

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.215 OF 2009

ANALIK WEKESA.....1ST APPELLANT

DIOCESE OF LODWAR (Thro' its Registered Trustees.....2ND APPELLANT

VERSUS

HELLEN WAIRIMU MWANGI & SIMON NJOROGE MWANGI (Suing as the Administrators

of the estate of JAMES KANENE MWANGI (Deceased).....RESPONDENT

RULING

The Memorandum of appeal was filed on 21st October, 2009 simultaneously with application for stay of execution. The stay was granted on condition that the appellant deposited Kshs.500,000/= in court. That condition was complied with on 23rd November, 2009.

On 9th March, 2011, the respondent in the appeal brought the present application for orders that the appeal be dismissed for want of prosecution for the reason that ten months (at the time of filing of this application) had elapsed since memorandum of appeal was filed without any steps being taken to set down the appeal for hearing.

The appellant through his advocate in opposing the application has deposed that the delay in setting the appeal down for hearing has been occasioned by the failure of the court to avail the proceedings of the trial court even after the requisite fees had been paid. It is further submitted that dismissal for want of prosecution is not available since directions have not been taken.

An appeal will be dismissed pursuant to **Order 42 rule 35(1)(2)** of the **Civil Procedure Rules** in two situations. In the first situation, if within 3 months after the giving of directions the appeal has not been set down for hearing by the appellant, the respondent may elect either to set it down for hearing himself or apply for its dismissal. In the second situation, the registrar, on notice to the parties may list the appeal before the judge for dismissal if no steps have been taken to set it down for hearing within 1 year after the service of memorandum of appeal. Clearly, this application is grounded on the first situation.

I reiterate that an application based on the first ground will be granted if one condition is satisfied, namely, three months have elapsed after the giving of directions. Directions have not been taken in this matter as the lower court record has not been availed. The appellant has given a plausible explanation why that stage has not been reached; the efforts made in order to avail the record.

I am satisfied that the appellant has not lost interest in the appeal. After all, he has deposited Kshs.500,000/= into court. I have seen the letters written by counsel for the appellant seeking proceedings from the lower court and one from the Deputy Registrar of this court dating back to November, 2009, the appellant having paid for them over 1½ years ago. It is inconceivable, indeed scandalous that it should take two years to remit the record from the trial court to this court when both courts are housed in the same building.

It is ordered that the Deputy Registrar of this court do ensure that the record is availed to the appellant within fourteen (14) days from the date of this order. The ruling to be served on the Deputy Registrar forthwith.

For the reasons given earlier, this application is dismissed. I make no orders as to costs.

Dated, Signed and Delivered at Nakuru this 2nd day of December, 2011.

**W. OUKO
JUDGE**