



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 485 OF 2013**

**NAFTALI MASARA OKWANYO....1<sup>ST</sup> APPELLANT/RESPONDENT**

**JANE MASARA.....2<sup>ND</sup> APPELLANT/RESPONDENT**

**- V E R S U S -**

**EMMA WAMBUI.....RESPONDENT/APPLICANT**

**RULING**

1. On 21.01.2014, this court issued an order staying proceedings in Nairobi C.M.C.C no. 5928 of 2008 pending the hearing and determination of this appeal within the year 2014. Emma Wambui, the Respondent/Applicant has now taken out the motion dated 4.11.2015 in which she sought for inter alia the aforesaid order to be set aside.

2. The motion is supported by the affidavit of Lilian Muthoni Njuguna. When served, Naftali Masara Okwanyo and Jane Masara, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants respectively filed the replying affidavit sworn by Stephen Oyugi Okero, to oppose the motion. Learned counsels recorded a consent order to have the motion disposed of by written submissions.

3. I have considered the grounds stated on the face of the motion dated 4.11.2016 and the facts deponed in the affidavits filed in support and against the application. I have also considered the rival written submissions. It is the submission of the Respondent /Applicant that the order issued by Lady Justice Ougo on 21.1.2014 staying proceedings in Nairobi C.M.C.C.C No. 5928 of 2008 was meant to last upto the end of the year 2014 when this appeal was anticipated to have been heard and concluded. The Respondent/Applicant further pointed out that as of the time of filing the current motion, the appeal had not and has not been prosecuted therefore this court's order staying proceedings before the trial court should be set aside. It is also the submission of the Respondents/Applicants that the Appellants/Respondents have lost interest in pursuing this appeal.

4. The Appellant/Respondents on the other hand, have vehemently opposed the motion. They argued that they have not lost interest in pursuing the appeal because they took diligent steps to have the record of appeal filed and served upon the Respondent. It is said that the trial court's file could not be traced until the year 2014 ended. The Appellants argued that the directions issued by lady Justice Ougo that the matter be heard within the year 2014 due to the fact that the matter was urgent and the same needed to be expeditiously heard and determined.

5. After a careful consideration of the material placed before this court, I am convinced that this court issued an order to have the intended appeal heard and determined within the year 2014. The Appellant have argued that there were some intervening factors, which made them not to prosecute the appeal within the stipulated. It is said that the lower court file could not be traced. The Respondent/ Applicant claimed that the trial court's file has always been available hence the reason based on a missing file to be untenable. Stephen Oyugi Okero swore an affidavit claiming that he was personally involved in trying to trace the file as late as 26.11.2015. The Appellants stated that immediately they traced the trial court's file they quickly prepared, filed and served the record of appeal. The Respondent/Applicant did not deem it fit to controvert the Appellants'/Respondents' averments made on oath through another affidavit but instead they chose to respond vide their written submissions.

6. On my part, I find the explanation given by the Appellants/Respondents to be persuasive. Though Lady Justice Ougo, gave timelines when the appeal should have been concluded, she did not prescribe the penalty for any default. In other words she did not expressly state that the order for stay of proceedings would automatically be set aside. A fair order in the circumstances is to dismiss the motion dated 4.11.2015, which I hereby do. In the circumstances of this case, each party should meet its own costs of the motion. Now that the record of appeal has been filed and served, the appeal is admitted to hearing before a single judge. Parties to obtain dates for directions and hearing of the appeal on priority basis.

7. Dated, Signed and Delivered in open court this 2<sup>nd</sup> day of March, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent