



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISCELLANEOUS CIVIL APPLICATION 143 OF 2007**

**JOSEPH BORO NGERA T/A NGERA FANCY FARM.....APPELLANT**

**VERSUS**

**SAMWEL NDEGWAKIRUNGUMI.....RESPONDENT**

*(From original judgment and decree of Nakuru C.M.C.C.NO.143/2007*

*by Hon. Nicholas Opele Ateya, Senior Principal Magistrate, Nakuru)*

**RULING**

This is an appeal from the decision of the court below delivered on 19<sup>th</sup> December, 2003 in Nakuru CMCC No.361 of 1996. The appeal was filed on 13<sup>th</sup> September, 2007.

On 10<sup>th</sup> February, 2009, this court (Koome, J.) ordered the appellant to prosecute the appeal within ninety (90) days. Learned Counsel for the respondent requested for a mention date before the court on 6<sup>th</sup> July, 2009. On that day he asked the court to dismiss the appeal on the ground that the appellant had failed to prosecute the appeal within ninety (90) days as ordered. Learned counsel for the appellant argued that he had not been notified of the purpose of the mention and that the appeal cannot be dismissed by way of a mention. Finally he submitted that the appeal has not even been admitted.

The court can dismiss an appeal under Order 41 Rule 9 Civil Procedure Rules at anytime after the memorandum of appeal has been

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served, on the ground that security for costs is not given within the time ordered.

Secondly, the court can dismiss an appeal under Order 41 Rule 14 where the appellant does not appear when the appeal is called out for hearing.

The third ground for dismissal of an appeal is Rule 25 where the court consisting of two judges who are divided in their opinion.

Finally an appeal will be dismissed for want of prosecution under the circumstances enumerated in

Order 41 Rule 31 of the Civil Procedure Rules.

I believe the court also has an inherent jurisdiction to order the dismissal of an appeal if it thinks it (the appeal) amounts to an abuse of its process.

In the matter before me, apart from the procedure adopted, namely, court moved by way of a mention, there is no basis for dismissing the appeal. After all, the court (Koome, J.) in directing that the appeal be prosecuted within ninety (90) days did not specify the consequences for failure. As a matter of fact, even where the court has limited time for doing an act, the court still retains the power to enlarge such time upon such terms as the justice of the case may require and such enlargement may be ordered even after the period limited has expired. The door has

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not been shut on the appellant. Besides, the appeal has not been admitted. It has never been the responsibility of the appellant to ensure

that the appeal is admitted or rejected. That is purely administrative. The appellant, apart from reminding the Deputy Registrar, has no role beyond that.

It is now ordered that the Deputy Registrar places this appeal before any judge in this court for orders under Sections 79B and 79G of the Civil Procedure Act.

No orders as to costs.

DATED and DELIVERED at Nakuru this 21<sup>st</sup> day of July, 2009.

**W. OUKO**

**JUDGE**