

- 3.1 *Moneys due and owing.*
- 3.2 *Respondent/defendant files Counter-claim.*
- 3.3 *Summary judgment entered against plaintiffs. 16th January 2008*
- 3.4 *Plaintiff appeals 14th February 2008*
- 3.5 *Orders 16th March 2010 matter for directions. Okwengu J.*
- 3.6 *To await notices by deputy registrar.*

4. *Application 6th June 2011*

By respondent original defendant

- i) *Appeal be dismissed..*

5. *In Reply:*

- i) *Awaiting notices from the deputy registrar*

6. *Held:*

- i) *Appeal never admitted*

- ii) *May explain deputy registrar not issuing notice for directions*
- iii) *Explanation by appellant accepted.*
- iv) *Application dismissed.*

7. *Case Law:*

8. *Advocates :*

- i) *N.K. Nguovi instructed by M/s Kingoo Wanjau & Co Advocates for appellant/applicant original plaintiff*
- ii) *J. Ochola holding brief for C. Ngare instructed by M/s G.N. Gichuhi & Co Advocates for respondent / original defendant*

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 63 OF 2008

RICHARD KIOKO KIUNDI APPELLANT/ ORIGINAL PLAINTIFF

VERSUS

KENYA PIPELINE CO. LTD RESPONDENTS/ ORIGINAL DEFENDANTS

(Being an appeal from the Judgment of Hon. C. W Githua Esq, Senior Principal Magistrate on 16th January 2008 in Civil Case No. 6187 of 2005 at Milimani Commercial Courts at Nairobi)

RULING

(Application To Dismiss suit for Want of Prosecution

Order 42 r 35 (1) Civil Procedure Rules

I. BACKGROUND

1. Summary judgment was entered by the trial court at Nairobi Milimani Commercial Courts on a counter-claim on the 16th January 2008.
2. The plaintiff being dissatisfied with the decision appealed to this High Court on the 14th February 2008. The parties appeared before Okwengu J on 16th March 2010 who then made orders that parties do proceed for directions. That the parties were to avail notices to issue to them by the Deputy Registrar.
3. No action on the file was taken and by an application dated 6th June 2011, the respondent/original defendant made application to this court to have the appeal dismissed.

II APPLICATION 6TH JUNE 2011

4. The application dated 6th June 2011 was brought under Section 3A, 1A of the Civil Procedure Act and Order 42 r 35(1) of the Civil Procedure Rules and all enabling provision of the law.
5. It was an application that sought not only the dismissal of the suit but the release of security amounting to Ksh. 500,000/= deposited to court pursuant to orders made on the 20th February 2008.
6. In reply, the respondent's explanation was that he was to receive a notice from the deputy registrar as ordered by court. No notice was issued for directions, except that one was attached to the application by the applicant of 23rd November 2009 which had never come to their attention. He prayed that the appeal be not dismissed.

III FINDINGS

7. The application has been brought under Order 42 r 35(1) Civil Procedure Rules that reads:-

“Unless within 3 months after the giving of directions ... 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.”

8. This means, that once directions under Order 42 r(2)-(4) Civil Procedure Rules have been given, the appellant should within 3 months set the matter down for hearing. If he or she fails to do so, then the respondent is at liberty to do so or apply for the dismissal of the matter on appeal.
9. In this file, the appeal had never been admitted or rejected for hearing. The deputy registrar did place the file before the Hon. Judge (Sitati J) but the said file was not admitted or otherwise on further queries raised by the judge before this was done. It therefore means that no directions under Order 42 r (2)-(4) Civil Procedure Rules had been taken. The effect of this being that the Order 42 r (2)-(4) Civil Procedure Rules is not available to the applicant respondent. Only the deputy registrar can move the file under Order 42 r (2)-(4) Civil Procedure Rules for dismissal for want of prosecution.
10. To this end, this application dated 6th June 2011 must fail. It is dismissed with costs to the respondent in the application.
11. The deputy registrar to ensure the queries raised by the Hon. Judge is dealt with and thereafter the file be placed before Hon. Judge for admission/rejection or otherwise.

DATED THIS 1ST DAY OF FEBRUARY 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

Advocates :

i) *N.K. Nguovi instructed by M/s Kingoo Wanjau & Co Advocates for appellant/applicant original plaintiff*

ii) *J. Ochola holding brief for C. Ngare instructed by M/s G.N. Gichuhi & Co Advocates for respondent/ original defendant*