



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT MERU**

**Civil Appeal 29 of 1997**

**DAVID MAORE.....APPELLANT**

**VERSUS**

**GERALD MUTUMA.....RESPONDENT/APPLICANT**

**RULING**

The application before the court is dated 18.1.2005. it sought a dismissal of the appeal dated 20.5.97. The applicant in this application is the respondent in the appeal who states that since the appeal was filed, it came up for hearing on 2.3.04, 18.5.04 and on 19.10.04. All these hearing dates, argues the applicant, were fixed not by the appellant but by the respondent due to his concern over great delay. Applicant also argues that it was him who prepared the record of appeal, and also moved the court to give directions on 2.3.04. And finally, that the last action in the appeal was in October,2004. Mr. Isaboke for the respondent therefore urged the court to dismiss the appeal for want of prosecution. Pointing out to the magnitude of the lower court's award which was Kshs.15,000/- which is the substance of this appeal, he also argued that the small appeal has become very expensive to the respondent. This in addition to the other grounds, should persuade the court to dismiss the pending appeal. Mr. Mwanzia for the appellant admits that the facts as stated by the respondent/applicant are true. He said that on 18.5.2004 when the appeal was due for a hearing, the court did not sit. That on 19.10.2004 when the appeal again came for hearing, the respondent is the one who sought and obtained an adjournment. Although the court then ordered that a fresh hearing date be taken on a priority basis, the appellant admits that he did not do so until this application was filed in January,2005. Mr. Mwanzia also argues that the respondent could have taken a hearing date but again also failed to do so. He urges the court to dismiss this application.

I have carefully considered this application. It is not denied that this is 1997 appeal and that the amount involved is small and has in time greatly lost value. It is also not denied by the appellant that after he filed the appeal he never attempted to fix the appeal for a hearing himself. It is not denied further that even when the hearing which was fixed by the respondent for October,2004 failed to take off, the appellant did not seek a fresh date on priority basis as ordered by court. These facts to my mind, raise a presumption to the effect that the appellant had not really filed the appeal for any genuine purpose but because he wanted to forestall execution or realization of the decree by the respondent. I have thoroughly examined this record to see if there is really any ground upon which this appeal can be left standing and filling the appeal space in our registry. I find none. Its presence and pendency in my view amounts to an abuse of court process and totally inequitable, from whatever angle one may wish to look at it. What beats logic is why the respondent has never proceeded on with execution, in view of the fact that there appears to be no order of stay in existence.

Be it what it may, I find that this application has merit and I hereby dismiss this appeal for want of prosecution. Costs are to the respondent. Orders accordingly.

Dated and delivered at Meru this 15th Day of September,2005.

**D. A. ONYANCHA**

**JUDGE**