



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO. 107 OF 2014**

**BALKAU ENGINEERING MECHANICAL**

**& STRUCTURAL ENGINEERS LTD. .... 1ST APPELLANT**

**JATINDER SINGH BHAMRA ..... 2ND APPELLANT**

**VERSUS**

**ENOCK ODHIAMBO ORIKO ..... RESPONDENT**

**RULING**

By the Notice of Motion dated 10th November 2015 the Respondent has sought dismissal of this appeal for want of prosecution. He also prays for the costs of the appeal and the application.

The gist of the application is that whereas the memorandum of appeal herein was filed on 15th October 2014 and served upon the respondent's counsel on 15th October 2014 the appellant has taken no further steps and has not demonstrated any intention and/or willingness to prosecute the appeal.

The application was opposed vide grounds of opposition dated 16th January 2016 the gist of which is that the application is premature.

The Court heard the Advocates for the parties on 18th January 2016 and has now had ample opportunity to consider the issues raised.

Order 42 rule 13(1) requires the appellant to within not less than 21 days of service of the memorandum of appeal to cause the appeal to be listed before a Judge in chambers for directions. This has never been done. Order 42 Rule 35(1) and 2 provide for dismissal for want of prosecution as follows:-

***"35.(1) Unless within three months after giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.***

***(2) 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."***

The memorandum of appeal herein was filed on 15th October 2014 and served on the respondent on the same date. No steps have ever been taken to place it before the Judge for directions as required under rule 13. The task to do so is placed on the appellant and not on the respondent or the registrar and the appellant can therefore not be heard to say that this application flouts that rule. The appellant has given no explanation for failing to do so. In any event this Court could even dismiss the appeal under sub-rule 2 as one year has lapsed since the service of the memorandum of appeal yet no steps have been taken to set the appeal down for hearing. The application is accordingly allowed with costs of the appeal and of this application being awarded to the Respondent.

It is so ordered.

**E. N. MAINA**

**JUDGE**

**28/1/2016**

**Signed, dated and pronounced in open Court this 28th day of January 2016.**

**In presence of:-**

Miss Mwalo for Respondent

Miss Namusubo for Appellant

CC: Felix



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