



## Editorial Summary

1. *Civil Appeal*
2. *Civil Practice and Procedure*
3. *Subject of subordinate court case*

### *TORT*

- 3.1 *Running down cause*
- 3.2 *Material loss damage*
- 3.3 *Appellant/original defendant appeals against liability and quantum from judgment of 28<sup>th</sup> December 2006 on 6<sup>th</sup> February 2007.*
- 3.4 *Application for stay of execution pending hearing of appeal granted on 19<sup>th</sup> April 2007 on condition sum of Ksh. 66,461/- is deposited in an interest earning account.*
- 3.5 *There is no action on the file for 4 years.*

4. *Application dated 10<sup>th</sup> October 2011*

- 4.1 *Seeking orders to dismiss appeal for want of prosecution.*
- 4.2 *That for 4 years no action has been taken on the file in reply by appellant.*
- 4.3 *Several letters written to court seeking the proceedings and copies of the typed judgments.*
- 4.4 *Several letters displayed and annexed to affidavit being 5<sup>th</sup> February 2007  
23<sup>rd</sup> January 2008  
19<sup>th</sup> December 2011  
and 16<sup>th</sup> January 2011 (read 2012)  
notifying of warrants of attachment being issued.*

5. *Held:*

- i) *Order 42 r 35(2) Civil Procedure Rules is not available to the appellant.*
- ii) *Application dismissed.*
- iii) *Compliance of Order 42 r 13 and Section 79B Civil Procedure Act have not been made.*

6. *Case Law:*

7. *Advocates :*

*i) M Odawa instructed by Pramod Patel & Co Advocates for  
applicant*

*ii) Mulandi instructed by Njeri Mburu & Co Advocates for  
respondent*

**REPUBLIC OF KENYA  
IN THE HIGH COURT  
AT NAIROBI  
MILIMANI LAW COURTS  
Civil Appeal 64 of 2009**

**KIRAN T CHAVDA ..... APPELLANT**

**VERSUS**

**JOHN WAINAINA MWATI ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon. D. Toigat (Senior Resident Magistrate) in Case No. 8344 of  
2002 dated 28<sup>th</sup> december 2006 at Nairobi)*

**R U L I N G**

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Application for dismiss appeal  
For want of prosecution  
Under Order 42 r 35(2) Civil Procedure Rules

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I.           INTRODUCTION

1.     Judgment was delivered against the appellant/original defendant

Kiran T Chavda, in the subordinate court case at the Milimani Commercial Court on the 28<sup>th</sup> December 2006. Being dissatisfied with the decision that was a tort case covering material loss damage, he filed appeal on 6<sup>th</sup> February 2007.

2.     An application for stay of execution was also granted by the High Court on 19<sup>th</sup> April 2007 on condition that a sum of Ksh. 66,461/- is deposited to court (Waweru J).

3.     For 4 years, no action had been taken on the file. The respondent original plaintiff filed an application dated 10<sup>th</sup> October 2011 seeking to have the appeal dismissed for want of prosecution.

II       APPLICATION 10<sup>TH</sup> OCTOBER 2011

4.     The application had been brought under Order 42 r 35(2) Civil Procedure Rules. The arguments being that for 4 years that the appeal had been filed, no action had been taken on the said file.

5.     The appellant filed a replying affidavit and respondent by stating that he had been asking for the proceedings and judgment but has received no response to the matter. Letters to the courts dated:

5<sup>th</sup> February 2007

23<sup>rd</sup> January 2008

19<sup>th</sup> December 2011

6.     A warrant of attachment was conferred by the court to have been issued by a letter of 16<sup>th</sup> January 2011, despite there being a stay of execution that the application be dismissed.

7.     Under Order 42 r 35(2) is not available to the applicant. This is because only the deputy registrar is permitted to issue notice upon the parties that he intends to place the file before the Hon. Judge for dismissal due to want of prosecution. Proof that the memorandum of appeal had been served upon the respondent and a lapse of 3 years passed must first be established before dismissal orders are made.

8.     The applicant can only come to court after the appeal has been admitted and directions given, to either set the appeal down for hearing or after three months to apply for the appeal to be dismissed.

9.     I note with regret the delay by the subordinate court to avail the lower court file for this to occur. It is hoped that this will be done without further delay.

10. The application is dismissed with costs to the appellant/respondent/original defendant.

DATED THIS 26<sup>TH</sup> DAY OF MARCH 2012 AT NAIROBI

**M.A. ANG'AWA**

**JUDGE**

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*Advocates* :

*i) M Odawa instructed by Pramod Patel & Co Advocates for  
applicant*

*ii) Mulandi instructed by Njeri Mburu & Co Advocates for  
respondent*