



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL APPEAL NO. 513 OF 2016**

**K.VENTURES LIMITED.....APPELLANT/RESPONDENT**

**VERSUS**

**PETER OLUMATI.....RESPONDENT/APPLICANT**

**RULING**

By a Notice of Motion dated 10<sup>th</sup> October 2017 and filed on 11<sup>th</sup> October 2017, the applicant seeks that the appeal herein be dismissed for want of prosecution. The application is brought under Order 42 Rule 35(2) of the Civil Procedure Rules, Sections 1A and 1B of the Civil Procedure Act. It is supported by the Affidavit of Edwin Kamau sworn on 10<sup>th</sup> October 2017 and a Further Affidavit sworn on 5<sup>th</sup> December 2017.

The applicant states that since the Memorandum of Appeal was filed, the appellant has not taken any steps to prosecute it by setting it down for hearing, a clear indication that he is no longer interested in pursuing his claim. He urges that the delay has been inordinate and that the appeal lacks chances of succeeding, adding that the respondent's case in the lower court had been at an advanced stage of trial when the appeal was filed.

The application was opposed through the Replying Affidavit of Michael Kamau Kimani, a director of the respondent company, sworn on 7<sup>th</sup> November 2017. The respondent reiterates his interest to pursue the appeal and urges that the respondent will suffer prejudice should the appeal be dismissed since it will have been denied an opportunity to present its case pending before the trial court.

The application was canvassed by way of written submissions. The appellant urged the court not to consider that the application which necessitated the appeal arose from its advocates mistakes in failing to file the documents which he had sought to introduce in the lower court's proceedings. The appellant stated that the respondent's response was an attempt to argue the merits of the appeal. He also submitted the period of over one year was inordinate delay justifying dismissal of the appeal for the interests of justice.

**Rule 35(2) of Order 42** of the Civil Procedure Rules under which the application is brought provides that:

*If, within one year after the service of the memorandum of appeal, the appeal shall not have*

***been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.***

Moving the court for dismissal of an appeal for want of prosecution under this provision is however, only available to the registrar and not a party. The appellant ought instead to have cited **Rule 35(1)** of Order 42 which provides that:

***‘Unless within three months after the giving of 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.’***

Nevertheless, I have considered the application on the basis of its substance over the procedural technicality of the applicant’s citation of the wrong provision of the law. The subject appeal was filed vide a Memorandum of Appeal dated 22<sup>nd</sup> July 2016, seeking to set aside orders of the trial court issued on 15<sup>th</sup> July 2016. It sought to challenge the Ruling of the trial court which declined to allow admission of documents by the respondent company in the pending proceedings. In the said proceedings, the matter had proceeded to conclusion and parties directed to file submissions. It is at that point that the respondent herein, filed an application seeking admission of the respondent’s statement and list of documents. This application was dismissed hence the filing of the appeal.

For an appeal to be liable for dismissal for want of prosecution under the proper provision Rule 35(1) directions must have been issued under Order 42 Rule 13 and three months lapsed without any action being taken by the appellant. Such directions have not been issued in this matter. That said, it is the duty of the appellant to move the court towards admission of an appeal in order to pave way for the issuance of directions. Rule 11 of Order 42 requires that once an appeal has been filed, the appellant should, within thirty days, cause the matter to be listed before a judge for directions under [section 79B](#) of the Act. Rule 13(1) of the same order also directs that:

***‘On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.’***

It is not in dispute that it has been slightly over one year since the memorandum of appeal was filed on 29<sup>th</sup> July 2016. A perusal of the file shows that following the filing of the memorandum of appeal, a request was made by the Deputy Registrar of the High Court on 29<sup>th</sup> July 2016 for the record of proceedings of the lower court. No action has been taken by the appellant. From a reading of the provisions of Order 42 cited above, it is the appellant’s duty to set the appeal in motion by having it listed for directions. This ought to have been done within 30 days of filing the appeal. The appellant did not take any such step and has not provided any reasons for such failure. I am therefore inclined to find that this application bears merit, and therefore the appeal is dismissed with costs to the applicant.

***Dated, signed and delivered at Nairobi this 16<sup>th</sup> day of May, 2018.***

**A. MBOGHOLI MSAGHA**

**JUDGE**