

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CIVIL APPEAL NO. 211 OF 2010

ERASTUS MBEU.....1ST APPELLANT/RESPONDENT
MARY WANJUGU.....2ND APPELLANT/RESPONDENT
BENSON GICHOHI NGURE.....3RD APPELLANT/RESPONDENT

VERSUS

JOSEPH NDERITU NGANGA.....RESPONDENT/APPLICANT

RULING

This ruling is in respect of a motion dated 4th November, 2014 filed under **Order 42 Rule 35(1)** of the **Civil Procedure Rules** principally seeking that the appeal herein be dismissed for want of prosecution. The motion is supported by the applicant's affidavit in which he has sworn that directions under **Order 42 Rule 13** of the rules on the hearing of this appeal were given on 14th May, 2013 yet for almost one and a half years later, the appellant has not taken any step towards setting down the appeal for hearing.

Apart from the directions, the applicant took it upon himself to remind the appellants to file their written submissions in compliance with the directions given under **Order 42 rule 13** of the **Civil Procedure Rules**; this was done vide a letter dated 16th November, 2012 but again this did not elicit any form of response from the appellants.

In what appears to me to be a concession on the part of the appellants, the 1st appellant swore a replying affidavit in which he has suggested that proceeding with this appeal serves only as an academic exercise because the dispute between the parties has been compromised or resolved; the rest of the appellants did not respond to the application.

Order 42 Rule 35(1) of the **Civil Procedure Rules** under which the application was made provides as follows:-

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.

There is no doubt that the appellants have not set down the appeal for hearing more than a year after directions were given. No reason has been given for the appellants' inaction and all I gather from at least one of the appellants is that they are not interested in the appeal. If that is the case I do not understand why they could not withdraw the appeal even after this application was filed and served upon their counsel. I am satisfied that the applicant's application is merited in these circumstances and I hereby allow it; the applicant will have costs both for the application and the appeal. It is so ordered.

Dated, signed and delivered in open court this 26th February, 2016

Ngaah Jairus

NGAAH JAIRUS