



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Civil Appeal 223 of 2004**

**JOSEPH JOHN KIBURI.....APPELLANT**

**VERSUS**

**ATANAS OMUROKA.....1<sup>ST</sup> RESPONDENT**  
**TIMOTHY OKUMU.....2<sup>ND</sup> RESPONDENT**  
**COLLINS OTIENO.....3<sup>RD</sup> RESPONDENT**

**RULING**

By the Chamber Summons dated 19/1/2011, the respondent seeks the dismissal of the appeal. The application is brought pursuant to **Order 42 Rule 35** of the **Civil Procedure Rules**. This appeal was filed on 26/8/2004. Since then the appellant has not taken any steps towards its prosecution. **Order 42 Rule 35** of the **Civil Procedure Rules** allows the respondent to apply for dismissal of the suit if no steps have been taken 3 months after directions have been taken. In this case, no directions had been taken and the above cited provision does not give the respondent the right to move the court for dismissal.

Under **Order 42 Rule 35(2)** of the **Civil Procedure Rules**, if within one year of the service of the memorandum of appeal, the appeal has not been set down for hearing, the court can notify the parties to appear before a judge to show cause why the appeal cannot be dismissed. The appeal was filed on 26/8/2004, eight (8) years ago. The appellant went to sleep thereafter. The court cannot grant the respondents' prayers because the court's jurisdiction was not properly invoked, but the court on its own motion exercising its wide discretion can move and have the appeal dismissed.

Chesang & Co. Advocates who filed the appeal were duly served with the notice on 2/7/2012. They did not appear or file any reply. It is obvious the appellant is no longer interested in the appeal and the court exercises its discretion and orders the appeal dismissed with costs to the respondent/applicant.

**DATED and DELIVERED this 19<sup>th</sup> day of November, 2012.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

N/A for the appellant

Mr. Kairuki for the respondent

Kennedy – Court Clerk