

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 134 OF 2012

ABRAHAM MARK EKHUYA.....APPELLANT

VERSUS

AGRICULTURAL DEVELOPMENT CORPORATION

THE MANAGING DIRECTOR AGRICULTURAL DEVELOPMENT CORPORATION

THE ATTORNEY GENERAL.....RESPONDENT

R U L I N G

1. The Appellant filed this appeal on 23rd March, 2012 against the judgment of Hon. T. C. Wamae delivered on 24th February, 2012 in Milimani Commercial Court CMCC No. 14102 of 2006.
2. The 1st and 2nd Respondents have now filed the Chamber Summons dated 28th January, 2015 seeking that the Memorandum of Appeal dated 20th March, 2012 and filed on 23rd March, 2012 be dismissed for want of prosecution. The application is premised on the grounds set out on the face of the application and the Supporting Affidavit of Mr. Jethro Kibet. He averred that the 1st and 2nd Respondent instructed the firm of Messrs. Cheptumo & Company Advocates to act for them in this matter. That pursuant to the said instructions, appearance was entered and court file perused. That upon perusal of the court file, it was found that since the filing of the appeal the Appellant had taken no steps to prosecute it. It was stated that the failure to prosecute the appeal amounts to an abuse of the process of court.
3. Mr. Kibet learned counsel for the 1st and 2nd Respondents submitted that in breach of Order 42 Rule 35, it is over three (3) years since this appeal was filed yet it has not been prosecuted and that the delay in prosecuting this appeal has not been explained.
4. In response thereto Mr. Lucas Leperes Naikuni swore a Replying Affidavit filed on 18th March, 2015. He attributed the failure to prosecute the appeal to the delay in the issuance of the typed and certified proceedings of the trial court. That it was until 6th February, 2015 that the Appellant's advocates received a letter from the Executive Officer dated 6th October, 2014 informing them that the typed and certified proceedings were now ready for collection upon payment of KShs. 1,440/= and that they have contacted their client who is in Vihiga to bring the said amount for purposes of obtaining the said proceedings.
5. Learned counsel for the Appellant Mr. Taliti submitted that they have been writing to the Executive Officer of the trial court to be issued with the typed proceeding but there has been no response and that the Appellant is not to blame.
6. I have given due consideration to the application herein and the submissions tendered. The law on dismissal of an appeal for want of prosecution is found in Order 42 Rule 35 of the Civil Procedure Rules. Under Rule 35 (1), an Appellant must have failed to prosecute the appeal within three (3) months of taking directions while under Rule 35 (2) no steps must have been taken by an Appellant to prosecute the appeal within one year after the service of the memorandum of appeal. In the instant case no directions have been taken and the applicable provision therefore is Order 42 Rule 35 (2). Order 42 Rule 35 (2) is to the effect that upon such failure to prosecute the appeal, the deputy registrar shall list the appeal before a judge in chambers for dismissal. The Rule provides:-

"If, within one year after the service of the memorandum of appeal, the appeal shall not be have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal." (Emphasies own).

7. It follows therefore that it is the duty of the Deputy Registrar to list the appeal for dismissal. In view of the foregoing the application is premature and is hereby dismissed. Costs shall abide the outcome of the appeal. However, since it is admitted that the proceedings are ready, I direct that the Appellant should file and serve the Appeal within 30 days of this ruling in default whereof the same shall stand dismissed.

Dated, Signed and Delivered at Nairobi this 5th day of June, 2015.

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A MABEYA

JUDGE