



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**HCCA NO. 12 OF 2013**

**MBURU KENNETH.....1<sup>ST</sup> APPELLANT/RESPONDENT**

**MWAGO NDUATI.....2<sup>ND</sup> APPELLANT/RESPONDENT**

**JAMES K. NDERITU.....3<sup>RD</sup> APPELLANT/RESPONDENT**

**SAMUEL MAINA KAHURA.....4<sup>TH</sup> APPELLANT/RESPONDENT**

**VERSUS**

**JOSPHAT W. KIHORO.....RESPONDENT/APPLICANT**

**RULING**

The applicant moved this court by a motion dated 23<sup>rd</sup> September, 2016 filed under **order 42 rule 35, sections 1,1A,1B and 3A** of the **Civil Procedure Rules** beseeching the court to dismiss the appellants' appeal for want of prosecution. In the brief affidavit he swore on 23<sup>rd</sup> September, 2016 in support of the motion, the applicant averred that since the appellants filed their appeal on 2<sup>nd</sup> February, 2015, they have never taken steps to prepare the record of appeal and have the appeal itself prosecuted despite the availability of the typed proceedings.

Counsel for the appellants swore a replying affidavit in response to the motion and stated that ever since they filed the appeal, the appellants' court clerks have made necessary efforts to obtain a certified copy of the typed proceedings, the judgment and the decree but as at the date of filing the affidavit, these efforts had not borne any fruit. According to the learned counsel for the appellants failure to file the record of appeal and prosecute the appeal has been occasioned by the magistrates' court and not the appellants or their counsel.

The rest of the affidavit of the learned counsel comprises, not depositions as such, but arguments on what the learned counsel interprets **order 42** of the **Civil Procedure Rules** and **section 79B** of the Civil Procedure Act to mean. This is obviously out of order as affidavits must always be confined to matters of fact only; legal issues can properly be covered in grounds of objection and ultimately in the submissions.

There are two possible scenarios under which an appeal can be dismissed for want of prosecution under **order 42 rule 35** of the Civil Procedure Rules. Under **rule 35(1)** the respondent has the liberty to apply for such dismissal; that rule states:

***35. (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.***

The rule is clear that the two options open to the respondent under these circumstances are either to set down the appeal for hearing or to apply for its dismissal for want of prosecution; whichever option that the respondent may want to take, it is mandatory that directions under **rule 13** of **order 42** must have been given.

The appeal herein has not been admitted and therefore directions have not been issued. According to **rule 13(1)** the obligation to set down the appeal for such directions lies on the appellant although there is nothing in that rule that expressly forbids the respondent from taking a similar step.

The second scenario in which an appeal may be dismissed for want of prosecution is provided for under **rule 35(2)** of **order 42**. That rule provides as follows:

***35(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.***

Here it is the court that takes the initiative to have the appeal dismissed where the appellant has fallen into lethargy.

The applicant did not specify which of the two available options he invoked in his application but it is apparent that he cannot have moved the court under **rule 35(2)** which, as noted, can only be invoked by the court itself.

Directions have not been taken because the appeal has, in any event not been admitted; in such circumstances, it would be premature to dismiss the appellants' appeal for want of prosecution under **rule 35(1)** of the rules.

**Rule 35(2)** gives this court power to dismiss the appeal on the same ground of want of prosecution where the appellant has not listed his appeal for hearing a year after the memorandum of appeal was served. Here, the question whether the appellant has set the appeal for directions does not arise because it is presumed that a year is time enough for a vigilant appellant to put in motion the process of hearing and determination of his appeal, including the taking of directions. I would be perfectly in order to dismiss the appeal under this provision because, contrary to what the learned counsel for the appellant has sworn, there is no evidence that his law firm's clerks or the firm itself has made any efforts to secure the proceedings, judgment and the decree. I have, however, opted to give the appellants one last chance and spare their appeal to be heard on merits. In order that they do not fall into slumber again, I hereby order the appellants to file and serve their record of appeal within 30 days of the date hereof; they shall also fix the appeal for directions within the same period and failure of any or both of the forgoing conditions their appeal stand dismissed. In the meantime, the applicant's application dated 23<sup>rd</sup> September, 2016 is dismissed with no orders as to costs. It is so ordered.

**Signed, dated and delivered in open court this 10<sup>th</sup> February, 2017**

Ngaah Jairus

**JUDGE**