



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL NO. 382 OF 2010**

**REUBEN OMWENGA MARWANGA.....1<sup>ST</sup> APPELLANT/RESPONDENT**

**FLORENCE MWANGO NYARANGA.....2<sup>ND</sup> APPELLANT/RESPONDENT**

**VERSUS**

**GWARO ONWONGA.....RESPONDENT/APPLICANT**

**RULING**

1. The application dated 2<sup>nd</sup> June, 2015 seeks orders that the appeal herein be dismissed for want of prosecution.

2. It is stated in the affidavit in support that there has been inordinate delay in the prosecution of this appeal while the Applicant is being denied the fruits of his judgment.

3. The application is opposed. The Respondents filed a replying affidavit and a further affidavit in opposition to the application. The delay is blamed on the non –availability of the lower court file due to the filing of an application for stay of execution which application was yet to be heard and determined. That subsequently this court had to hear and determine the application for stay filed before it. That the said application was determined on 10<sup>th</sup> September, 2013 on condition that a sum of Ksh.1,600,000/= be deposited. That the said deposit was made. That the lower court file was eventually availed and the appeal admitted and directions given. It is stated that the instant application has therefore been overtaken by events.

4. The application was canvassed by way of written submissions. I have considered the said submissions.

5. Appeals to the High Court are governed by Order 42 of the Civil Procedure Rules. Order 42 rule 35 provides as follows in regard to dismissal of Appeals for want of prosecution:

**“35. (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. The record of appeal was filed on 1<sup>st</sup> April, 2012. Following the determination of the application for stay of execution on 10<sup>th</sup> September, 2013, the matter was in court once again on 11<sup>th</sup> November, 2013 for the hearing of application dated 20<sup>th</sup> August, 2013 which sought orders for temporary stay of execution. The application turned out to have been overtaken by events. The appeal was to be fixed for directions but the lower court file had not been availed when the instant application was first fixed for hearing on 22<sup>nd</sup> September, 2015. The lower court file was eventually availed and the appeal admitted on

8<sup>th</sup> June, 2016. On 7<sup>th</sup> October, 2016 the appeal was certified ready to proceed and directions given that it be given a hearing date in the registry.

7. The application at hand was filed on 2<sup>nd</sup> June, 2015. Prior to the filing of the instant application, the last time this file was in court was on 11<sup>th</sup> November, 2013. The Respondents' counsel thereafter wrote the letter dated 23<sup>rd</sup> January, 2014 requesting for the appeal to be fixed for directions. The said letter was received in court on 24<sup>th</sup> July, 2014. The file was therefore active. There was delay in the availing of the lower court file. Now that the appeal is ready for hearing it ought to proceed on a priority basis.

8. With the foregoing, I dismiss the application with costs in cause.

Date, signed and delivered at Nairobi this 21<sup>st</sup> day of Sept, 2017

**B. THURANIRA JADEN**

**JUDGE**