



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**Civil Appeal 35 of 2003**

**MANOAH CHANGILWA MAFUMBWA.....APPELLANT**

**V E R S U S**

**EZEKIEL MUSAKALE.....RESPONDENT**

**RULING**

The appeal herein was filed by the appellant on 10<sup>th</sup> March 2003.

As the respondent, **EZEKIEL MUSAKALE**, was convinced that the appellant was not keen to prosecute the appeal, he brought an application dated 30<sup>th</sup> August 2007, seeking to have the appeal dismissed for want of prosecution.

In his supporting affidavit the respondent stated that the appellant had continued to occupy the respondent's property. Therefore, the respondent says that he was suffering due to the inaction on the part of the appellant.

It was for that reason that the respondent moved this court for an order dismissing the appeal for want of prosecution.

When the application first came up for hearing on 11<sup>th</sup> February 2008, Mr. Chegenye advocate held brief for Mr. Lugadiru, the learned advocate for the appellant. However, as Mr. Lugadiru was reportedly unwell, the application was adjourned to 22<sup>nd</sup> April 2008.

When the matter came up in court on 22<sup>nd</sup> April 2008, Mr. Lugadiru advocate asked the court to give the appellant an opportunity to canvass his appeal. He explained that the appellant had previously been unaware that the appeal had been admitted to hearing.

The respondent said that if the appellant was ready to set down the appeal for hearing, the respondent had no objection.

At that stage, Mr. Lugadiru advocate informed the court that if he was given only one month, he would take appropriate steps to fix the appeal for hearing.

As the parties were in agreement, that the appeal be fixed for hearing, the court made orders in the

following terms;

***“The appellant is to file and serve his record of appeal within the next 30 days from today, failing which the appeal shall stand dismissed for want of prosecution.***

***If the record of appeal is filed within the 30 days, it is thereafter to be fixed for hearing on a priority basis.***

***The case is S.O. to 26/5/2008 for mention to fix a hearing date for the appeal, if the record will have been filed within the time allowed.***

***Today’s costs, and the costs of the application dated 30/8/07 are awarded to the applicant in any event.”***

As the appellant’s advocate had asked for 30 days to take action; and as the court gave him the time he had asked for, one would have expected him to take appropriate action.

However, by 26<sup>th</sup> May 2008 when the appeal came up for mention, there was absolutely nothing on the court file, to indicate that the appellant had taken any steps.

Notwithstanding the failure by the appellant and his advocate to attend court on 26<sup>th</sup> May 2008, the court nonetheless decided to give the appellant one more opportunity. The appeal was adjourned to 8<sup>th</sup> July 2008.

Regrettably, although the appellant and his advocates were both served, independently, they failed to attend court on 8<sup>th</sup> July 2008.

In the result, I find and hold that the appellant has failed to prosecute the appeal.

Although, I had earlier ordered that the appeal would stand dismissed if the appellant had not taken steps to prosecute within 30 days, I do appreciate that that order was premature because the court had not yet given directions.

I therefore hereby, ***suo moto***, review the orders made on 22<sup>nd</sup> April 2008, by recalling the said orders as having been irregular.

Instead, I now invoke the provisions of Order 41 rule 8B of the Civil Procedure Rules, and direct the learned Deputy Registrar of this court to list the appeal for directions before me, on notice to the parties. The appeal shall be set down for directions on a priority basis.

***Dated, Signed and Delivered at Kakamega, on this 27<sup>th</sup> day of October, 2008.***

**FRED A. OCHIENG**

**J U D G E**