



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 320 OF 2014**

**1. COCA COLA EAST & CENTRAL AFRICA LIMITED.....1<sup>ST</sup> APPELLANT**

**2. NAIROBI BOTTLERS LIMITED.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**1. BONIFACE KYENZE.....1<sup>ST</sup> RESPONDENT**

**2. AUGUSTINE KAINDI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The respondents have moved this court by a Notice of Motion dated 13<sup>th</sup> September, 2016 seeking the dismissal of this appeal for want of prosecution. The motion is brought under order 42 rule 11, 12, 35 of the civil procedure rules and section 1A of the civil procedure act. It is supported by the affidavit of the 2<sup>nd</sup> respondent. It was contended that since filing of the memorandum of appeal on 25<sup>th</sup> July, 2014, the appellants have neither taken steps to cause the appeal to be listed before a judge for directions or to have the appeal admitted for hearing. That the respondents being the successful litigants in the lower court have been denied the fruits of their judgment. That the appellants only filed the record of appeal on 6<sup>th</sup> June, 2016 outside the stipulated time and without leave of court.

2. In response thereto Oscar Avedi the advocate in conduct of the matter on behalf of the appellant swore a replying affidavit. He contended that there has been a myriad of challenges occasioning the delay. That the appellants' application for stay of execution of judgment was scheduled for hearing on 18<sup>th</sup> August, 2014. It was however heard on 4<sup>th</sup> September, 2014 and a ruling delivered. That on the same day the appellants' counsel wrote to the respondents' advocates seeking nomination of a bank upon which the decretal sum would be deposited as per the court order, there was no response and a follow up letter was written on 12<sup>th</sup> September, 2015. That on the same date, the appellants filed an application to stop irregular proclamation which was heard and a ruling delivered on it on 18<sup>th</sup> March, 2015. The decretal sum was deposited on 24<sup>th</sup> March, 2015. That at some point the court file disappeared and it was not until 21<sup>st</sup> July, 2016 that they secured typed and certified copies of proceedings. It was contended that the appellants could not have complied with the procedure without a record of appeal.

3. The 2<sup>nd</sup> respondent filed a further affidavit in rejoinder. It was contended that the executive officer never issued any letter confirming the missing of the file as stated. That the appellants were notified that the proceedings were ready on 17<sup>th</sup> July, 2015 but did not taken steps to file record of appeal until 6<sup>th</sup> June, 2016.

4. In submissions, the respondents faulted the appellants for failure to place the appeal for directions. They cited **Haron E. Ongechi v. British American Insurance Co. Ltd [2012] eKLR** and **Justus Gachoki Wachira v. Emma Makena [2011] e KLR** where appeals were dismissed for failure to place the same before a judge for directions. On allegations that the court file was missing, it was submitted that although the appellants wrote to the respondents that the court file was missing, the respondents found otherwise upon their inquiry.

5. The appellants on the other hand reiterated their averments and relied on **Benson Mang'era&Loyford Mugendi Mati v. Wambua Mbuva HCCA No. 648 of 2012 NRB, Kirinyaga Genral Machinery v. HezekielMureithi HCC No. 98 of 2008, Harron E Ongechi** (supra) among others.

6. The court has considered the application and the arguments put forth by the parties herein. The law governing dismissal of appeals for want of prosecution is provided for in Order 42 Rule 35 of the Civil Procedure Rules. Order 42 Rule 35 provides that:

**“(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.”**

7. It follows therefore that it is only after directions have been given that an appeal may be dismissed for want of prosecution, under Order 42 Rule 35 (1) of the Civil Procedure Rules, 2010. That since Order 42 Rule 35 has not been invoked, and since directions in this appeal have not been given, the orders sought do not lie. See **Kirinyaga General Machinery**(supra) where while interpreting Order XLI 31 (now Order 42 rule 35), Mary Kasango J., 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 8B. Directions have never been given in this matter. The directions having not being given the orders sought by the respondent cannot be entertained.”**

8. The second scenario is that contemplated under Order 42 Rule 35 (2). Under the latter provision, 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. It should be noted that the discretion of the court under section 3A is very wide and it is within its discretion to dismiss the Appeal for want of prosecution at any time if its shown to the satisfaction of the court that the Appellant has been indolent in prosecuting the same. However, I take note of the fact that the Appellants have filed a record of Appeal and for that reason, the court will give them a chance to prosecute Appeal. The same is hereby admitted under section 79B.

9. In the end, the application dated 13<sup>th</sup> September, 2016 is hereby dismissed. The Appellant to take a date for directions within 30 days from the date of this ruling.

Dated, signed and delivered at Nairobi this 16<sup>th</sup> day of March, 2017.

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**L NJUGUNA**

**JUDGE**

***In the presence***

.....***For the 1<sup>st</sup> Appellant***

.....***For the 2<sup>nd</sup> Appellant***

..... ***For the 1st Respondent***

.....***For the 2<sup>nd</sup> Respondent***