



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO. 132 OF 2010**

**JOSEPH KIIRU GACHUIGA.....1ST APPELLANT**

**MOSES WANJUKI GITAHU .....2ND APPELLANT**

**Versus**

**JOHN WAGURA IKIKI t/a**

**KENYA MOTOR GARAGE.....RESPONDENT**

*(Appeal arising from the Judgment of Hon. R.N. Nyakundi*

*Chief Magistrate Nyeri in Civil Case No. 201 of 1996)*

**RULING**

1. The appellant herein on 23rd July 2010 filed a memorandum of appeal against the judgment of Mr. N. Nyakundi then Chief Magistrate. On 24th September 2010 the appellants filed an application for stay of execution pending the hearing of the appeal which was subsequently withdrawn.
2. On 28th February 2012 the respondent/applicant filed an application under order 42 Rule 35(2) and order 51 rule 1 for the dismissal of the appeal for want of prosecution which application was supported by the affidavit of CHARLES WAHOME GIKONYO wherein he deponed that more than a year has passed since the appeal was filed and has never been set down for hearing and therefore the appellant is not keen to prosecute the appeal.
3. In response to the said application the applicant filed a replying affidavit sworn by Mr. GATHIGA MWANGI wherein he deponed that copies of the proceedings of the lower court have not been typed and neither has the appeal been admitted and directions have not been issued and therefore the appeal can not be fixed for hearing.
4. It was submitted by Mr. Wahome for the applicant that rule 40 talks of from the date of service of memorandum while Mr. G. Mwangi submitted that until the appeal has been admitted and directions given there is nothing the appellant can do.
5. The law under which an appeal can be dismissed for want of prosecution is provided for under order 42 rule 35 as follows:

***35(1) unless within three months after the giving 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.***

6. From clearing reading of this rule the respondent can only move the court under rule 35(1) which is three (3) months after direction and in this I find support in the decision of MARY KASANGO J in KIRINYAGA GENERAL MACHINERY v HEZEKIEL MUREITHI IRERI HCCC NO. 98 OF 2008 where the learned judge has this to say.

***“It is clearly seen from the rule that before the respondent can move the court either to set the appeal down for hearing or to apply for dismissal for want of prosecution directions ought to have been given as provided under (then) rule 8B. Directions have never been given in this matter. The direction having not been given the orders sought by the respondent cannot be entertained.”***

7. Rule 35(2) under which the application is premised only gives the registrar the duty to by notice list the matter before the judge and my understanding of the rule is that this can only be done when the appeal has been admitted.
8. I therefore find no merit on the application herein and will therefore dismiss the same with no order as to cost.
9. In the interest of justice Deputy Registrar of this court is hereby directed to secure the copies of proceedings herein for the chief magistrate's court within the next 30 days from the date herein.

Dated, Signed and delivered at Nyeri this 6th day of June 2014.

J. WAKIAGA

JUDGE

Mr. G. Mwangi for the Respondent.

Miss Thungu for Mr. Wahome for applicant.

Court: Ruling read in open court.

J. WAKIAGA

JUDGE