



**IN THE HIGH COURT OF KENYA**

**CIVIL APPEAL NO.224 OF 2001**

**DEVJI KESRA VAGHANI ..... APPELLANTS**

**PAUL MUCHIRI MWANGI..... RESPONDENT**

1. On 5<sup>th</sup> November 2012, the parties consented to a consolidation of the respondent's Chamber Summons Application dated 25<sup>th</sup> January 2012, and the applicant's Notice of Motion dated 8<sup>th</sup> February 2012 for hearing and determination. The application dated 25/01/2012 is made pursuant to **Order 42 Rule 35 (1) Civil Procedure Rules**, and **section 3A**, seeking that the appeal be dismissed for want of prosecution, and the costs of the application be provided for. The basis for the prayer is that the memorandum of appeal was served on 13<sup>th</sup> December 2001 and the appellants filed the record of appeal on 04/01/2009. The record of appeal was subsequently served on 12<sup>th</sup> August 2010 after making several correspondences. Since then, the appellant has not listed down the appeal for directions before the Judge, as provided under **Order 42 Rule 13** of the **Civil Procedure Rules**.

In opposing the application, the appellant's counsel Mr. Felix Ochieng Orege, swore an affidavit saying his firm took over the matter in August 2010, from the firm of Pramrod Patel & Co., Advocates.

4. The matter was disposed of by way of written submissions and the applicant (Respondent's) counsel points out that the judgment/decreed against which the appeal was lodged, was entered in the year 2001 and an appeal filed in December 2001, yet since then the appellant has remained indifferent or asleep and was only moved into action when the application seeking dismissal of the appeal was made. The application seeking to amend the memorandum of appeal is described as an afterthought which is intended to open new doors for the benefit of the appellant.

6. I consider the history of this matter which was decided more than eleven years ago. The realization that there was an error in the record of appeal, became apparent in the year 2010 and the court responded quickly to the request made by the appellant counsel. Thereafter, the appellant's counsel or the appellant went, on an off mode and did absolutely nothing until 31<sup>st</sup> January 2012 when another letter was written to the court seeking to be furnished with the court file. It is not a long shot, to infer and conclude; that what stirred this belated response was nothing other than the application dated 25/01/2012 filed by the respondent to the appeal, seeking dismissal of the appeal.

8. What I decipher from the contents of the replying affidavit and application by the appellant for amendment is that there has been inexcusable delay amounting to indolence, and they do not deserve indulgence by the court. The application seeking to amend the memorandum of appeal is not made in good faith, but is designed to deliberately defeat the prayer for dismissal. I am not persuaded that the delay has been to some inadvertent action by the appellant's counsel.

**Delivered and dated this 28th day of February, 2014 at Nakuru.**

**JUDGE**