

REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

CIVIL APPEAL NO.42 OF 2016

GODFREY TAUTA OLE LERINKON.....APPELLANT

VERSUS

WALTER J. MUGANGASIA.....RESPONDENT

RULING

The application dated 27/3/2018 seeks the dismissal of this appeal for want of prosecution based on grounds that the Appellant has failed to abide by the courts direction made on 22/9/2016 and that he has also failed to take steps to have the appeal heard. The Respondent contends that he will be prejudiced if the appeal is not heard expeditiously.

The application was supported by the Respondent's supporting affidavit sworn on 27/3/2018. He deponed that when this matter last came up in court on 22/9/2016, the court directed the Appellant to file and serve submissions in respect of his application dated 29/8/2016, but he has not complied with that order to date. He deponed further that the Appellant has not made any effort to list the application dated 11/5/2016 or the appeal for hearing. The Respondent swore a further affidavit dated 31/1/2019 in which he deponed that it was through his advocate's efforts that the original file in respect of **Kajiado SPMCC No. 287 Of 2005** was brought to this court because the Appellant appears to have lost interest in the appeal.

Both parties attended court on 29/11/2018. They were directed to file written submissions on the application dated 27/3/2018 which were to be highlighted on 12/3/2019. Counsel for the Appellant did not attend court on 12/3/2019, when counsel for the Respondent who was present made oral submissions. He made reference to the Appellant's replying Affidavit and annexures thereto, alluding to the fact that they were served without a court stamp to confirm that indeed they had been filed. That replying Affidavit, said to have been sworn by Lucas Reperes Naikuni is not in the court file.

The court has considered the application, affidavits and submissions made by counsel for Respondent. The record shows that when the matter was last in court on 22/9/2016, the court granted the Respondent leave to file and serve a replying affidavit in response to the Appellant's application dated 11/5/2016, and proceeded to direct the parties to file and exchange written submissions on that application, then fix a mention date to confirm compliance with the directions before the court could give further directions on the said application. The court has not given directions on the appeal.

Dismissal of appeals for want of prosecution is governed by Order 42 Rule 35 of the Civil Procedure Rules. In **Kirinyaga General Machinery v. Hezekiel Mureithi Ireri HCCC No. 98 of 2008**, while interpreting Order XLI Rule 31 (now Order 42 rule 35), Mary Kasango J., observed as follows:

“It is clearly seen from that rule that before the respondent can move the court either to set the appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given as provided under rule 8B.”

No directions have been given in this appeal. Based on Order 42 rule 35(1), the court is not satisfied that it ought to allow the application and dismiss the appeal. The application dated 27/3/2018 is declined.

Dated and delivered at Nairobi this 24th day of April 2019

K.BOR

JUDGE

In the presence of: -

Mr. Njuguna Kihika for the Appellant

Mr. V. Owuor- Court Assistant

No appearance for the Respondent