



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 588 of 2002**

**1. GARDEN ESTATE ACADEMY**

**2. S. N. MWANGI .....APPELLANTS**

**V E R S U S**

**SILAS DAVID OBUHATSA .....RESPONDENT**

**(From original Civil Case No. 1074 OF 2000 before the Chief Magistrate's Court at Milimani)**

**R U L I N G**

This is an application by notice of motion dated 8<sup>th</sup> October,

2007 by the Respondent in the appeal for dismissal on the appeal for want of prosecution. The Respondent is acting in person. The Respondent's application, inasmuch as it is brought under Order 16, rule 5 of the Civil Procedure Rules (the Rules) is defective. That order has no application to appeals. All matters pertaining to appeals are provided for in Orders 41 and 42 of the Rules. Rule 31 of Order 41 specifically provides for dismissal for want of prosecution. That notwithstanding, where any situation does not come within the said rule, a party can properly apply under the inherent power of the court for dismissal of an appeal for want of prosecution.

The only ground for the application is that the Appellants have not taken any step towards prosecution of the appeal since they obtained an order of stay of execution of the lower court decree. The Appellants have opposed the application.

I have read the supporting and replying affidavits. I have also given due consideration to the submissions made. Finally, I have perused the court record. The decree of the lower court appealed against was passed on 19<sup>th</sup> September, 2002. The appeal was lodged within time on 17<sup>th</sup> October, 2002. On 18<sup>th</sup> June, 2003 the Appellants obtained a temporary stay of execution. That temporary stay of execution appears to have been confirmed by consent order entered on 17<sup>th</sup> September, 2003 pending disposal of the appeal.

The replying affidavit is sworn by the Appellants' advocate. He has deponed that numerous letters were written to the lower court requesting for copies of proceedings and judgment. Copies of such letters have been annexed. I have looked at them. The first such letter exhibited is dated 16<sup>th</sup> October, 2003. It was received by the registry of the lower court on 10<sup>th</sup> December, 2003. Although the letter mentions previous correspondence resting with a letter dated 30<sup>th</sup> October, 2002, it would appear that the Appellants' advocates took about a year to write a reminder to the lower court for copies of proceedings and judgment.

More importantly, the lower court informed the Appellants' advocates by letter dated 21<sup>st</sup> and received on 30<sup>th</sup> March, 2007 that a certified copy of the judgment and an uncertified copy of the proceedings were ready for collection. It appears that the same were collected on 16<sup>th</sup> May, 2007, that is about 1½ months later. And after collection of copies of the proceedings and judgment the Appellants still have not filed a record of appeal nor taken any other step towards prosecuting the appeal. The excuse contained in the

replying affidavit is that the Appellant's advocates have been waiting for a certificate of delay from the lower court. But what is the certificate of delay for? The memorandum of appeal was duly lodged within the time permitted by law. A certificate of delay is necessary only where the appeal has not been lodged within the 30 days allowed by law since the passing of the decree or order appealed against. See section 79G of the Civil Procedure Act (the Act).

It appears to me that the Appellants have been indolent. It is quite clear that they have not taken any credible action towards prosecution of the appeal, most likely because of the stay of execution in place. The Respondent could not apply for dismissal of the appeal under rule 31(1) of Order 41 because directions under rule 8A of the same Order have not yet been given. So he has properly approached the court under section 3A of the Act. There is no just reason why he should be kept from his money any longer. He has waited long enough. If the Appellants were diligent they would have long prosecuted the appeal. They have been indolent. No proper reasons have been given for the very long delay in prosecuting the appeal. The Appellants must suffer the consequences of their inaction.

I will in the event allow this application. The Appellants' appeal is hereby dismissed with costs for want of prosecution. That will be the order of the court.

**DATED AT NAIROBI THIS 3<sup>RD</sup> DAY OF MARCH, 2008**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 7<sup>th</sup> DAY OF MARCH, 2008**