

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.551 OF 2012

FRANCIS KAMAU KANG'ETHE & 8 OTHERS.....APPELLANT/RESPONDENT

VERSUS

MAKENANGIRA FARMERS TRADING COMPANY LTD.....RESPONDENT/APPLICANT

RULING

1. The Motion on Notice by the Respondent dated 17/2/2015 seeks that the appeal be dismissed for want of prosecution. It is brought under Order 42 Rule 35(1) & (2) of the Civil Procedure Rules. The grounds are contained in the body of the Motion and the Supporting Affidavit of Elizabeth M. Karanja.
2. These grounds are that the appeal was filed Appellant filed on 23/10/12; that since the filing of the Appeal, the Appellants have not taken any step to prosecute their appeal; that it is in the interests of justice that the appeal be dismissed due to the laxity on the part of the Appellants to prosecute the same.
3. The application was opposed vide a Replying Affidavit of Joseph Muigai Kamau sworn on 4th May, 2015. He deposed that the Appellants were keen in having the appeal determined; that the re-organization of the Civil Division of this Court made it difficult to have the appeal expedited. That the Business Premises Rent Tribunal lost its Chairman and this made it difficult to have the original court file forwarded to this court for the Appeal to be proceeded with; that the chairman was only appointed in August, 2014 and the typed proceedings are ready but yet to be certified; that the Respondents have made various applications thereby delaying the hearing of the Appeal. That the delay has not been inordinate.
4. This is an application for dismissal of the Appeal for want of prosecution. The prayer for release of the rent to the Respondent was dispensed with by the consent of the parties recorded on 12/5/15. The application is made under Order 42 Rule 35 (1) and (2) of the Civil Procedure Rules. That rule provides:-

***“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.*”**

(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.”

5. From the foregoing, it is clear that an application under rule 35(1) can only be made after directions have been made on an appeal. In this case, no directions have been given. Further, the appeal has not even been admitted. The record of appeal itself has not been lodged. To that extent, the application is incompetent and cannot be sustained.
6. Under Sub-rule 2 of Rule 35, it is the Deputy Registrar who is mandated to list the appeal in court for dismissal. Before me is a Motion by the Respondent. If the Respondent was minded to approach the court under that sub-rule, it should have requested the Deputy Registrar to issue a

Notice to Show Cause upon the Appellant and list the appeal for dismissal. This the Respondent did not do.

7. Accordingly, I find the application to be incompetent and I dismiss the same with costs to the Appellants.

DATED and DELIVERED at Nairobi this 10th July, 2015.

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A. MABEYA

JUDGE