**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NUMBER 66 OF 2007**

**MWANASHA MOHAMED.....APPELLANT**

**VERSUS**

**FUMO SHEE FUMO.....DEFENDANT/RESPONDENT**

**R U L I N G**

I have before me the Appellant's application by way of Notice of Motion dated 5th June, 2009.

The main prayer sought by the Appellant under that motion is Order Number 3 which reads as follows:

"**That this Honourable court be pleased to vacate and set aside the Order dated 4th June, 2009, dismissing the appeal herein."**

The grounds on which the Motion is based are briefly; that the appeal was dismissed after a notice for dismissal was issued by the Deputy Registrar; that the non attendance of the Applicant's advocates on 4th June, 2009 when the matter was mentioned in court is excusable due to an inadvertent mistake in diarisation by the Appellant's clerk; that the said clerk's mistake, resulting in Appellant's counsel omitting to attend the matter in court, should not be visited upon the Appellant whose appeal has high chances of success; that the Appellant had an explanation as to why the appeal should not have been dismissed; that the Appellant shall suffer irreparable loss and damage if the orders of stay and setting aside of dismissal of the appeal are not granted; that unless the Order of stay is granted and the order of dismissal is set aside and vacated the suit premises will be valued and sold, to the detriment of the Appellant.

From the record held on the file, the background to this matter is as follows. The appellant prepared an appeal against the judgement of Hon. Kadhi Mr. Twalib B. Mohamed dated 24th April, 2007, in Kadhi Succession Cause number 58 of 2005. The Memorandum of Appeal was both dated and filed on 3rd May, 2007. On 4th May, 2007 the parties entered consent before the Kadhi's court saying execution of the Judgement.

On 24th June, 2008 the Respondent took out a summons pursuant to Order XLI Rule 31 (2) of the Civil Procedure Rules, seeking the striking out of the Appellant's appeal for want of prosecution. Justice Sergon ruled on the 6th March, 2009, and that the power to cause the file to be listed before the court is reserved to the Registrar and not the Respondent, that the Respondent's right lies under Rule 31(1) and the inherent jurisdiction of the Court. He declined the application.

The record shows that on 27th March, 2009, the appeal was admitted by certificate Under Section 79(B) by Hon. Justice Azangalala. On 2nd April, 2009 the Deputy Registrar placed the file before the Judge under Order XLI Rule 31 (2) of the Civil Procedure Rules for orders of dismissal for want of prosecution, as no steps had been taken in the appeal since 2007. On 9th April 2009, the case was listed for mention on 20th April, 2009. Both parties' counsel appeared before Hon. Justice Sergon on 20th April, 2009, and the matter was stood over generally. On 28th April, 2009 the matter was listed for hearing on 4th June, 2009 and notices issued. On that date, the Appellant was unrepresented and Justice Sergon ordered the appeal dismissed for want of prosecution.

In this application, Mr. Mwakireti argues that the listing and forwarding of the appeal by the Registrar for dismissal for want of prosecution under Order XLI Rule 31(2) on 2nd April, 2009 is an error apparent on the face of the record. He says that the Registrar was obliged under Order XLI Rule 8B to issue and deliver a Notice to the parties listing the appeal for directions by a Judge in chambers, after Judge Azangalala before whom it came, refused to reject the appeal summarily. As this was not done, directions were not taken in compliance with Order XLI Rule 8B of the CPR. Thus, the appeal could not be dismissed under Order XLI rule 31(2) as the Deputy Registrar had to comply with the provisions relating to issuance of notice to the parties for giving of directions, upon which the appeal would be ready for listing for hearing.

Mr. Mwakireti pointed out that no steps could have been taken since 2007to list the appeal for hearing because no such steps could be taken before the appeal was admitted and directions taken in accordance with the rules.

On the issue as to his absence in court on 4th June, 2009 for the hearing of the notice of dismissal, Mr. Mwakireti said that the same was a diarisation error well explained in the Affidavit of his clerk, Estone Akumonyo dated 5th June, 2009. In that affidavit the clerk outlines that he inadvertently diarised the notice of dismissal hearing for 24th June, 2009 rather than 4th June 2009. He annexed copies of that day's page of his diary. Counsel argued that the inadvertent and unintentional error on the part of his clerk should not be visited on his client, leading to the drastic consequence of the dismissal of the appeal.

The Respondent filed Grounds of opposition to the Motion on 7th July, 2009. The grounds state, inter alia, as follows:

**2. That the Appellant is not interested in prosecuting the appeal and just want to bid time while she enjoys the stay of execution to the detriment of the Responded(sic) who is elderly and sick.**

**3. That the orders dismissing the appeal were properly issued as the Appellant failed to show any cause as to why the appeal should not be dismissed."**

**4. That the Appellant has not shown any steps that she has taken to prosecute the appeal since it was filed on 3rd May, 2007."**

In addition, on 11th April, 2011, the Respondent filed an affidavit sworn by Mwaziza Fumo Shee, as personal representative of the deceased respondent, in which she reiterates that the dismissal was done pursuant to a direction by my learned Senior Brother Hon. Justice J.K. Sergon, after notice of dismissal had been served for the hearing on 4th June, 2009 and the appellant failed to attend. Further, that she, the deponent, had discovered that the Appellant was intermeddling with the estate of the deceased Respondent by, amongst other things, transferring one of the properties of the deceased's estate, to the Appellant and her sister. She annexed a copy of a land search dated 12th October, 2010 in respect of Title No. Kwale/Vanga/5 showing that the proprietors were Mwandazi Mohamed Nassor and Biasha Sharrif Omar. She depones in Paragraph 10 of the affidavit that Mwandazi Mohammed Nassor is the same person known as Mwanansha Mohamed Nassor, the Appellant.

