



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA  
Civil Appeal 109 of 1999**

**GEORGE E. WEKESA & OTHERS.....APPELLANT**

**VERSUS**

**AGA KHAN HEALTH SERVICES MOMBASA.....RESPONDENT**

**FARID M. S. ALMAARY.....INTERESTED PARTY**

**RULING**

Pursuant to the provisions of Order XLI rule 31 of the Civil Procedure rules, Farid M.S. Almaary the Interested Party herein applied for the appeal to be dismissed for want of prosecution or in the alternative for this court to discharge the order of stay of execution given on 27-10-99. The application is supported by the affidavit sworn by the Interested Party. The application was served but did not attract any response from the Appellant.

It is the submission of Mr. Ndegwa that the Appellant has not taken any steps to make the appeal ready for hearing. It is the argument of the Interested Party that the Appellant has lost interest in pursuing the appeal. The Interested Party has complained that he is extremely prejudiced and frustrated by the order barring him from dealing with the property.

I have considered the arguments put forward by the Interested Party. I have also perused the material placed before this court. The provisions of Order XLI rule 31(1) of the Civil Procedure Rules can only be invoked by the Respondent and not an Interested Party. When a Respondent invokes the above provisions, it must be shown that directions have been taken. It is clear that directions have not been taken in this case. In view of the above discrepancies, I find that the application under Order XLI rule 31 is premature. The same is ordered struck out. The Interested Party has also prayed for the order of stay issued on 27-10-99 to be set aside. I am satisfied that the Interested Party has been affected by that order hence he has a right to come before the appellate court to set aside the stay order. I am convinced that the Appellant has taken an inordinately long period to prosecute the appeal thus causing an untold suffering to the Interested Party. I hereby set aside the order of stay of 27-10-99 pursuant to order XLI rule 4(1) of the Civil Procedure Rules.

Dated and delivered this 19<sup>th</sup> day of October, 2006

**J. K. SERGON**

**JUDGE**

In open court in the presence of Mr. Ndegwa for the interested party.

No appearance for the Appellant.