



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND HIGH COURT AT GARISSA**

**CIVIL APPEAL NO 3 OF 2017**

**ABDIA NUROW.....APPELLANT**

**VERSUS**

**ISSACK EDEN GONJOB.....RESPONDENT**

**RULING**

**INTRODUCTION**

The respondent, ISSACK EDEN GONJOB filed a Notice of Motion dated 22<sup>nd</sup> September, 2015 under Section 3A 79B CPA and Order 50 Rule 1 CPR. The respondent is seeking an order of dismissal of the appeal herein for want of prosecution.

The respondent is also seeking costs of the application. In the grounds in support of the application, the respondent contends that the judgment giving rise to this appeal was delivered on 18<sup>th</sup> May,2009 by the then Senior Resident Magistrate Mr. A. Ingutya at Mandera Law Courts. Being dissatisfied with the decision of the said Learned Magistrate, the appellant on 11<sup>th</sup> June, 2009 and the record of Appeal filed on 19<sup>th</sup> November, 2009. The respondent further avers that it is now six (6) years since the appeal was filed and that the appellant has taken no steps to prosecute the same. In his opinion, the Appeal by the appellant is a tactic meant to frustrate him for enjoying the fruits of his judgment.

**APPLICANTS SUBMISSION**

The applicant/respondent through his advocate submitted that this appeal was filed more than seven years ago and that directions were taken and the appeal admitted for hearing by Honourable Justice Waweru on 19/6/2014. On 8/12/2014, the matter was fixed for hearing when directions were given that the appeal could be disposed of by way of written submissions. On the same day, counsel for the appellant sought time to seek and obtain fresh instructions from his client. Ever since then, the appellant did not take steps to prosecute the appeal.

**RESPONDENTS/APPELLANTS SUBMISSIONS**

The application is opposed by the appellant by way of written submissions in which he states that the delay in prosecuting the appeal has not been inordinate as to be prejudicial to the applicant. He further states that he had informed the court on 8/12/2014 the difficulty in obtaining instructions from the client who was residing in Mandera.

I have considered the application Notice of Motion dated 22/9/2015 and the supporting documents. I have also considered the rival submissions by counsel for the appellant in opposition thereto. The main issue

for determination in this application is whether the application meets the conditions for granting an order for dismissal of an appeal for want of prosecution. The application before me is brought under Section 3A and 79B CPA and Order 50 Rule 1 CPR.

Section 3A is the inherent power given to the court to issue orders in the interest of justice and to prevent the abuse of the court process. Section 79B is the power given to the court to consider whether sufficient grounds have been given failing which to expect an appeal summarily. The applicant has sought the dismissal of this appeal for want of prosecution under the above all cited sections. In my view, the court has not been properly moved for the order of dismissal of the appeal for want of prosecution. The appropriate order to seek order of dismissal of an appeal for want of prosecution is Order 42 Rule 35. Order 42 Rule 13 provides situation where no steps have been taken by the appellant to fix the appeal for hearing three months after issuance of directions. In such a scenario, the respondent has two options:

- 1. To either fix the appeal for hearing or**
- 2. Apply his summons for the dismissal of the appeal.**

An application for dismissal of an appeal can only be made through the prescribed procedure. In this case, the applicant ought to have filed his application by summons under Order 42 Rule 35(2) CPR. Since the applicant has not properly moved this court for the orders being sought, the application dated 22/9/2015 is struck with no order as to costs.

**READ, DELIVERED and SIGNED in the open court this 27<sup>th</sup> day of July 2017.**

**E. C CHERONO (MR)**

**ELC JUDGE**

**27/7/2017**

**In the presence of:**

1. Court clerk – Ijabo
2. In the absence of the applicant and the respondent.