



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**Civil Appeal 79 of 2005**

**1. PETER KITHUKA MATOLO**

**2. QUENTIN WAMBUA MUTISYA**

**3. MICHAEL KINUTHIA MUTISYA.....APPELLANTS**

**VERSUS**

**SOMBA WAMBUA.....RESPONDENT**

**R U L I N G**

- 1.** This is an application by **chamber summons dated 3<sup>rd</sup> July 2009** brought under **Order XLI, rule 16** of the then **Civil Procedure Rules (the Rules)**. The main order sought is to set aside the order of 2<sup>nd</sup> October 2008 by which the appeal was dismissed for non-attendance and to reinstate the same for hearing. The main ground for the application is that the appeal was irregularly dismissed when it came up for **directions** and not for hearing. There is a supporting affidavit sworn by the Appellants' advocate.
- 2.** The Respondent has opposed the application by **replying affidavit filed on 9<sup>th</sup> September 2009**. The same is sworn by his advocate. It is conceded that the appeal was dismissed when it came up for directions. Nevertheless the Respondent urges that the dismissal was lawful and proper.
- 3.** At the hearing of the application there was no appearance for the Respondent despite his advocates having notice of the hearing. I have considered the submissions made on behalf of the Appellants. I have also perused the court record.
- 4.** On 7<sup>th</sup> July 2008 the registry fixed the appeal for mention on 2<sup>nd</sup> October 2008, no doubt for the court to give necessary directions towards preparing the appeal for hearing. Notice was to issue to the parties. I note that the appeal had not been formally admitted as yet. On that date (2<sup>nd</sup> October 2008) there was no appearance for Appellants and the appeal was dismissed for non-attendance. There does not appear to have been any enquiry whether notice had been duly served upon the Appellants.
- 5.** As the appeal was not coming up for hearing, I hold the view that it was irregularly dismissed for non-attendance. The court should first have either admitted the appeal or summarily rejected the same. That it could do *ex parte* the Appellants. But having not summarily rejected the appeal the court should have given directions with regard to filing of the record of appeal in order to prepare the appeal for hearing.
- 6.** In the interests of justice the Appellants should be accorded an opportunity to prosecute the appeal. I will therefore set aside the order of dismissal of 2<sup>nd</sup> October 2008 and reinstate the appeal to hearing. The

appeal is hereby formally admitted. Necessary directions will be subsequently given by the court. Costs of the application will be in the appeal. Those will be the orders of the court.

7. Delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now regained fully my health.

**DATED AT NAIROBI THIS 4<sup>TH</sup> DAY OF SEPTEMBER 2012**

**H. P. G. WAWERU**

.....

**JUDGE**

**COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2012**

**ASIKE-MAKHANDIA**

.....

**JUDGE**