



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC. CASE NO. 53 OF 2015**

**JOSEPH MBURU GITAU.....APPELLANT**

**VERSUS**

**MUNGAI KIMANANGE .....RESPONDENT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 16<sup>th</sup> April 2015 in which the Respondent seeks for this Appeal to be dismissed for want of prosecution and for the costs of the Appeal and of this Application be awarded to him.

The Application is premised on the Supporting Affidavit of the Respondent, Mungai Kimanange, sworn on 16<sup>th</sup> April 2015 in which he averred that this Appeal was lodged on 25<sup>th</sup> January 2013, as evidenced by a copy of the Memorandum of Appeal which he annexed. He further averred that since then, for a period of 2 years thereafter, the Appellant has failed to file a record of appeal or list the Appeal for directions under Order 42 rule 11 of the Civil Procedure Rules, 2010 to enable the Appeal to be considered for admission or to be rejected under section 79B of the Civil Procedure Act. He further averred that the Appellant appears to have lost interest in the Appeal and the same should be dismissed with costs to enable the lower court file namely Gatundu Resident Magistrates Civil Suit No. 18 of 2012 to be returned to the lower court for execution to proceed. He further added that the Appellant's application for stay of execution was dismissed on 10<sup>th</sup> December 2014.

Notwithstanding that this Application was served upon the Appellant on 22<sup>nd</sup> January 2016, he did not file any response thereto.

The issue I am called upon to determine is whether or not to dismiss this Appeal for want of prosecution with costs to the Respondent. The Applicable law is to be found in **Order 42 rule 35(1) of the Civil Procedure Rules, 2010** which provides as follows:

***“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.”***

In this particular Appeal, the Appellant has not sought directions under rule 13 to facilitate the setting the appeal down for hearing. He has not taken any step after filing the Memorandum of Appeal on 25<sup>th</sup> January 2013. It is clear that he has lost interest in prosecuting the Appeal. It would be unfair to hold the Respondent in this court in these circumstances. Accordingly, this Appeal is hereby dismissed for want of prosecution with costs to the Respondent.

**DELIVERED, SIGNED AND DATED AT NAIROBI THIS 21<sup>ST</sup> DAY OF JULY 2017.**

**MARY M. GITUMBI**

**JUDGE**