

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 237 OF 2011

FIDELITY COMMERCIAL BANK LTD.....RESPONDENT

VERSUS

GILANI SUPERMARKET LTD.....APPLICANT

RULING

The notice of motion dated 18/6/2013 was filed by the respondent who seeks an order that this appeal be dismissed. It is brought pursuant to **Order 42 Rule 35** of the **Civil Procedure Rules**. The grounds upon which it is premised are that 29 months have lapsed since the memorandum of appeal was filed; that the appellant has lost interest in the appeal and the continued pendency of the appeal is prejudicial to the respondent and in the interest of justice, should be dismissed for want of prosecution.

Wandabwa & Co. Advocates, counsel for the appellant/respondent filed grounds of opposition to the effect that the application is premature; that the delay has not been caused by the design of the appellant and that the application is fatally defective because it is supported by a defective affidavit.

Though the firm of Wandabwa Advocates was served with hearing notice, there was no appearance at the hearing of the application on 7/5/2014. The court being satisfied that counsel for the appellant was served, proceeded with the hearing of the application.

The appeal arose from a suit filed way back in 2007, i.e. CMCC 1542/07. The memorandum of appeal was filed on 23/12/2011. The instant application was filed way back in 28/6/2013, about 16 months after the filing of the appeal. Though the appellant filed grounds of opposition, they were not expounded upon. So far, no reason has been given for the inaction in the prosecution of the appeal. Under **Order 42 Rule 35(1)** of the **Civil Procedure Rules**, directions should have been taken before a respondent can apply to have the appeal dismissed. In this case the directions had not yet been taken because the record of appeal has not been prepared nor directions taken. Under **Rule 35(2)**, if no steps have been taken in a matter within one year, then the Deputy Registrar can set it before the judge for dismissal. Apart from moving the court under **Order 35(1)** of the **Civil Procedure Rules** which is not applicable, the applicant also invoked the inherent jurisdiction of the court under **Order 3A** of the **Civil Procedure Act**. It is well over one year since the appeal was filed. Since the delay in prosecuting the appeal has not been explained, the appeal is hereby dismissed with costs to the respondent.

DATED and DELIVERED this 6th day of June, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Wahome holding brief for Khasiani for the appellant/respondent

Mr. Biko holding brief for Situma for the applicant/defendant

Kennedy – Court Assistant