

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 309 OF 2006

ELIUD MAINA THEURI.....RESPONDENT/APPLICANT

VERSUS

DANSON MWAURA MWANGI.....APPELLANT/RESPONDENT

RULING

1. The respondent/applicant (**'the respondent'**) has filed the notice of motion dated 31st December, 2012. He prays that the appellant/respondent's (**'the appellant'**) appeal be dismissed for want of prosecution. The application is expressed to be brought under **order 42 rule 35(1)** of the **Civil Procedure Rules 2010** and **section 3A** of the **Civil Procedure Act (Cap 21) Laws of Kenya**.
2. The gist of the application is that the appellant has neither prepared a record of appeal nor prosecuted the appeal yet the appeal was filed way back on 16th May, 2006.
3. The application is unopposed. I have depositions in the application and I am of the following opinion that what falls for this court's consideration is whether or not the delay in prosecuting this appeal is inexcusable and inordinate.
4. A perusal of this file reveals that no directions have been taken in this appeal. The applicable provision is **order 42 Rule 35(2)** of the Civil Procedure Rules. The aforementioned provision can only be invoked by the registrar and not the respondent in this appeal.
5. I find the motion brought under Order 42 Rule 35 (1) to be premature since no directions were taken prior to filing of this motion.
6. The motion is ordered struck out with no orders as to costs.

Dated, Signed and delivered in open court this 7th of November, 2014.

J.K.SERGON

JUDGE

In the presence of:

N/A for the Appellant

Ombete h/b for Mwangi for the Respondent