



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**HCC APPEAL NO 86 OF 2008**

**MOSES MEDZA KUBAI.....1ST.  
APPELLANT**

**STEPHEN KAGO NDUATI.....2<sup>ND</sup>  
APPELLANT**

**VERSUS**

**JOHN MAREKIA ( DECEASED**

**Represented by GLADYS MAREKIA (wife and legal Representative.....RESPONDENT**

**RULING**

This appeal was filed on 5/7/2008. So far no steps have been taken towards its prosecution. On 17/5/2011 the Court issued a Notice to Show Cause pursuant to Order 42 Rule 35(2) of the Civil Procedure Rules for the appellant to show cause why the appeal cannot be dismissed. Ms Penina Oloo, Counsel for the appellant filed an affidavit contending that attempts to have the appeal fixed for hearing on January 2009 failed, as the lower court file had not been called for. She wrote to the Deputy Registrar to request for the file from Naivasha ('PO1'). She claims to have written to the court and the court replied to none of these letters but the said letters were not exhibited as per of 'PO1'. Counsel also exhibited several letters from her office addressed to the Deputy Registrar dated 3/6/09, 3/9/09,5/3/09, 5/3/2010 and 5/8/2010 all requesting for the lower court file but there was no response. To date, no record of appeal has been prepared or filed.

I have perused the letters exhibited by counsel. It cannot be confirmed whether any of them were received by the court because none of the letters bears the court stamp. When one writes to the court

or files a document it is immediately receipted by the registry. But for whatever the letters may be worth, I will give the appellant the benefit of doubt so that if the letters are truly written to the court, counsel did make an attempt to have the appeal prepared for hearing but for lack of the lower court record from Naivasha court. That is beyond counsel's control. I will allow the appellant 3 months within which to procure the proceedings of the lower court, have the record ready and have the appeal admitted in readiness for hearing. In default the appeal will be struck out automatically.

**DATED AND DELIVERED THIS 17<sup>TH</sup> DAY OF JUNE 2011**

**RPV WENDOH**  
**JUDGE**

**PRESENT**

Mr Oloo for applicant

CC: Kennedy Ogumo