

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL APPEAL NO. 54 OF 2016

JOHANA MUTHENGI TOTO.....APPLICANT

VERSUS

WILSON MUTEGI NYAGA.....RESPONDENT

R U L I N G

1. **Johana Muthengi Toto**, the Applicant, approached this Court by way of Notice of Motion seeking orders that the Appeal filed herein be dismissed for want of Prosecution and the order of stay of execution issued herein be dismissed since it has expired.

2. The application is premised on grounds that:

More than three (3) months have elapsed since the Appeal was filed and an order of stay issued; the Appellant deposited the decretal sum as ordered but has failed to prosecute the Appeal and fix it for hearing; and that it appears that the Appellant has lost interest in the matter.

3. In an affidavit in support of the application the Applicant deponed that the Respondent/Appellant filed this Appeal on **9th December, 2016** together with an application by way of Notice of Motion which was heard on **17th January, 2017** and the stay of execution order granted but the Appeal has not been prosecuted; Three (3) months having elapsed, the Appeal should be dismissed as the Appellant is not keen on prosecuting it.

4. The firm of **Rabala & Co. Advocates** was served with the Hearing Notice which was received under protest. Consequently the application was unopposed.

5. I have considered the application herein. The Appeal was admitted for hearing on the **24th** day of **January, 2017**. The matter was supposed to be listed before the Court for purposes of giving directions before the hearing. This had not been done. Dismissal for want of Prosecution is provided for in **Order 42 Rule 35** of the **Civil Procedure Rules** that stipulate thus:

“(1) Unless within three months after the 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.”

6. No directions have been given in this matter therefore the Appeal cannot be dismissed as sought. However, in the interest of justice the Appellant is directed to take a date for directions within **21 days**. In default the Respondent shall be at liberty to set down the Appeal for hearing or to apply for dismissal of the Appeal.

7. No orders as to costs.

8. It is so ordered.

Dated, Signed and Delivered at Kitui this 23rd day of August, 2017.

L. N. MUTENDE

JUDGE