



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CIVIL APPEAL 137 OF 2011

CHARLES MUNDIA

JAMES WAIREGI MWANGIAPPELLANTS

VERSUS

WAKUTHI JOHN NDAMBIRI.....RESPONDENT

(Being an appeal from Judgment and Decree of M. WACHIRA Chief Magistrate in PMCC No. 144 of 2007 at Embu on 5th July, 2011)

RULING

This is the Notice of Motion dated 12/4/2012 brought under Order 42 Rule 13 of the Civil Procedure Rules for orders that:-

1. *The Appeal be struck out with costs.*

2. *In the alternative and without prejudice to the above the court orders the Appellants to file a record of Appeal and fix it for hearing within the next 30 days.*

The application is supported by the affidavit of Mr. Kiama advocate for the Respondent. He depones that he was served with the Memorandum of Appeal on 23/1/2012 (PKK1). No single step had been taken by the Appellants/Respondents to prosecute the appeal.

The Appellant's counsel was duly served with this Notice of Motion and the hearing notice but he did not file any replying affidavit and neither did he turn up on 19/6/2012 when the matter came for hearing.

I am not quite sure how the Memorandum of Appeal was served on the Respondent/Applicant before the same was admitted by the High Court. Order 42 Rule 11 of the Civil Procedure Rules provides for admission or rejection by the Judge under Section 79B of the Civil Procedure Act Appellant is the one to cause the placement of the appeal for admission.

It is only after admission that the memorandum of appeal is served and then other processes follow. The application for dismissal is therefore premature. I therefore give the Appellants 30 days within which they should move the Court for directions under Order 42 Rule 11 and Section 79B of the Civil Procedure Act.

The Deputy Registrar to notify the Appellant's counsel.

Cost in cause.

DELIVERED, SIGNED AND DATED AT EMBU THIS 18TH DAY OF JULY 2012.

H.I. ONG'UDI

JUDGE

In the presence of:-

Mr. Mungai for Kiama for Respondent

Njue CC