



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 163 of 2009

Editorial Summary

1. *Civil Appeal*
2. *Civil practice and procedure*
3. *Subject of Subordinate Court case*

TORT

3.1 *Running down cause.*

Motor vehicle collision between two motor

vehicles being registration No. KAU 483N, KAA 138H

3.2 *Injuries*

3.3 *Suits filed in subordinate court cases*

Limuru SRM 381/07

384/07

382/07

385/07

379/07

124/07

125/07

151/07 & 2 others.

3.4 *Test suit.*

3.6 *1st April 2009 against decision of 10th March 2009
on liability.*

3.6 *Stay of execution granted on 18th November 2009*

by Okwengu J. leave to file cross-petition granted

to be so filed within 21 days.

3.7 No further action taken on file..

3.8 Application Notice of Motion 23rd April 2012 for
dismissal of appeal for want of prosecution.

Order 42 r 35(2) Civil Procedure Rules.

4. Application under Order 42 r 35(2) Civil Procedure Rules.

4.1 Inordinate delay in prosecuting appeal.

IN REPLY:

4.2 Application opposed on grounds of a
missing exhibits.

5. Held:

Application dismissed.

Order 42 r 3(2) Civil Procedure Rules not available to applicant.

6. Case Law:

7. Advocates :

i) A.P.M. Gakumu holding brief for P. Omingo instructed by M/s Arati & Co
Advocates for appellant/original respondent.

ii) P.G. Wanjohi instructed by Kairu McCourt & Co Advocates for
respondent/original appellant

**BOLPACK TRADING CO. LTD APPELLANT/ ORIGINAL 3RD
DEFENDANT**

**ERNEST GAKURE NGANGA 2ND APPELLANT/ ORIGINAL 4TH
DEFENDANT**

VERSUS

**SAMUEL MUTURA MBURU 1ST REPENDENT/ ORIGINAL
PLAINTIFF**

**DAVID KIBURU MACHARIA 2ND RESPONDENT/ ORIGINAL 2ND
DEFENDANT**

RULING

Application to dismiss appeal under

Order 42 r 35(2) Civil Procedure Rules

For lack of prosecution

I. BACKGROUND

1. Multiplicity of suits was filed in the subordinate courts at Limuru being SRM 381/07, 382/07, 384/07, 385/07, 379/07, 124/07, 125/07 and 151/07 and two other cases.
2. The matter arose from a running down cause where two motor vehicles registration No. KAU 483N and KAA 138H collided. As a result of the collision, persons concerned sustained personal injuries.
3. A test suit was heard. The appellant appealed to this High Court on 1st April 2009. On being dissatisfied with that decision on liability, an application for stay of execution Notice of Motion dated 10th September 2009 was placed before the court and orders made on 18th November 2009 Okwengu J – that there be stay of execution and further that leave be granted within 21 days to file a cross petition.
4. No further action took place in this matter nor was there any cross-appeal filed.
5. The advocate for the respondent filed a Notice of Motion dated 23rd April 2012 seeking orders to dismiss the appeal for want of prosecution.

II APPLICATION OF 23RD APRIL 2012

6. The applicant/respondent were concerned with the delay in this matter. They came in under Order 42 r 35 (2) Civil Procedure Rules seeking orders to have the matter dismissed for lack of prosecution. The grounds being that this appeal was a test suit of filing other cases. The issue of the delay being caused due to a police file missing should not be relied on but a police abstract having all the details should suffice.
7. In reply, the respondent stated the appeal was ready save the exhibits on the police file.
8. The appeal before court awaits the lower court file to be brought up. This was required by the deputy registrar of this court on the 13th April 2010. Once the file has been brought to the High court, the registrar would place the appeal file to court, together with directions vide Section 79B Civil Procedure Rules for the Hon. Judge to admit or reject the appeal for hearing.
9. If the appeal is admitted for hearing, then the said appeal would be set down for directions under Order 42 r 35 Civil Procedure Rules at a date to be given by the registrar of the court.
10. In this appeal, no directions has been taken. The claim under Order 42 r 35 (1) Civil Procedure Rules to seek dismissal of appeal after directions would not normally be available to the applicant (before directions).
11. The application under Order 42 r 35(2) Civil Procedure Rules is available only to the deputy registrar.
12. It is therefore the finding of this court that the main issue is that of an exhibit. This would be dealt

with under Order 42 r 13 (4) (e) Civil Procedure Rules.

13. I would therefore order that the original file be brought up to begin the process of admission of this appeal under Order 79B Civil Procedure Rules.

14. The application under Order 42 r 35(2) Civil Procedure Rules not being available to the applicant is hereby dismissed with costs to the respondent.

DATED THIS 4TH DAY OF JULY 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

Advocates :

i) *A.P.M. Gakumu holding brief for P. Omingo instructed by M/s Arati & Co Advocates for appellant/original respondent.*

ii) *P.G. Wanjohi instructed by Kairu McCourt & Co Advocates for respondent/original appellant*