



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, AZANGALALA & KANTAI, JJ.A)**

**CIVIL APPLICATION NO. 52 OF 2014 (UR. 36/2014)**

**BETWEEN**

**JAMENY MUDAKI ASAVA .....APPLICANT**

**AND**

**BROWN OTENG ASAVA ..... 1<sup>ST</sup> RESPONDENT**

**AUTHUR MWANZI ASAVA ..... 2<sup>ND</sup> RESPONDENT**

*(An application for stay of execution, from the Ruling of the High Court of Kenya at Kakamega (Chitembwe, J.) dated 26<sup>th</sup> February, 2014*

**in**

**KAKAMEGA SUCC. CAUSE NO. 278 OF 2007)**

\*\*\*\*\*

**RULING OF THE COURT**

The Motion by Notice drawn by M/s Athunga & Co Advocates for the Applicant, filed under a Certificate of Urgency, is stated to be brought under Rule 5 (2) (b) of this Courts Rules and Sections 3A and 3B of the Appellate Jurisdiction Act. It is supported by an affidavit of the Applicant sworn on 18<sup>th</sup> July, 2014 where various reasons are advanced for the prayers sought principally that we grant a stay of execution in Kakamega High Court Succession Cause No. 278 of 2007 pending hearing and determination of Civil Appeal No. 23 of 2014.

That application was called for hearing on 23<sup>rd</sup> October, 2014 but neither the applicant nor his advocate was present.

Hearing Notice was served upon the said Advocates on 10<sup>th</sup> September, 2014 as is evidenced by a stamp of the said firm on the Hearing Notice and further evidenced by the Affidavit of service sworn by Joseph Kiarie, a court process served, who depones that he served the said Notice on the said law firm on the said date.

Miss M. Bikeyo, the learned counsel for the respondent, appeared for the hearing of the Motion and stated that nothing had been filed in opposition to the application. However, in terms of Rule 56 (1) of the Rules of this Court, in the absence of the applicant and his advocate where the application cannot be prosecuted the proper course to take is to dismiss the application under the said Rule which we hereby proceed to do.

As the respondents did not oppose the application they are not entitled to costs.

***DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF OCTOBER, 2014.***

**D. K. MARAGA**

.....

**JUDGE OF APPEAL**

**F. AZANGALALA**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**