



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU**

**Civil Appeal 75 of 2002**

**DANIEL NDUNGU NGANGA.....APPLICANT/RESPONDENT**

**VERSUS**

**BENSON MUNGAI GITAU.....RESPONDENT**

**RULING**

The applicant/respondent filed an application by way of a notice of motion brought under **Order XVI rules 5 and 6** and **Order XLI rule 31** of the **Civil Procedure Rules**. The application was filed on 20<sup>th</sup> July 2005. He sought the dismissal of this appeal for want of prosecution. The application was made on the grounds that since 14<sup>th</sup> March 2002 when the appeal was filed, the same had not been set down for hearing. On the basis of that appeal the appellant had obtained stay of proceedings in Nakuru Chief Magistrate's Civil Case No. 1432 of 1991. The applicant was prejudiced by the appellant's indolence in that he was in unlawful occupation of the applicant's parcel of land which was the subject matter of the aforesaid case before the subordinate court. The record shows that the appeal was admitted to hearing on 26<sup>th</sup> June 2003 but since that date no effort has been made to set it down for hearing.

In his replying affidavit, the appellant/respondent stated that the appeal had not been admitted to hearing but that is not the position. When his counsel's attention was drawn to the fact that the appeal had long been admitted to hearing, he said that he was not aware of the same. He further replied that the appellant should not be punished for the negligence of his counsel in failing to set down the appeal for hearing.

I cannot agree with the submissions of the respondent's counsel. Having filed the appeal, the appellant and his counsel should have been pro-active and diligently follow up the progress of the matter to ensure that it was expeditiously disposed of. I agree with the applicant's submissions that the respondent is enjoying the stay orders which were issued in the subordinate court matter to the detriment of the applicant. No reasonable explanation was given as to why the appeal has not been prosecuted over the last four years. I therefore grant the orders as sought by the applicant with the result that this appeal is now dismissed with costs for want of prosecution.

DATED, SIGNED and DELIVERED at Nakuru this 27<sup>th</sup> day of October, 2006.

**D. MUSINGA**

JUDGE

Ruling delivered in open court in the presence of Mr. Magata holding brief for Mr. Ghai for the applicant and N/A for the respondent.

**D. MUSINGA**

JUDGE