



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 210 OF 2010

JOSEPH NGUKU MAKU.....1ST APPELLANT/RESPONDENT

JOHN M. MATHINJI.....2ND APPELLANT/RESPONDENT

- VERSUS -

WILSON MWANGI NG'ANG'A.....RESPONDENT/APPLICANT

RULING

In a chamber summons dated 8th day of March, 2013, the appellants sought directions concerning their appeal and in particular directions as to the manner and the time of its hearing and whether the appeal itself is in order. Although the application is stated to have been brought under **Order 1 Rule 8** of the **Civil Procedure Rules**, that rule deals with third party proceedings against the government; the proper rule that ought to have been invoked in these circumstances is **Order 42 rule 13** of the rules which specifically provides for directions before the hearing of an appeal. The pertinent parts of that rule provide as follows:-

13. (1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.

(2)

(3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.

Be that as it may, on 11th March, 2013, parties took directions to the effect that the appeal would be determined by way of written submissions; the appeal was to be mentioned before the judge at a later date, which any of the parties would have taken, presumably to confirm whether the submissions had been filed as directed. For some reason, no action was taken on the directions by the court; the parties neither filed their written submissions nor took any date for the mention of the appeal.

It is against the foregoing background that the respondent moved this court by way of a motion dated 17th October, 2014 seeking to have the appeal dismissed for want of prosecution. Although the motion was

served the appellants did not file a response of any sort to the application and when the application came up for hearing all that counsel for the appellants told the court was that although a consent had been recorded to the effect that the appeal was to be resolved by way of written submissions the appellants had not filed the submissions and they did not intend to file any in future. Counsel for the appellants also contended that the respondent had not filed any submissions in any event and therefore this was not an appeal fit for dismissal for want of prosecution.

The applicant's motion was based on **Order 42 Rule 35(1)** of the Civil Procedure Rules which 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.

It is not in dispute that the directions under **rule 13** of the rules were taken; it is also not in dispute that the appeal was not set down for hearing within three months after the directions were taken. In fact the appellants chose not to take any action in the manner directed by the court or in any other manner not just within the three months but they have never done anything more than two years after the directions were taken.

I am inclined to agree with the applicant that, in these circumstances, the motion was legitimately conceived because it satisfies the conditions set forth for dismissal of an appeal for want of prosecution as prescribed in **Order 42 Rule 35 (1)** of the **Civil Procedure Rules**. The appellants' counsel's argument that the appellants were not going to rely on written submissions does not appeal to me to be consistent with the directions of the court and which he submitted were taken by consent in any event. I would suppose that if the appellants had opted to take any course other than the one directed by the court then it was open to them or to any other party to apply to vary the order; no such an application had been made as at the time the applicant's motion was urged and the order was still intact.

The appellant's counsel's submission that the respondent had also not filed his submissions and therefore cannot apply to have the appeal dismissed for want of prosecution is not convincing. Where an appellant has, for one reason or another, fallen into lethargy **Order 42 rule 35(1)** accords the respondent with the option to either set the appeal down for hearing or to apply to have it dismissed for want of prosecution; the respondent opted for the latter option and, in my humble view, he cannot be faulted for taking this particular option.

My conclusion is that the respondent's motion dated 17th October, 2014 is merited and it is therefore allowed with costs. The costs of the appeal shall also go to the respondent. It is so ordered.

Dated, signed and delivered in open court this 10th July, 2015

Ngaah Jairus

JUDGE