



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL NO. 294 OF 2012**

**PETER MBAU GAITHO.....APPELLANT/RESPONDENT**

**VERSUS**

**ANNA MUNYIVA MUTUA**

**JOSEPH MUTUKU MBITHI.....RESPONDENTS/APPLICANTS**

**(Suing for and on behalf of the dependents and the estate of JOSEPH MAINA KANYI (Deceased))**

**RULING**

1. The application dated 29<sup>th</sup> June, 2017 seeks orders that:

**1. That the Appellant's appeal be dismissed for want of prosecution.**

**2. That the order for stay of execution pending appeal issued by the Chief Magistrates Court on 3<sup>rd</sup> August 2012 and reviewed on 19<sup>th</sup> October 2012 be discharged and or set aside.**

**3. That the decretal sum deposited and held in the joint interest earning account in the names of Mbigi Njuguna & Co. Advocates and Kefa Ombati & Co. Advocates be released to the Respondents Advocates for onward transmission to the Respondent.**

**4. That the costs of this application and those of the appeal be borne by the Appellant.**

2. The application is based on the grounds stated therein and is supported by the affidavit of the 1<sup>st</sup> Applicant, Anna Munyiva Mutua. It is stated that the judgment of the Lower Court was delivered on 11<sup>th</sup> May, 2012 in favour of the Applicants for the sum of Ksh.1,421,240/= plus costs and interest. That the Respondent filed the Appeal herein on 8<sup>th</sup> June, 2012 and applied for a stay of execution pending the hearing and determination of the Appeal. That the Respondent was granted stay of execution on condition that the sum of Ksh.500,000/= was deposited in a joint fixed deposit interest earning bank account in the names of the Advocates for the parties. The Applicants complaint is that since then the Respondent has not taken any steps to prosecute the Appeal.

3. The Respondent was served with the application as per the affidavit of service sworn by the process server, Patrick Juma Yuka on 11<sup>th</sup> July 2017. No papers were filed in opposition to the application. A notice of Preliminary Objection dated 4<sup>th</sup> September, 2017 was filed by the Respondent on 6<sup>th</sup> September, 2017 on the following grounds:

**1. The motion is premature and misconceived as no directions have been given under order 42 rule 13 so as to entitle the applicant to invoke the court's discretion under order 35.**

4. The application dated 29<sup>th</sup> June, 2017 was fixed for hearing by the Applicants. The Respondent was served with the said hearing date as per the affidavit of service sworn on 29<sup>th</sup> September, 2017 by the same process server. However, there was no attendance by the Respondent on the hearing date.

5. I have considered the submissions made by the Applicants' counsel. It is noted that the Appeal was filed more than five years ago. No step has been taken by the Respondent to prosecute the appeal. No affidavit has been filed by the Respondent to explain the difficulties, if any, faced by his side in prosecuting the Appeal. The Respondent had the responsibility of preparing the Record of Appeal in order for this

court to give directions on whether to admit the Appeal in accordance with section 79B Civil Procedure Act. This court has inherent powers to prevent the abuse of the process of the court, like in the instant case where a party files an Appeal and goes to sleep.

6. For the above stated reasons, the application is allowed with costs to the Applicants.

**Date, signed and delivered at Nairobi this 31<sup>st</sup> day of Jan, 2018**

**B. THURANIRA JADEN**

**JUDGE**