



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Civil Appeal 312 of 2010**

**KENNETH MBAE CHARLES ..... APPELLANT**

**VERSUS**

**CARZAN FLOWERS (K) LIMITED ..... RESPONDENT**

**RULING**

This appeal was filed on 7/12/2010. Since then the appellant has not taken any steps towards its prosecution. The court issued a Notice to Show Cause why the appeal cannot be dismissed under **Order 42 Rule 35 (2)** of the **Civil Procedure Rules**. Upon service of the Notice to Show Cause, counsel for the appellant, Mark Nganga Githiru, filed a replying affidavit. He stated that there was a delay in typing proceedings of the lower court and this rendered it impossible to prepare a record of appeal. He received a copy of the typed proceedings in April 2012 and by that time, the appellant had relocated to Naivasha without giving his new address nor did he leave instructions with his counsel. This further delayed the preparation of the record of appeal. Through the appellant's relatives, Mr. Githiru managed to get in contact with appellant who indicated his intention to prosecute the appeal. He also paid the requisite legal fees.

Mr. Ochieng for the respondent urged court to dismiss the appeal.

I have considered the replying affidavit of Mr. Githiru and the reasons given for the delay in filing the record of appeal and setting down the appeal for hearing. He stated that on 19/09/2012 he received a letter dated 30/4/2012 from the court, notifying him that the proceedings of the lower court had been typed. He however did not annex the said letter to support this averment despite purporting to have done the same. I therefore hold that the explanation given by counsel for the delay in receiving the typed proceedings is not satisfactory. Mr. Githiru further deponed that he had lost contact with the appellant and was unable to receive instruction necessary for the prosecution of the appeal. In **Bi-Mach Engineers Limited Vs James Kahoro Mwangi (Civil Application No. 15 of 2011)** Waki J said that the applicant has a duty to pursue his advocates to find out the position of the litigation. This in turns means that though counsel lost contact with the appellant, it was the duty of the appellant to pursue his advocate on the progress of his matter.

Since counsel for the appellant deponed that the appellant was ready and willing to conclude the appeal and that the appellant had availed the requisite funds, the court directs that this appeal be set down for hearing and be heard within the next 6 months failing which it stands dismissed.

The appellant to bear costs of the Notice to Show Cause.

**DATED and DELIVERED this 14<sup>th</sup> day of November, 2012.**

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

**PRESENT:**

Ms Mukunga holding brief for Mr. Githiru for the appellant

N/A for the respondent

Kennedy – Court Clerk