



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**MISCELLANEOUS APPLICATION NO. 22 OF 2014**

**MUTEGI EDWARD.....1<sup>ST</sup> APPELLANT**

**BENSON MWENDA MURIITHI.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**DAVID MUGO NJIRU.....RESPONDENT/APPLICANT**

**RULING**

1. By an application dated 8<sup>th</sup> May, 2017 the applicant **David Mugo Njiru** seeks orders that the appellants' appeal be dismissed with costs for want of prosecution. He based the application on the following grounds:

- (a) That the respondents have not taken any steps towards the prosecution of their appeal.***
- (b) That it is now two years and the respondents have not taken any steps towards the prosecution of this appeal.***
- (c) That it is only just and fair that the orders sought are granted as it is clear that the respondents are not keen in prosecuting the appeal.***

2. The application is supported by the affidavit of Ichaura Wachira sworn on 8<sup>th</sup> May, 2017. His contention is that the Appellant filed the Memorandum of Appeal on 26<sup>th</sup> November, 2014. That the Appellant has since lost interest in the appeal as it is over two years and the appellants have not taken any action to prosecute the appeal. It is further contended that the delay in prosecuting the appeal is prejudicial to the applicant.

3. The respondents who are the appellants Mutegi Edward and Benson Mwenda Muriithi opposed the application and filed a replying affidavit sworn by Pauline Waruhiu. Her contention is that after filing the Memorandum of Appeal dated 25<sup>th</sup> November, 2014 against the judgment of the Senior Resident Magistrate delivered on 24<sup>th</sup> October, 2014 in Kerugoya P.M.C.C. No. 330 of 2013 David Mugo -V- Mutegi Edward & Another they applied for the certified copies of the decree, judgment and typed proceedings to enable them file the record of appeal but the letter did not elicit any response. She contends that they cannot be faulted for the delay in prosecuting the appeal. She further claims that part of the decretal amount has already been paid as ordered by the Court and any prejudice can be compensated by an award of damages and costs.

4. It is further contended that the appeal has not been admitted as required under **Section 79B** of the **Civil Procedure Act** and since the governing provision on dismissal is **Order 42 rule 35 (2) Civil Procedure Rules** the appeal cannot be dismissed as directions have been given. That the rule is couched in mandatory terms. It is further contended that they could not comply with the mandatory terms as they had not been supplied with proceedings, judgment and decree of the lower court to enable them file the record and the lower Court file had not been transferred to the High Court. I however, note that the Respondents have not annexed any letter showing that they had applied for the proceedings, judgment and decree and it is therefore not shown with certainty that the documents were applied for and if so when.

5. The Respondents contend that they will suffer prejudice as they have an arguable appeal with chances of success.

6. The application proceeded by way of written submissions which were filed for the applicant by Waiganjo Wachira & Co. Advocates while for the Respondents were filed by Kairu & McCourt. The issue which arises for determination is on dismissal of appeal for want of prosecution.

7. From the record, this appeal has not been admitted as provided under **Section 79B** of the **Civil Procedure Act**. It is provided:

***“Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall persue it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily.”***

8. Where an appeal has not been admitted for hearing the procedure for dismissal is as provided under **Order 42 Rule 35 Civil Procedure Rules** which provides:

***1. “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.***

***2. 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.”***

There is a pre-requisite which is that the Court must have given directions. **Order 42 rule 13** provides for directions before hearing.

9. The Respondents filed a Memorandum of Appeal on 5<sup>th</sup> June, 2015. No record of appeal was filed, the judge has not given directions as provided under **Section 79B** and **Order 42 rule 13 Civil Procedure Act**. At the time of filing this application no action had been taken by the appellants for close to one year. My view is that no explanation has been given by the appellants for the delay as the alleged letter requesting for the documents to facilitate preparation of the record was not availed. Be thus as it may, the applicant has jumped the gun in filing this application as directions have not been issued. The applicant relies on **Order 42 rule 35** which requires that the application be filed within three months after giving of directions. The application has not complied with this rule which is mandatory. At this stage the appeal could only be dismissed as provided under **Order 42 rule 35 (2) Civil Procedure Rules** (supra).

10. The applicant relies on **Mumias Sugar Co. Ltd. -V- Galifaus Wafula Juma & 2 Others (2008) eKLR**, a persuasive decision by Ochieng J. where it was stated:

***“....in reality the appellant cannot just sit back after filing the appeal, and wait for the registrar to take action”.....an appeal cannot proceed to hearing before the High Court, before the judge gives directions concerning the appeal generally.....After directions have been given if the appellant does not within three months have the appeal set down for hearing the respondent may either set down the appeal for hearing or alternatively the respondent can apply for dismissal of such an appeal”. That is provided for by Order 41 rule 31 (1)”***

Though the judge stated that an appellant who fails to take steps to prosecute his appeal risks having the appeal dismissed, such dismissal must be in compliance with the rules and which are clear and in this case the relevant rule is **Order 42 rule 35 (2)** (supra). This rule is in my view available to a respondent who is at liberty to write and move the registrar to comply with the rule. As such all is not lost for respondent who wishes to have the appeal dismissed where an appellant files a memorandum of appeal and sits back. My view after considering the persuasive authorities in **South Nyanza Sugar Company Ltd -V- Charles Onyango Odieki (2009) eKLR Muchelule J** and **Haron E. Ogechi Nyambei -V- British American Insurance Co. ltd (2012) eKLR**, there is a duty on the registrar in clear provisions under **Order 42 rule 35 (2)** (supra) to prevent abuse of Court process by an indolent appellant. There is no sanction for failure to comply with **Order 42 rule 11** of **Civil Procedure Rules**. The registrar on his own motion is supposed to give notice to the parties and place the appeal before the Judge for dismissal. The rule is a clear provision which ensures that appellants do not by their action clog the system of justice. The rules are not without a remedy to the respondent and my view is that the applicant (respondent) should comply with the rules when seeking dismissal for want of prosecution. I am in agreement with the holding in **Rosavie (EPL) Limited -V- Stanley Mbithi James (2015) eKLR** where the Court in dismissing a similar application stated:

