



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**CIVIL APPEAL NO. 67 OF 2012**

**TRINITY CLEARING & FORWARDING COMPANY LTD.....APPELLANT**

**VERSUS**

**IYA WARIO ROBA .....RESPONDENT**

**RULING**

1. The Respondent in this appeal has sought by notice of motion dated 28<sup>th</sup> November 2012 dismissal of the appeal for want of prosecution. Though **Order 42, rule 35** of the **Civil Procedure Rules, 2010** (the **Rules**) provides for such dismissals, the application is not made under that rule. **Order 2, rule 15** that has been cited has no application to appeal; it provides for striking out of pleadings.
2. But the Respondent has also invoked the inherent power of the court. Where the circumstances obtaining do not fit any of the two scenarios provided for in Order 42, rule 35, there cannot be any impediment to a respondent in an appeal invoking the inherent power of the court.
3. In the course of arguments the Appellant's learned counsel conceded that since the filing of the memorandum of appeal on 28<sup>th</sup> February 2012, no certified copy of the decree appealed against has been filed as required by **rule 2** of Order 42. He also conceded that no record of appeal has ever been prepared and filed and no directions under **rule 11** of Order 42 have been sought. Without the taking of these preliminary steps, what purpose would the invitation dated 20<sup>th</sup> November 2012 to the Respondent's advocate to take a hearing date for the appeal have served? That letter appears to be the only action taken by the Appellant after filing the memorandum of appeal! No other action is disclosed by the replying affidavit.
4. I am satisfied that there has been inordinate delay in prosecuting this appeal. No credible explanation has been offered for that delay. The inordinate delay in prosecuting the appeal has prejudiced the Respondent.
5. In the circumstances I will allow the application. This appeal is hereby dismissed with costs for want of prosecution under the inherent power of the court. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 4<sup>TH</sup> DAY OF MARCH 2014**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 10<sup>TH</sup> DAY OF MARCH 2014**