



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**P&A APPEAL NO. 23 OF 2012**

**IN THE MATTER OF THE ESTATE OF SAMUEL KANYONI GACHOKA ALIAS KANYONI GACHOKA (DECEASED)**

**GEORGE GACHOKA KANYONI "B"**

**DAVID KINYANJUI KANYONI .....APPELLANTS**

**VERUS**

**GEORGE GACHOKA KANYONI "A" ..... RESPONDENT**

**RULING**

1. The application subject of this ruling and dated 31<sup>st</sup> December, 2018 seeks to have the appeal dismissed for want of prosecution as the same was filed in 2012 and so far no memorandum of appeal has been served upon the respondent nor any steps taken in 6 years yet the trial court gave a stay.

2. I have considered the application and inasmuch as the same may be merited; firstly, there was no explanation why the application was served upon the Appellants yet they have a counsel on record, secondly it is not said how the process server identified them. Thirdly **Order 42 rule 35 (1)** requires that within 3 months after giving directions the appeal ought to be set down for hearing and if the appellant does not do so the respondent is at liberty to set it for hearing or apply for dismissal.

3. The **Order 42 rule 35(1)** presupposes that the appellant has filed the record and the court has given directions as to hearing. This is not the situation here as no record has been filed nor directions issued. The circumstances therefore militate against dismissal. However, **Order 45 rule 35(2)** on the other hand gives the court the power to dismiss an appeal within a year of service of the memorandum of appeal. It has been 6 years since the memorandum was filed and the court can proceed to issue notice.

4. I decline to grant the prayers sought. However since the appellants after obtaining a stay went to slumber for 6 years denying the respondent fruits of a judgement in his favour which is totally unfair, I direct the Deputy Registrar to issue notice of dismissal of the appeal for want of prosecution and set the matter down at a date to be communicated to the parties.

**Dated and Delivered in Nairobi on this 30<sup>TH</sup> day of JULY, 2020.**

**ALI-ARONI**

**JUDGE**