

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL CASE NO. 79 OF 2012

JOSEPHINE MAKHASO WAMALWAAPPELLANT/RESPONDENT

VERSUS

JAMES JOHN AMBUTSIRESPONDENT/APPLICANT

RULING

[1] The applicant has brought this application under Section 3 and 3A of the Civil Procedure Act. He prays that this appeal be and is hereby dismissed with costs for want of prosecution. He argues that the appellant has lost interest in the appeal and that its pendency is causing anxiety and/or mental anguish to the Respondent. It is also stated that the decree in the subordinate court giving rise to this appeal has already been executed and that the appeal remains for academic purposes only. The applicants relied on order 42 Rule 11.

[2] The respondent filed grounds of objection. He stated that the application is frivolous, vexatious and an abuse of the process of the court and meant to delay the hearing of the Appeal on merits. He says that failure of the lower court to release the lower court file (original record) cannot be blamed on the appellant. The appellant says that the appellant has overwhelming chances of success and that he shall suffer irreparable loss damage, prejudice and a great injustice if this appeal does not proceed on merit. In his ruling on 30th day of September, Justice Omollo moved the respondent in this application to take steps of prosecuting this appeal. The applicant herein waited for a whole year and when he found that the respondent was not doing anything he filed this application and asked the appeal to be dismissed for want of prosecution. During the hearing of this application all the respondent was supposed to do was to explain that delay of one year. He did not. Arguing that he was waiting for the original record from the lower court is not good enough. He did not annex letters to the Deputy Registrar of this court expressing his inability to get the original record. He did not depone any visits to the court registry to look for such record. It is not enough to say that the appeal has overwhelming chances of success. He had to comply with the court order and take steps to have the appeal fixed for hearing. The applicant stated that the decree giving rise to the appeal has already been executed and that the appeal now remains as an academic exercise only. This allegation was not controverted by the respondent. I agree with counsel for the applicant that no reason have been given for the delay of fixing the appeal for the period of 12 months prior to the filing of the application. I allow the application as prayed and strike out the appeal for want of prosecution with costs to the applicant.

Dated at Bungoma this 11th day of May 2016.

S. MUKUNYA - JUDGE

Ruling read in open court in presence of

Mr. Were for the respondent

Mr. Elong for Mr. Ashiruma for the applicant

S.MUKUNYA - JUDGE

11/5/2016