

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 38 OF 2011

PYRETHRUM BOARD OF KENYA.....PELLANT

VERSUS

WOKABI WANGOMBE.....RESPONDENT

RULING

The notice of motion dated 26/3/2011, is filed by the respondent seeking the dismissal of this appeal for want of prosecution. The application is brought under **Order 42 Rule 35(2)** and **Order 51 Rule 1** of the **Civil Procedure Rules, Sections 1A** and **3A** of the **Civil Procedure Act**. The application is supported by grounds that the memorandum of appeal was filed on 21/3/2011, served the respondent on 24/3/2011 and since then, the record of appeal has not been served and it has not been listed for hearing. The respondent accuses the appellant of indolence and that the delay is prejudicial to the respondent since he has judgment from the lower court which he cannot enjoy. He prays that, in the interest of justice, the appeal be dismissed.

A replying affidavit was filed by Mr. Felix Orege, counsel for the appellant who deposed that after the memorandum of appeal was filed on 12/11/2011, they wrote a letter to the Chief Magistrate's Court requesting to be supplied with typed copies of the proceedings and judgment and certified of the decree; that the same was received by court on 22/1/2012 but to date, they have not received the said proceedings and that neither the advocate or appellant can be blamed for the delay in prosecuting the appeal.

From the date the memorandum of appeal was filed on 21/3/2011, it took the appellant's counsel about 11 months to request for proceedings from the court as is evidenced by the letter exhibited by the appellant as FOO1. Though it is dated 12/11/2011, it seems it was never sent to the court till 22/1/2012. What is surprising is that, since 22/1/2012, the appellant's counsel has sat back and done nothing, not even written a reminder to the court. It is now over 2 years since he requested for the said proceedings and it would only be prudent that counsel reminds the court.

The appellant is enjoying stay orders in this matter and that is why for two years, they have sat back without taking any action towards having this appeal prosecuted. The laxity is demonstrated the more by the time the counsel took to request for the proceedings, about a whole year from the time judgment was delivered to January 2012. In my view, the appellant has demonstrated a very lax attitude and no effort has been made towards procuring the proceedings of the trial court in order to prepare the appeal for hearing. Two years of inaction is inordinate delay.

Under **Order 42 Rule 35(2)** of the **Civil Procedure Rules**, if the appeal is not set down for hearing within a year, the Court Registrar may issue notice to the parties to list the appeal for dismissal. The respondent can only make an application for dismissal under **Order 42 Rule 35(1)** of the **Civil Procedure Rules**. However, since this application is before this court, having found that the appellant has been indolent, I exercise this court's discretion under Sections 1A and 3A of the Civil Procedure Act and dismiss the appeal for want of prosecution. Costs to the respondent.

DATED and DELIVERED this 4th day of July, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

N/A for the appellant

Ms Njoroge for the respondent

Kennedy – Court Assistant