



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT NAKURU**

**Civil Appeal 166 of 2010**

**NYAHURURU ELITE SCHOOLS LTD .....APPELLANT**

**VERSUS**

**DAVID CHEGE MURAYA.....RESPONDENT**

**RULING**

Pursuant to order **42 rule 35(2) of the Civil Procedure Rules 2010** the registrar on notice to the parties listed this appeal before the court for dismissal as the appellant had not set it down for hearing one year after the memorandum of appeal was served. There was no response to the notice to show cause and the appeal was accordingly dismissed. The appellant has now brought the instant application for orders that the orders of dismissal be set aside and the notice to show cause reinstated and thereafter the appeal to be reinstated.

This application was granted by consent of the parties and the notice to show cause why the appeal should not be dismissed reinstated. This ruling therefore relates to the notice to show cause. The appellant has explained that after filing this appeal the lower court failed to avail typed proceedings to enable the appellant prepare record of appeal. Later the file was forwarded to Nakuru High Court. But since there was need to have a signed copy of the decree, the appellant sought to have the file sent back to the lower court at Nyahururu. This was not done promptly with the result that the notice to show was issued. The appellant has pleaded to be given another chance; that the delay was not inordinate pointing out that dismissing the appeal would be a drastic step.

The respondent has maintained that the appeal ought to be dismissed as the appellant has not exhibited seriousness to prosecute the appeal, thereby delaying the respondent from enjoying the fruits of the judgment.

An appellant by dint of **order 42 rule 35 (2)** foresaid must set down the appeal within 1 year from the date the memorandum of appeal is served. If within that period the appeal is not set down as aforesaid then the same will be dismissed after a notice has been issued to the parties and no explanation offered by the appellant .

The appellant through counsel has explained the steps they have taken to ensure the appeal is prosecuted. That explanation includes the delay by the court below in failing to promptly supply typed proceedings yet the appellant had paid for them. The file was sent to Nakuru High Court three months later without the proceedings being supplied to the appellant.

I am persuaded that the appellant took sufficient steps towards prosecution of the appeal. The delay is not inordinate and the appellant has demonstrated that it is still keen to pursue the appeal. No prejudice will be suffered by the respondent. The application is allowed and the order dismissing the appeal set aside. The appeal is reinstated and the appellant has ninety (90) days to ensure the appeal is ready for fixing a hearing date.

Costs to the respondent for inconvenience.

**Dated, Signed and Delivered at Nakuru this 30<sup>th</sup> day of July, 2012**

**W OUKO**  
**JUDGE**