

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 874 OF 2007

ROBERT RUHIU CHIRA.....APPELLANT/APPLICANT

VERSUS

PETER NGURE CHIRA.....1ST RESPONDENT

GEOFFREY NGURE CHIRA.....2ND RESPONDENT

STEPHEN MIMI CHIRA.....3RD RESPONDENT

JUDGMENT

On 16th June 2010, pursuant to the Respondents' application, this appeal was dismissed for want of prosecution. On learning of the dismissal, the Appellant filed an application on 28th June 2010 to set aside that dismissal order and reinstate the appeal for hearing. Counsel for the Appellant submitted that the Respondents' application had been brought under **Order 16 Rule 6** of the **Civil Procedure Rules** which relates to suit and not appeals. They urged that the application should have been brought under **Order 41 Rule 31** of the **Civil Procedure Rules**.

Counsel also urged that they failed to attend court on the hearing of the Respondents' application because the date was not convenient to them and that they had received the hearing notice under protest. In the circumstances they urged me to allow this appeal.

On their part counsel for the Respondent submitted that their clients' application had not been opposed as the Appellant, though served did not file any replying affidavit.

Having considered these submissions I find no merit in this appeal. After filing the appeal and obtaining an order of stay, the Appellant went to sleep and did not bother to fix the appeal for hearing. He was not even piqued by the application which sought to dismiss it for want of prosecution. When served with a hearing notice counsel received it under protest and failed to attend court or send somebody to hold brief and say why he received the hearing notice under protest. That the Respondents' application was brought under wrong provisions of the law does not help the appellant who has clearly been indolent in this matter. In the circumstances I dismiss this appeal with costs.

DATED and delivered this 26th day of July 2011.

**D.K. MARAGA
JUDGE**