



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. 101 OF 2008

LOCHAB BROTHERS LIMITED.....APPELLANT

VERSUS

STEPHEN WANJALA WANYONYI.....RESPONDENT

RULING

1. This appeal was dismissed on 6th July 2015 during an initiative of the Judiciary styled *justice@last*. The order was made under Order 42 Rule 35(2) of the Civil Procedure Rules 2010. The appellant is upset by the order. The appellant has filed a notice of motion dated 3rd November 2015. The motion is expressed to be brought under sections 1A, 1B, 3, 3A and 80 of the Civil Procedure Act; Order 42 Rule 8B, and, Orders 45 and 51 of the Civil Procedure Rules 2010.
2. The appellant claims that no formal notice to show cause or any other notice for dismissal was issued. It is averred that there is a mistake on the face of the record. The appellant claims that it was surprised to learn of the dismissal of the appeal; that there was no sufficient cause for the dismissal; that the appeal has never been admitted or directions granted; and, that the delay in prosecuting the appeal is due to factors beyond the appellant's control. Those matters are detailed at length in a deposition sworn by the appellant's counsel on 3rd November 2015.
3. The application is contested by the respondent. There are grounds of opposition dated 16th November 2015. They are two-fold: that the application is incompetent; and, it is *mala fides* or an abuse of court process.
4. On 17th November 2015 I heard counsels for the appellant and respondent. I have considered the notice of motion, the depositions and rival submissions.
5. Order 42 Rule 35 (2) allows the court to dismiss dormant appeals. The rule provides as follows-

“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”

6. The rule does not speak of personal service of the notice: but there *must* be some form of notice to the parties. By employing the word *shall* it is clear the requirement of notice is *mandatory*. The respondent never moved the court for dismissal. The dismissal was *initiated* by the Deputy Registrar of the court. But there can be no circumventing the requirement of notice. There is *no* evidence of any prior notice to the parties. The respondent has *not* filed an affidavit to controvert the averments by the appellant. I thus find that there was *no* notice mandated by Order 42 Rule 35 (2).
7. The appeal was lodged on 29th September 2008. That is more than *seven years* ago. The record of appeal was filed on 8th August 2012. That is well over *three years* ago. The appellant has *not* taken steps to *move* the Deputy Registrar to have the appeal admitted or directions taken. This

- appeal is dormant. The reasons advanced for delay do not appeal to me. The respondent is obviously prejudiced by the lassitude of the appellant.
8. The appellant has not explained the delay or what it terms as “*reasons beyond its control*”. In a sense, this motion has led to further delay; and, dams the river of justice. So much so that the court was *entitled* to dismiss the appeal for want of prosecution. The only caveat has been want of service of a valid notice for dismissal.
 9. When delay is established, unless it is well explained, it is deemed to be inexcusable. See *Allen v Mc Alpine & Sons Ltd* [1968] 1 All ER 543, *Ivita v Kyumbu* [1984] KLR 441. However, in the absence of some form of notice for dismissal, I am minded to review the order of 6th July 2015. Due to the conduct of the appellant, the review shall be *conditional*.
 10. The upshot is that the order dismissing the appeal made on 6th July 2015 is hereby set aside *but* upon the appellant meeting two *conditions*. The appellant shall pay the respondent *thrown away* costs of Kshs 5,000 within the next *thirty* days. The appellant shall also ensure that the appeal is *admitted* and set down for *directions* within *sixty days* of today’s date. If the appellant fails to meet *any* of the two conditions within the set *time*, the appeal shall automatically stand *dismissed*.

It is so ordered.

DATED and DELIVERED at ELDORET this 4th day of February 2016

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

No appearance for the appellant.

Ms Kosgey for the respondent.

Mr. J. Kemboi, Court Clerk.