



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CIVIL APPEAL NO. 1 OF 2017

KAMENE MWENGA.....APPLICANT

VERSUS

MUTHAKYE MUSYIMI.....RESPONDENT

RULING

1. The Applicant, **Muthakye Musyimi**, approached this Court by way of Notice of Motion seeking orders as follows:

- 1) That the Appeal herein be dismissed for want of Prosecution.
- 2) That orders issued for stay of execution be dismissed since they have expired and the Appellant has failed to fix a hearing date for the Appeal.
- 3) That the costs of the application be provided for.

2. The application is premised on grounds that: It is more than a month since the Appeal was filed and orders of stay issued; The Appellant was ordered to prosecute the Appeal within **14 days** from the date of stay of execution; and the Applicant has lost interest in the matter.

3. The Applicant deponed an affidavit in support of the application where she stated that the Respondent filed the Appeal on **7th day of February, 2017** together with an application which was heard on the **14th February, 2017** and stay of execution granted. A month has lapsed since the stay order was granted. The Respondent is not keen in prosecuting the case which calls for dismissal.

4. The Respondent through the firm of **Kinyua Musyoki and Company** filed grounds of opposition where she stated that the application is pre-mature, incompetent and an abuse of the Court process; and it is based on incorrect grounds.

5. At the hearing the Applicant asked the Court to dismiss the appeal.

6. In response **Mr. Kinyua Musyoki**, Counsel for the Respondent opposing the application submitted that the Court gave unconditional stay of execution as no timelines were given in the ruling. The Court called for the Lower Court file by its letter dated **16th May, 2017** which was forwarded on the **24th May, 2017**. On the **30th May, 2017** the Appeal was admitted. The application is incompetent because the Appellant (Respondent) could not have fixed the Appeal for hearing before admission.

7. I have considered averments raised. **Order 42 Rule 35** of the **Civil Procedure Rules** provide thus:

“(1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

(2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”

As correctly pointed out by Counsel for the Respondent (Appellant) this is a matter that was admitted to hearing on the **30th May, 2017**. The application was filed on the **10th April, 2017**. No directions had been given in the matter, therefore the Appeal cannot be dismissed for want of Prosecution.

8. In the premises, the application lacks merit. Accordingly, it is dismissed with no orders as to costs.

9. It is so ordered.

Dated, Signed and Delivered at Kitui this 6th day of June, 2017.

L. N. MUTENDE

JUDGE