

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCA CASE NO. 73 OF 2017

JOHN ODONGOAPPELLANT/RESPONDENT

VERSUS

JOYCE IRUNGU MUHATIARESPONDENT/APPLICANT

RULING

The application is dated 23rd August 2017 and is brought under order 17 rule 2 of the Civil Procedure Rules seeking the following orders;

1. That the honourable court be pleased to dismiss the appeal herein for want of prosecution.
2. That costs of this application be provided for.

The applicant submitted that, the appeal was filed way back on 22nd May, 2014 but to date the same is pending admission. That there has been no deliberate move by the applicant to have the same admitted. That the Appellant's silence informs of his intention to have this appeal remain unprosecuted to his benefit vis a vis to continue drawing rent from the disputed plot at his expense. That he cannot enjoy the fruits of the lower court judgment that was in his favour due to the stay given based in this appeal. That it is until this appeal is determined that he can tell whether or not he may proceed with the execution of the lower court judgment. That there must be an end to litigation and the only remaining option to that end is by way of having this appeal dismissed for want of prosecution.

The respondent submitted that, the Respondent/Applicant's application is premature since the appeal herein has not been admitted due to lack of the lower court records. That he filed the appeal herein and the lower court records disappeared. That the lower court records have been called to enable the court admit the appeal but the same have not been availed (Annexed is a notice dated 26/12/2014 marked JO1). That he has been unable to get proceedings to enable his advocate to prepare the records of appeal so that his appeal may proceed. That he has deposited Kshs 250,000/= in the bank as ordered by the court to enable him pursue this appeal (Annexed is a deposit slip marked J02). That he is ready to proceed with this appeal if his advocate is provided with the lower court records. That his appeal cannot be dismissed before the same is admitted to hearing. That he is not benefiting in any way from the non-prosecution of his appeal. That it is the responsibility of the deputy registrar of the court to avail the lower court records to the judge for purposes of admission.

This court has carefully considered the submissions and the annexures therein. The application is based on the grounds that the appeal herein was filed way back on 22nd May, 2014 and to date the same has not been admitted to hearing. That there has been no deliberate move by the appellant's counsel to have this appeal admitted to hearing and final determination. That it is the deliberate intention by the appellant to have this appeal unprosecuted for the reason that he is the one benefiting from the disputed plot at the expense of the respondent who was the decree holder in the lower court case. That there must be an end to litigation and in this respect the same can only be realized through dismissal of the appeal herein for want of prosecution. The respondent submitted that, the Respondent/Applicant's application is premature since the appeal herein has not been admitted due to lack of the lower court records. This court will give the respondent the benefit of doubt this time. This application is dismissed on condition that the respondent obtains a hearing date within the next 30 days from today's date. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 12TH DAY OF JULY 2018.

N.A. MATHEKA

JUDGE