



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NUMBER 696 OF 2012**

**PAUL RUTTOH. .... 1<sup>ST</sup> APPLICANT**

**SEDCO CONSULTATION LIMITED. .... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**SUSAN MUTUNGI. .... RESPONDENT**

**R U L I N G**

The lower court entered a judgment for Ksh.438,000/- against the Defendant and in favour of the Plaintiff, on 7<sup>th</sup> December, 2012. Ten days later, on 17<sup>th</sup> December, 2012 the Defendant filed this appeal by filing a Memorandum of Appeal in this court.

On 4<sup>th</sup> April, 2012, the Appellant had filed an application at the lower court seeking stay of execution pending the determination of the appeal. The lower court granted a conditional stay on 15<sup>th</sup> February, 2013. The Appellants were to deposit in court the decretal sum of Ksh.438,000/-. They deposited the amount on 16<sup>th</sup> April, 2013, after obtaining leave of the lower court to do so outside the prescribed time. This application seeking orders of court to strike out the Memorandum of Appeal and release the said decretal sum deposited in court, was filed by the Respondent on 30<sup>th</sup> May, 2013. The application in the alternative, seeks an order to transfer the decretal sum to a joint Counsel Bank interest-earning account, pending the hearing and final determination of the Appeal.

The Respondent's case is that since the appeal was filed on 17<sup>th</sup> December, 2012, nothing has been done by the Appellants to set the appeal for directions before the Judge although that should have been done within 30 days after service the Memorandum of Appeal upon the Respondent. The service was done on the 18<sup>th</sup> December, 2012 – a year and 5 months down the line. The Respondent further argued, that this is an old case, first filed in court in the year 2005 and that the Appellants intention was to go slow, and that way prevent the Respondent from enjoying the fruits of her judgment.

In response the Appellants/Respondents argued that what prevented action and progress on their part, was the lower court which took a long time to the 3<sup>rd</sup> of July, 2014, to provide a certified copy of proceedings and judgment while a certified copy of decree the certificate of delay had not still been provided by the time the application was being argued in July, 2014. The Appellants pointed to four letters they had written to the lower court pursuing the above mentioned court documents. The Appellants accordingly denied delaying in acting towards the finalization of this appeal and sought the dismissal of this application.

I have carefully considered the application to strike out the appeal for want of prosecution. I am

aware that the law requires the Appellant to fix its appeal within 30 days of service of the record of appeal. In this case the appellant has explained satisfactorily the reason for not being able to move forward. It was the failure to receive the lower court record. The documents would enable them to bind the record of appeal without which being in the file record, directions of appeal would not be due. While, therefore, the delay incurred was technically sufficient to enable this court to strike out the appeal, on the facts and circumstances, the court will not be justified to strike out the appeal.

However, this is an old case which started almost ten years ago. It should be brought to an end. Since the Appellants obtained the lower court record documents early in July, 2014, they should by now have bound and filed and served the appeal record. While I will spare this appeal from being struck out, I will in my final orders, bring pressure to bear upon the Appellants to prosecute the appeal without further delay.

**ORDERS**

- 1. This application is dismissed with costs thereof being paid by the Appellants.**
- 2. The Appeal Record shall be filed and served on or before 20<sup>th</sup> January, 2015.**
- 3. Directions in the appeal are fixed on 19<sup>th</sup> February, 2015.**
- 4. Hearing of appeal is tentatively fixed on 26<sup>th</sup> February, 2015.**
- 5. In default of (2) or (3) above, this appeal shall stand struck out or dismissed.**
- 6. In the meantime the decretal sums deposited in court shall within 15 days be transferred to a joint Counsel Bank Interest-earning Account of their choice.**

Dated and delivered at Nairobi this 18<sup>th</sup> day of December, 2014.

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**D A ONYANCHA**

**JUDGE**