



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 633 OF 2012**

**PETER N. KARIUKI**

**BERNARD KARARI MUNGAI .....APPELLANTS**

**VERSUS**

**GATHIGIA KAGURUKU (suing as administrator of the Estate of**

**BENJAMIN MWANGI GITHAIGA ..... RESPONDENT**

**RULING**

1. The application before this Court is a Notice of Motion dated 10<sup>th</sup> March 2014 brought under Order 42 Rule 35(2) and Order 51 rule 1 of Civil Procedure Rules, 2010 and Sections 1A, 1B, & 3A OF Civil Procedure Act and Article 159 of the Constitution. The applicant seeks that the applicant's appeal be dismissed for want of prosecution and seeks costs of the application and of the entire appeal.

2. The applicant relies on the grounds on the face of the application and the affidavit of Githaiga Kaguruki. The applicant contends that the appellant filed a Memorandum of Appeal on 22/11/12 against the Lower court's judgment; that since the appellant hasn't taken any steps to prosecute the appeal; that the appellants have never requested for the proceedings of the Lower Court in CMCC 586 of 2008; that the appellants aren't keen on prosecuting the appeal to its conclusion; that the delay in taking steps to prosecute the appeal unduly prejudices him and he is unable to enjoy the fruits of the judgment.

3. The appellant opposed the application and filed a replying affidavit sworn by Mr. Sammy Munywoki a Court clerk working with the firm of Okong'o Omogeni & Co. Advocates, plus the affidavit of Mr. Frank Walukwe. It is deponed that they requested for the Lower Court's proceedings in the matter vide a letter dated 29/11/12 and have religiously followed up the progress of the documents but to date he hasn't been able to trace the Court file; that the in availability of the documents is not as a result of their commission or omission on the part of the appellant or the advocates on record.

4. Counsel's for the parties made oral submissions in Court. The applicant's counsel reiterated what is deponed in their affidavits. I have considered all what is deponed by all parties; it is not in doubt that the Memorandum of appeal was filed in Court on 22/11/12 from a judgment delivered on 23/10/12; a day before the 30 days stay for filing an appeal expired. It is the appellants contention that the Lower court file has been missing. They have annexed a letter dated 22/11/12 where they wrote to the Executive Officer seeking for a certified copy of decree and judgment. Since the appellant has not written another the letter. Mr. Munywoki stated that he has been following up on the file. There is no evidence to support, should I believe him? It could be that the Court file has been missing. I'll give the appellant the benefit of doubt and will not dismiss the appeal as sought. I'll give the appellant a chance to be heard. The appellant shall prepare, file and serve the record of appeal within six (6) months from the date of this ruling and also take directions within the said period in default the appeal shall stand dismissed with costs to the respondents.

Orders accordingly.

Dated, signed and delivered this 23<sup>rd</sup> day of *July* 2014.

**R.E. OUGO**

**JUDGE**

In the presence of:-

..... For the Plaintiff/Respondent

.....For the Defendants/Applicant

.....Court clerk