



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 1 OF 2011**

**JOSECK MASITA GEORGE.....APPELLANT**

**V E R S U S**

**BAKARI SULEIMAN SARAI.....RESPONDENT**

*(Being an appeal from the Ruling and Order of the Senior Resident Magistrate at Kwale the*

*Hon. A. M. Obura delivered on 24<sup>th</sup> November 2010 in Kwale SRMCC No. 434 of 2006)*

**RULING**

1. This appeal was filed on 11<sup>th</sup> January 2011 against a Ruling at SRMCC at Kwale in **Case No. 434 OF 2006**. Since filing the appeal Appellant has taken no action at all in prosecuting it. The Respondent filed Notice of Motion dated 7<sup>th</sup> August 2014 seeking dismissal of this appeal for want of prosecution.

2. In support of the application Respondent deponed, through his Learned Counsel, that it is now three years since the appeal was filed, and that the appeal was filed as a means of Appellant avoiding execution of the lower Court Decree.

3. The deponent deponed that Appellant's suit was dismissed by the lower Court and judgment was entered for the Respondent on the Counter claim for Kshs. 535,000/-. It is that judgment the Respondent has been prevented to execute by the existence of this appeal.

4. Although the Respondent was served with the application when it came up for hearing on 12<sup>th</sup> March 2015 the Respondent was absent and had not filed any document in opposition. It therefore follows that the submission by the Respondent is upheld, that is, that the Appellant has lost interest in this appeal and the appeal was intended to interfere with Respondent's execution before the lower Court.

5. In addition to the finding that this appeal shall be dismissed for want of prosecution it shall also be struck out for being filed out of the thirty days provided under Section 79G of the Civil Procedure Act Cap 21, without leave of the Court. The appeal should have been filed on or about 11<sup>th</sup> December 2010. It was however filed on 11<sup>th</sup> January 2011. Todate the Appellant has not sought for the appeal to be admitted out of time contrary to Section 79G, see the case **GERALD M'LIMBINE -Vs- JOSEPH KANGANGI [2009]eKLR**. Section 79G provides-

**“Every appeal from a Subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the decree or order:**

**Provided that an appeal may be admitted out of time if the Appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.”**

6. In the end this appeal is hereby dismissed with costs to the Respondent for want of prosecution.

**DATED and DELIVERED at MOMBASA this 19<sup>TH</sup> day of MARCH, 2015.**

**MARY KASANGO**

**JUDGE**