***“The law on dismissal of an appeal for want of prosecution is contained in Order 42 Rule 35 of the Civil Procedure Rules. The rule contemplates two scenarios when an appeal can be dismissed. One is where three (3) months after issuance of directions no steps have been taken to prosecute the appeal i.e. Order 42 Rule 35 (1), and the second is where no steps have been taken to prosecute the appeal within one year after the service of the memorandum of appeal i.e. Order 42 (35)(2). Under the first scenario, it is the Respondent to move the Court whilst under the second scenario, the action is by the registrar.***

***In the instant case, no directions have been taken. The applicable provision therefore is Order 42 Rule 35 (2) which specifically 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.” (Emphasis own).***

***From the above provision, it is clear that it is upon the registrar to list the appeal before a judge in chambers for dismissal. I have taken the liberty to read the record, a similar application was on 13<sup>th</sup> May, 2009 struck out by Lady Justice H. N. Okwengu (as she then was). The reasons advanced then by the Appellant for delay in prosecuting the appeal were similar to the reasons tendered now. Since under Order 42 Rule 35 (1) the appeal cannot be dismissed before directions have been given, the applicant should have taken advantage of Order 42 rule 35 (2) and cause the registrar to list the appeal for dismissal. I have not seen any letter to the registrar requesting for the matter to be listed for dismissal. If there had been such correspondence which the registrar ignored, I would have been inclined to accede to the application.***

***Since however, there is no evidence that the Applicant had requested the registrar to list the matter in terms of Order 42 Rule 35 (2) and the later failed, I find it difficult to accede to the application.”***

A similar holding was made in UAP Insurance Company Limited -V- Washington Gatura Kimani (2017 eKLR) where it was stated:

*“Order 35 (1) provides for a situation where three months after issuance of directions under Order 42 Rule 13, no steps have been taken by the Appellant to fix the appeal for hearing. In such a case, the Respondent can either fix the Appeal for hearing or apply by summons for it to be dismissed. In the case of Kirinyaga General Machinery Vs Hezekiel Mureithi Ireri HCCC No. 98/2008 the judge observed:-*

*“It is clearly seen from that rule that before the respondent can move the court either to set the Appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given as provided under rule 79B.”*

*The second scenario is that contemplated under Order 42 Rule 35 (2): if within one year after 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.*

*Noting that no directions have been issued in this Appeal and based on the provisions of Order 42 rule 35 (1), I have no reason to deviate from the holding in Kirinyaga General Machinery Vs Hezekiel Mureithi Ireri (supra).*

#### **11. In conclusion**

The applicants lack legal foundation and fail to demonstrate the existence of mandatory legal requirements for dismissal of appeal for want of prosecution. The applicable provision in **Order 42 rule 35 (2) Civil Procedure Rules** which requires the registrar to place the appeal before the Judge for dismissal with notice to the parties since the appellant had only filed a memorandum of appeal. The application as filed does not meet the threshold for the dismissal of appeal. The Court will not dismiss an appeal on application by the respondent where the appeal has not been admitted and directions have not been issued. For the appeal to be dismissed **Order 42 rule 35 (1)** and **2** supra must be complied with. I am in agreement with the holding in the cases cited above and also in Kirinyaga General Machinery -V- Hezekiah Mureithi Ireri H.C.C.C. 98 of 2008, Elem Investment Limited -V- John Mukora Otuoma 2015 eKLR and Sursh Ruginath Ramiga & Another -V- Sagar Mohan S. M. Ram C.A. No. 433 of 2012 Mabeya J which all dealt with **Order 42 rule 35 Civil Procedure Rules** on dismissal of appeals for want of prosecution.

12. The applicant brought this appeal under **Order 50 rule 1 Civil Procedure Rules, Section 1A** and **1B** and **3A Civil procedure Act** which are general provisions providing for the objectives of the Act and the duty of the Court to do justice. They do not provide for striking out of appeals. **Order 42 rule 35** is the substantive provision for dismissal for want of prosecution of appeals.

13. The Court has to weigh the prejudice to be suffered. The Appellants have a right to appeal. They have paid part of the decretal sum which the Court ordered. It would be prejudicial for the appellants if the appeal is not heard and determined. In Elem Investment (supra) the Judge stated:

*“In addition, the prejudice that the appellant is likely to suffer if this appeal is dismissed is likely to be graver than the prejudice that the applicant would suffer if the appeal is ordered to proceed given that the applicant has deposited the decretal amount in Court and settled some disputed costs. In arriving at that conclusion I am enjoined by the Court of Appeal decision Abdurahaman Abdi -V- Safi Petroleum Products Ltd. & 6 Others (2011)eKLR Civil Application No. Nai 173 of 2010 where the Court stated:*

*“The Court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the Court strikes out its document. The Court in that regard exercises Judicial discretion.”*

It would be fair to allow the appellant to take appropriate steps to ensure that the appeal is heard on merits. In view of what I have stated, this application is not properly before the Court and it lacks merits. I dismiss it with costs.

**Dated and delivered at Kerugoya this 12<sup>th</sup> day of July 2018.**

**L. W. GITARI**

**JUDGE**