



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAKURU
CIVIL APPEAL 89 OF 2007

JOSEPH AWUOR ABANDE.....APPLICANT/RESPONDENT

-VERSUS-

CHEMNJOR
SAMUEL K.
THE
CHAIRMAN, BORAD OF GOVERNORS
KABARNET
HIGH SCHOOL

THE H/MASTER, KABARNET HIGH SCHOOL.....RESPONDENTS/APPELLANTS

RULING

The applicant herein brought a suit against the respondents in the court below claiming Kshs.185,000/= being the balance of a contract sum of Kshs.245,000/= the court found for him. The respondents were aggrieved and brought this appeal on 7th June, 2007. On 22nd April, 2009, the applicant, through counsel sought orders that the appeal be dismissed for want of prosecution.

It would appear that that application has not been determined. Instead the applicant, now acting in person, brought the instant application for the very orders sought in the earlier application. He had argued that three years after filing the appeal, the respondents have failed to take steps to prosecute it; that the failure to prosecute the appeal is prejudicial to the applicant; that it is clear from that delay that the respondents have no interest in the appeal.

In response to the application and the foregoing averments, the respondents, through counsel have deposed that the failure to prosecute the appeal was brought about by attempts to settle the dispute out of court which after some time failed. They have argued that the appeal has high chances of success.

I have considered these arguments and hold the following view on the matter.

The application is expressed to be brought under **Order 42 rule 35(1)** of the **Civil Procedure Rules, 2010**. Under **rule 35(1)** aforesaid, an appeal will either be set down for hearing by the respondent

or dismissed if it is not prosecuted three months after the giving of directions.

No directions had been taken in the matter and the applicant ought to have proceeded under **sub rule (2)** which provides that the registrar will on notice to the parties list the appeal before a judge for dismissal if within one year after service of the memorandum the same is not set down for hearing.

It is the registrar according to the above provision who is required to list the matter before the judge after the parties have been notified.

In this matter, it is the applicant and not the registrar who has brought the delay to the attention of the court. It is my view that the respondents have not suffered any prejudice as they have had an opportunity to explain why the appeal has not been prosecuted.

The appeal has not been prosecuted for nearly five (5) years. That is a long period of time. The respondents have merely stated that there were negotiations to settle the matter out of court without any evidence to demonstrate that there were such negotiations, particularly after the applicant denied the suggestion. There is no affidavit from the applicant's erstwhile advocate to buttress those assertions.

Considering that this dispute arose in 2003, some nine (9) years ago, it would be unconscionable to delay this matter longer. Justice being a double edged sword must be applied in equal measure to both sides.

I am persuaded that the respondents have no plausible justification for failing to prosecute this appeal.

In the result the appeal is dismissed with costs.

Dated, Signed and Delivered this 17th day of May, 2012.

**W. OUKO
JUDGE**