



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 542 OF 2017**

**NIRMA CONSTRUCTION COMPANY LIMITED.....APPELLANT**

**VERSUS**

**HARRONY OUMKHOBERO OKUTOYI.....RESPONDENT**

**RULING**

1. In the Notice of Motion dated 18<sup>th</sup> December 2018, the respondent *Harrony Oumkhubero Okutoyi* (hereinafter the applicant) seeks that the appellant's appeal be dismissed with costs for want of prosecution.
2. The application is anchored on grounds that since 10<sup>th</sup> October 2017 when the appeal was filed, the appellant has not filed a certified copy of the decree within a reasonable time and is yet to set down the appeal for directions or take steps to facilitate its hearing. These grounds are replicated in the supporting affidavit sworn on 18<sup>th</sup> December 2018 by the applicant's counsel *Mr. Nelson Kaburu Felix*.
3. The application is opposed. The appellant's counsel *Mr. Dennis Matara Abinja* swore a replying affidavit on 7<sup>th</sup> February 2019 in which he gave reasons explaining the delay in prosecuting the appeal. He averred that the appellant has always been keen to prosecute the appeal but has been prevented from doing so by the trial court's failure to supply it with copies of proceedings in the lower court to enable its counsel prepare and file the record of appeal and thereafter list the appeal for directions.
4. When the application came up for hearing, both parties agreed to have it prosecuted by way of written submissions which parties duly filed and which I have carefully considered.
5. I wish to state from the outset that appeals to the High Court are governed by *Order 42* of the *Civil Procedure Rules*. *Order 42 Rule 35 (1) and (2)* provides for the circumstances under which appeals can be dismissed for want of prosecution. A perusal of *Order 42 Rule 35* shows that the law contemplates two scenarios in which an appeal can be dismissed for want of prosecution.
6. The first situation is where three months after the giving of directions under *Order 42 Rule 13*, the appeal had not been set down for hearing. In the second scenario, the Deputy Registrar of the court either on application or on his or her own motion but with notice to the parties is mandated to list an appeal before a judge in chambers for its dismissal if within one year after service of the memorandum of appeal, the appellant has not fixed it for hearing.
7. It is not disputed that the instant appeal though filed on 10<sup>th</sup> October 2017 slightly over a year ago does not fall under any of the above two situations since the record of appeal is yet to be filed and therefore directions under *Order 42 Rule 13* have not been issued. The Deputy Registrar has also not taken the initiative of listing the appeal before a judge for dismissal under *Order 42 Rule 35 (2)*. Since the applicant has claimed that he was served with the memorandum of appeal on 13<sup>th</sup> October 2017 which is over a year ago and this is not disputed by the appellant, it is clear that the applicant could have prompted the Deputy Registrar to list the appeal before a judge for its dismissal if he was so minded.
8. That said, the fact that the appeal does not fall under any of the scenarios contemplated by *Order 42 Rule 35* of the *Civil Procedure Rules* does not mean that the same cannot be dismissed for want of prosecution. The court in appropriate cases in the exercise of its discretion and inherent power can dismiss any appeal that amounts to an abuse of the court process even where directions under *Section 79 B* of the *Civil Procedure Act* and *Order 42 Rule 13* of the *Civil Procedure Rules* had not been issued.
9. I have considered the reason advanced by the appellant for failure to take any action to progress the hearing of the appeal since it was filed. The annexures to the replying affidavit show that as late as January 2019, the appellant was still following on its request to be supplied with copies of the proceedings by the lower court. Without the lower court's proceedings, the appellant was undoubtedly handicapped since it could not compile its record of appeal and no step can be taken towards hearing of an appeal without availability of the

record of appeal. In the premises, I am persuaded to find that the delay in the prosecution of the appeal was occasioned by factors beyond the appellant's control.

**10.** In addition, I have noted from the record that this court is yet to receive the original record of the lower which is a prerequisite to the issuing of directions under *Section 79 B* of the *Civil Procedure Act*. It is important to note that the calling for the original record of the lower court is the responsibility of this court through its Deputy Registrar and not the appellant.

**11.** Taking everything into account, I am satisfied that it would not be in the interest of justice to dismiss this appeal as sought by the applicant. I accordingly dismiss the application on condition that the appellant files its record of appeal within the next 60 days failing which the appeal will stand dismissed with costs to the applicant for want of prosecution. In the meantime, the Deputy Registrar is hereby directed to call for the original record of the lower court and ensure that it is forwarded to this court within the next 30 days. Parties to take a mention date in the registry after the expiry of 30 days for directions or further orders.

**12.** It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 18<sup>th</sup> day July, 2019.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Nyakundi for the respondent

Ms Njoroge holding brief for Mr. Kaburu for the applicant

Mr Salach: Court Assistant