

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI
Civil Appeal 43 of 2003

JULIANA WAWIRA NYAMU APPELLANT
VERSUS
SUSANA WAGUAMA MUCIGA RESPONDENT

**(Appeal from the original judgment in Principal Magistrate's Court at Kerugoya
Succession Cause No. 159 of 2000 dated 7th March 2002 by Mr. N. M. Kiriba – S.R.M.
– Kerugoya)**

R U L I N G

Susan Waguama Muciga (hereinafter referred to as the Applicant) is the Respondent in this appeal filed by Juliana Wawira Nyamu (hereinafter referred to as the Appellant). By her notice of motion dated 8th December 2004, the applicant seeks to have the appeal dismissed for want of prosecution and the stay of execution issued on 7th March 2003 lifted. It is the applicant's contention that the appellant has failed to expeditiously prosecute the appeal as more than 6 months has gone by since the filing of the record of appeal. She maintains that the Appellant is not serious in proceeding with the appeal and is only using it to delay execution.

The appellant has sworn a replying affidavit in which she blames her former advocates A.G. Kiai & Co. Advocate whom unknown to her had been struck off the roll of advocates and therefore took no action in the prosecution of the appeal.

It is evident from the court record that the appeal was admitted to hearing on 25th March 2004, following which the Deputy Registrar sent a notice to the appellant's advocate filed a record of appeal.

The appellants have annexed a news letter from the law society of Kenya showing that his former advocate A.G. Kiai was struck off the roll with effect from 6th September 2004. I am satisfied that the appellant has given a reasonable explanation for the delay in prosecuting her appeal. The delay was not only due to factors beyond her control but is also not inordinate.

Moreover this application is wrongly brought under section 3A and Order XVI rule 5 a & d of the Civil Procedure Act. The application ought to have been brought under Order XLI rule 31 of the Civil Procedure Rules which provides for dismissal of appeals for want of prosecution.

For the above reasons I do reject the application dated 8th December 2004 and order parties to move the court for directions with a view to having the appeal heard expeditiously.

Dated signed and delivered this 13th day of July 2005

H. M. OKWENGU

JUDGE