

striking out of the annexure depending on how the court looks at the matter. However, the annexures are not relevant to the application since they relate to the merit or demerits of the application. In an application of this nature, a supporting affidavit is sufficient. For these reasons, I strike out the annexures from the record.

Order 42 Rule 35 (1) provides as follows:

“Unless within three months after the giving directions under rule 13 the appeal shall have been set down for hearing by the Appellant, the Respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.”

This appeal was filed on 29/01/2010 and through an application under certificate of urgency, the Respondent applied successfully for stay of the magistrate’s ruling. The appeal was admitted on 15/04/2010 and directions given accordingly. Since that date, it is now one year and three months. The Appellant has never caused the appeal to be fixed for hearing. It now appears that the urgency with which the appeal was filed and stay order obtained has ceased to exist. The orders for stay are for the benefit of the Respondent/Appellant as opposed to the Applicant/Respondent. The provisions of Order 42 Rule 35 (1) are very clear that if within three months after directions, the Appellant fails to move the court to hear his appeal, the Respondent is at liberty to set down the appeal for hearing or to apply for dismissal of the appeal for want of prosecution. The Respondent may opt for any of the two options under the rule. The Applicant herein did not explain the cause for non-compliance with the provisions of the law. Instead he dwelt on other side issues leaving the core of the matter untouched. In effect this means that there is no serious opposition to the application.

As for the non-compliance of Order 42 Rule 12 by the Registrar, I find this a mere excuse in that the Appellant is expected to use due diligence to follow up his appeal step by step. I refuse to buy the argument that the Appellant may not have been aware that the appeal had been admitted and directions given.

It is my finding that the Applicant has satisfied the court as to the requirements of Order 42 Rule 35 (1). I accordingly allow the application as prayed. The appeal stands dismissed with costs to the Applicant.

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F. N.MUCHEMI
JUDGE

Ruling dated and delivered on the 8th day of Nov 2011 in the presence of Mrs Areba for Areba.

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JUDGE