



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO.155 OF 2006**

**CECILIA NJOKI**

**MAINA.....APPELLANT**

**VERSUS**

**SAMWEL KANGETHE**

**KIMANI.....RESPONDENT**

**RULING**

The applicant in the present application has asked the court to dismiss this appeal for the reasons that the memorandum of appeal does not incorporate a certified copy of the decree appealed against and the court ought to summarily reject the appeal. Secondly, the applicant has deposed that four years since the appeal was filed the respondent has taken no steps to prosecute it and finally, that the appeal has no merit.

In response, the respondent has averred that the lower court is responsible for the delay in prosecuting this appeal as the record took long to avail; that the respondent is ready and willing to proceed with the appeal: that she has been waiting for this court to confirm to her whether or not the appeal has been admitted; that the appeal has high chances of success.

I have considered these arguments and the two authorities cited by counsel for the applicant. There are two instances under **Order 41 rule 31** of the revoked **Civil Procedure Rules**, now contained in **Order 42 rule 35** of the **2010 Rules**, when an appeal may be dismissed for want of prosecution. Firstly, if within 3 months after the giving of directions the appeal is not set down for hearing by the appellant, the respondent has the first option either set it down for hearing or elect to apply for its dismissal for want of prosecution. The second instance is where one year has elapsed since the filing of the memorandum of appeal and the appellant has not taken any steps to prosecute the appeal. In that instance, the registrar shall list the appeal before the Judge after giving notice to the parties and if the judge is satisfied that there are no sufficient reasons why the appeal has not been set down for hearing, the judge will dismiss the appeal. This application does not meet the conditions in any one of the two scenarios set out above.

Directions have not been taken in this appeal. As a matter of fact, the record of appeal has not been prepared. The court can only summarily reject an appeal after perusing the record and satisfying itself that there is no sufficient ground for interfering with the decree. In the second instance, it is the registrar, not the respondent who moves the court. In this matter, the respondent ought to have written to the registrar drawing his/her attention to the delay in order to cause the matter to be listed for dismissal by the judge.

On the merit of the application, it must be noted that the Memorandum of Appeal was filed way back in 2006. The lower court record was not forwarded to the High Court until January, 2007. No action was taken until this application was brought three years later. The respondent has deposed that she was not aware that the file had been forwarded or that she was required to do anything else after filing the Memorandum of Appeal. She was waiting for the court to inform her whether or not directions had been taken.

It must be borne in mind that the respondent does not have the service of counsel and was in my view, genuinely mistaken. She has expressed her readiness and interest in prosecuting the appeal. In a situation where a party satisfies the court that the delay has not been caused by lack of diligence and if, as is the case here, no prejudice is shown to have been suffered by the other side, the court will give the party a chance. This application fails for the reasons stated and is dismissed. The respondent to pay to the applicants the costs of the application.

The respondent must compile and serve the record of appeal within twenty one days from the date hereof failing which the registrar will list the appeal for dismissal.

**Dated, Delivered and Signed at Nakuru this 3<sup>rd</sup> day of March, 2011.**

**W. OUKO**

**JUDGE**