

IN THE HIGH COURT OF KENYA

AT MURANG'A

CIVIL APPEAL NO 204 OF 2013

DICKSON MUTUMA KIRUTHU.....APPELLANT

VERSUS

EMILY WANJIKU MUTERO.....RESPONDENT

R U L I N G

1. The appeal herein is against a money decree of the lower court. Apparently the Appellant obtained conditional stay of execution pending appeal, and he met the conditions. The memorandum of appeal was filed on 20th June 2013.

2. On 25th August 2014 the Respondent in the appeal applied by **notice of motion dated 22nd August 2014** for dismissal of the appeal for want of prosecution. That application is the subject of this ruling. It is brought under **Order 42, rule 35** of the **Civil Procedure Rules, 2010** (the **Rules**). At the hearing of the application learned counsel for the Respondent clarified that the application is brought under **sub-rule (2)** of the said rule. The Appellant has opposed the application by his **replying affidavit filed on 13th November 2014**.

3. I have considered the submissions of the learned counsels appearing. No authorities were cited.

4. Rule 35(2) provides -

“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”.

A respondent in an appeal can certainly apply under this rule as the effect of such application will be to place the appeal before a judge for dismissal on notice to the parties.

5. The operating date in an application for dismissal under rule 35(2) is the **date of service** of the memorandum of appeal. In the present case this date is not stated in the supporting affidavit. Learned counsel for the Respondent stated at the hearing that the memorandum of appeal was served upon the Respondent on 19th May 2013. But this cannot be because the memorandum of appeal was filed on 20th June 2013!

6. This application must therefore fail upon the simple ground that the date of service of the memorandum of appeal is not disclosed. It is hereby dismissed with costs to the Appellant. It is so ordered.

DATED SIGNED AND DELIVERED AT MURANG'A THIS 5TH DAY OF DECEMBER 2014

H.P.G.WAWERU

JUDGE

