



1. *Civil Appeal*
2. *Civil Practice & Procedures*
3. *Subject of Subordinate court case:-*
  - a. *TORT/contract*
  - b. *Employee run down by employers motor vehicle*
  - c. *Award:*
    - i. *Liability 50%*
    - ii. *General damages Kshs. 300,000/=*
    - iii. *Special damages kshs.180,513.10*
4. *Appeal*
  - i. *Employer appeals (25 October 2001)*
5. *Stay of execution:*
  - i. *Stay of execution granted (Aganyanya J. 18 April 2004)*

*on condition decretal sum of 50% is deposited to court.*
6. *Application:*
  - i. *Registrar to list appeal before Hon. Judge for dismissal (27 January 2010)*
  - ii. *Appellant served through registered post with leave of the court (Deputy Registrar)*
  - iii. *Reasons: No action taken on the appeal.*
7. *Held:*
  - i. *Application granted*
  - ii. *Appeal dismissed*
  - iii. *Security deposited be released to appellant/respondent*
8. *Case Law*
9. *Advocates*
  - i. *Kimani Githongo instructed by M/s Kimani Githongo & Co. Advocates for the Respondent/Appellant/original defendant-absent*
  - ii. *J. K. M Gichachi instructed by M/s Gichachi & Co. Advocates for the Applicant/Respondent/Original Plaintiff - Present*

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**CIVIL APPEAL NO.744 OF 2001**

**CONCORDE CONTAINER SERVICES LTD.....**  
**.....RESPONDENT/APPELLANT/ORIGINAL DEFENDANT**

**VERSUS**

**FRANCIS NDUNGU WAINAINA.....**  
**....APPLICANT/RESPONDENT/ORIGINAL PLAINTIFF**

***(Being an appeal from the order and decree of J. O. Kanyangi Esq, Senior Principal Magistrate dated 11<sup>th</sup> October, 2001 in RMCC No. 3657 of 1999 at Milimani Commercial Courts)***

## **RULING**

### **(Dismissal of appeal for want of prosecution Order XLI Rule 32(2) Civil Procedure Rules)**

#### **I. INTRODUCTION**

1. Under Order XLI Rule 31(2) Civil Procedure Rules (former) states:

*“If within one year after the serve of the memorandum of appeal, the appeal shall not have been set down for hearing the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.*

2. This rule remained identical under the Civil Procedure Rules of 2010. Section 81 of the civil Procedure Act Cap 21 Laws of Kenya.

3. The applicant/respondent/original plaintiff brought an application dated 18 January 2010 and filed on the 27 January 2010 seeking for orders that the Registrar of the High Court of Kenya place this file before the Hon. Judge for dismissal of the appeal for 12 months no action had been taken on the appeal.

#### **II. BACKGROUND**

4. The original subordinate Court case concerned TORT/contract. The applicant/respondent/original Plaintiff sued his employer when a vehicle owned by his employer accidentally ran him down due to a faulty hand break and a battery that was unserviceable. He was pinned between that vehicle and another when the vehicle moved on its own. The cause of action arose on 16 June 1998.

5. The trial Magistrate gave an award for injuries sustained at Kshs. 300,000/=. Special Damages was awarded at Kshs.180,513.10. Liability was put at 50%. The employer being dissatisfied with this award filed an appeal. On 25 October 2001, from the award judgment of 21 March 2001, his arguments being that Special Damages should have been apportioned at 50%.

6. The High Court permitted an application for stay of execution on condition that the decretal sum is deposited to court (Aganyanya J, as he then was) (16 April 2002).

7. The Appellants took no action in this appeal. It is believed that the appellants company no longer exists and they were not traced. The applicant/respondent/original plaintiff applied for substitutive service under Order V and under Order XLIII Rule 5(1)(ii) Civil Procedure Rules (formerly) and now Order 49 Rule 7(1)(iii) Civil Procedure Rule through the Deputy Registrar who is bestowed with ministerial powers under that rule to grant such orders.

8. The file was placed before this court on 30 May 2011 for interparte hearings.

#### **III. APPLICATION 18 JANUARY 2011**

Filed on 27 January 2010

9. The applicant demonstrated to this court that no action has been taken for 12 months after service of the Memorandum of Appeal.

#### **IV. FINDINGS**

10. The application to have the appeal dismissed for want of prosecution for the last 10 years is hereby granted. That the decretal sum so ordered to be deposited to court be and is hereby ordered released to the respondent/original plaintiff in this appeal.

11. There will be costs to the respondent/original plaintiff in this court and in the Subordinate Courts.

**RULING DATED THIS 3<sup>RD</sup> DAY OF JUNE 2011 AT NAIROBI**

**M. A. ANG’AWA  
JUDGE**

*Advocates*

*i. Kimani Githongo instructed by M/s Kimani Githongo & Co. Advocates for the Appellant/original defendant-absent*

ii. *J. K. M Gichachi instructed by M/s Gichachi & Co. Advocates for the Applicant /Respondent /Original Plaintiff - Present*