

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL

HC. APPEAL NO. 661 OF 2005

KENYA WILDLIFE SERVICEAPPELLANT

VERSUS

COLLINS ODERARESPONDENT

RULING

1. The Respondent in this appeal seeks by **notice of motion dated 22/08/2012** an order for dismissal of the appeal with costs for want of prosecution. The application is made under **Order 42, rule 35** (without specifying which subrule) of the **Civil Procedure Rules, 2010** (the **Rules**). **Sections 1B (1) (d)** and **3A** of the **Civil Procedure Act, Cap 21** have also been invoked.

2. The grounds for the application include the ground that since the issuance of directions on 19th June 2009 the Appellant has not taken any action to prosecute the appeal. There is a supporting affidavit sworn by the Respondent's advocate, **Joyce Lwande Oneko**.

3. The Appellant has opposed the application by a **replying affidavit filed on 11/10/2012**. It is sworn by one **Margaret Wairimu Ngugi**, a court clerk with the Appellant's advocates. Grounds of opposition that emerge therefrom include -

- i. That in November 2009 the Appellant's advocates wrote to the Respondent's advocates inviting them to attend the registry for purposes of fixing the appeal for hearing, but that the letter could not be delivered because they had moved from their known physical address without leaving a forwarding address.
- ii. That another invitation was sent by post in March 2011, but that the registry declined to give a hearing date because there was no evidence of service of the invitation.
- iii. That an enquiry with the **Law Society of Kenya** disclosed the same old address of the Respondent's advocates.

4. At the hearing of the application there was no appearance for the Appellant despite service. I have considered the submissions of the Respondent's learned counsel. I have also considered what is averred in the replying affidavit.

5. It is an unlikely story that the Appellant or its advocates could not fix the appeal for hearing merely because a letter inviting the Respondent's advocates to attend the registry for that purpose had not been delivered. Hearing dates are taken *ex parte* all the time and hearing notice served. In any event, why did it take another 1½ years before making another move to fix the appeal for hearing? And this time round, why was there no evidence of delivery of the invitation letter if indeed the registry declined to give a hearing date for want of such evidence?

6. The fact of the matter is that since directions were given on 19/06/2009 the Appellant has not taken any step to prosecute the appeal. No credible reason for this inordinate delay has been given.

7. In the circumstances I will allow the application as prayed. The appeal herein is dismissed with costs for want of prosecution. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 8th DAY OF MAY 2014

H.P.G. WAWERU

JUDGE

DELIVERED THIS 9TH DAY OF MAY 2014