



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NUMBER 442 OF 2012**

**NEWLAND INDUSTRIES LIMITED. ....PLAINTIFF**

**VERSUS**

**ALEX BOGE ASAVA. ....DEFENDANT**

**RULING**

The Respondent herein has moved the court by way of a Notice of Motion dated 9<sup>th</sup> day of December, 2015 seeking to dismiss the appeal for want of prosecution.

The application is brought under Order 42 Rules 35(2) and Order 51 rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act. The application is based on the grounds that since the Memorandum of Appeal was filed on the 24<sup>th</sup> August, 2012, the Appellant has not taken any step in the appeal. That the delay in prosecuting the appeal is prejudicial to the Respondent by the appeal remaining in abeyance. The Respondent has urged the court to dismiss the appeal.

When the application came up for hearing on the 12<sup>th</sup> October, 2016, it proceeded ex parte as counsel for the Appellant did not attend court despite the fact that her firm of advocates had been served with a hearing notice on the 29<sup>th</sup> September, 2016 and had duly acknowledged receipt of the hearing notice. The court also notes that the Appellant did not file any replying affidavit/grounds of opposition and therefore, the application is not opposed.

This court has considered the submissions by the learned counsel for the Respondent. I have also taken the liberty of perusing the court file. From the record, the appeal was filed on 24<sup>th</sup> August, 2012 and since then, no action has been taken in the appeal by the Appellant.

This court appreciates that under Order 42 Rules 35(2), an appeal cannot be dismissed before directions have been taken, but the application has also been brought under Sections 1A, 1B and 3A of the Civil Procedure Act. Under these provisions, the court has a wide discretion to exercise under its inherent powers in the interest of justice. It is now over four years since the appeal was filed. The Appellant did not attend court to defend the application for the dismissal of the appeal yet counsel on record was duly served. In line with the legal principle, that matters have to come to an end, the only justifiable order to make in the circumstances of this appeal is to dismiss the same for want of prosecution. Costs are hereby awarded to the Respondent.

**Dated, delivered and signed at Nairobi this 1<sup>st</sup> day of December, 2016.**

.....

**L NJUGUNA**

**JUDGE**