Mr. Alwenya for the Respondent argued that the issuance of directions under Order 41 Rule 1(b) are the duty of the Registrar, but that it was a practice for parties to move the Registrar. The Appellant had made no such application. Counsel pointed out that both parties' counsel were present when Hon. Justice Sergon ruled on 6th March, 2009 that action should be taken under Order 41 Rule 31, and it was pursuant to that ruling that the Registrar issued a notice of intention to dismiss the appeal which was duly served on both parties. He urged that the explanation of mis-diarisation for failure to attend is insufficient, and the consequence was the dismissal of the appeal, as the judge had noted that no steps had been taken in prosecuting the appeal.

Finally, Mr. Alwenya urged that the court should take into account the issue of intermeddling in the estate in reaching its decision.

I have considered the submissions of counsel carefully. What I have to decide is whether, in the circumstances detailed above the appeal herein was regularly and properly dismissed for want of prosecution under the provisions of the then extant Civil Procedure Rules.

The Ruling of my brother Justice J.K Sergon dated 4th June, 2009 states:

**" The appellant was served with a notice under Order XLI 31 (2) Civil Procedure Rules by the Deputy Registrar. The Appellant and his** counsel **are absent. In the absence of any submissions, I have no reason to why the appeal should be spared. The appeal is ordered dismissed for want of prosecution with costs to the Respondent."**

Order XLI Rule 31 (2) Civil Procedure Rules, relied upon, provides as follows:

**" If within one year after the service 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."**

This rule is clear enough; within one year of service of the Memorandum of Appeal if a hearing date is not taken the Registrar is empowered to serve parties a notice of dismissal, and list the appeal before a judge for dismissal.

In this case, the Memorandum of Appeal was filed on 3rd May, 2007 and served on 10th May, 2007. Hon. Justice Sergon's earlier ruling of 6th March, 2009, declining to grant the Respondent's application for dismissal, records that the Respondent had not taken any steps to prosecute the appeal since 8th June, 2007. Prompted by the said Ruling of 6th March 2009, the Respondent's advocates wrote to the Deputy Registrar requesting that the file be placed before a judge for dismissal under Order XLI Rule 31(2). The Defendant then placed the file before the judge on 2nd April, 2009 for dismissal, which was effected by the Ruling of 4th June, 2009. The actions taken appear straightforward under Order XLI Rule 31 (2).

What has complicated the matter is the fact that on 23rd March, 2009, ten days before the said order, the Deputy Registrar had placed the file before the judge for certification under Section 79(B) of the then Civil Procedure Act. For, presumably, it was thought, that a dismissal could not be effected of an uncertified suit. Thus, the learned Judge on 27th March, 2009 certified the appeal and did not reject it summarily. Section 79 B provides:

**" Before an appeal from a subordinate court is heard, a judge of the High Court shall peruse it, and if he considers there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding Section 79 C, reject the appeal summarily."**

This step of deciding (or certifying) whether or not to reject an appeal summarily is a mandatory step for

every appeal from a lower court. That step, clearly, must be taken before an appeal can be heard, for the obvious reason that the High Court should not be engulfed with appeals for hearing which have not passed the criteria for summary rejection.

Once the court has satisfied itself that an appeal meets the benchmark for a hearing, it may then be set down for the actual hearing. When the judge refused to reject the appeal under Section 79 B, then Order XLI, Rule 8A kicked in, requiring the Registrar to notify the Appellant who would then serve the Memorandum of Appeal on every respondent. Thereafter, not less than twenty one days(21) after the date of service of Memorandum of Appeal the Registrar was obligated to list the appeal for the giving of directions in chambers. This obligation is placed on the Registrar by Order XLI Rule 8B.

In this case, the Memorandum of Appeal had in fact long been served on the Respondent on 10th May, 2007. Service thereof is confirmed by the Respondent's Affidavit dated 25th June, 2008 deponed in support of his Chamber Summons Application on 24th June, 2008 seeking dismissal of the appeal for want of prosecution. The Appellant, by early serving the Memorandum, appears to have presumed that the appeal had not been rejected summarily under Section 79B and that Order XLI Rule 8A on service of the Memorandum of Appeal, needed not be complied with. The Appellant, having by its action in fact pre-empted the application of Order XLI Rule 8A, the efficacy of the Provisions of Rule 8B (1) of that Order were left in suspense.

Rule 8B(1) requires the Registrar to give notice to the parties within twenty one days of service of the Memorandum of Appeal for the giving of directions by a judge in Chambers. That is notice for attendance for directions. It is this notice and those directions that the appellant argues have not been given to precipitate the setting of a hearing date for the appeal. In the absence of these, the appellant contends, the dismissal could not be validly done under Order XLI Rule 31(2).

The question that then arises is whether the certification by the judge under Section 79B on 27th March, 2009, had the effect of re-opening the procedural thoroughfare and processes so that the procedures under Rules 8A and 8B of Order XLI had to be restarted. I think not. Both the Appellant and the Respondent had the respective pleadings of the other, a notice of dismissal issued by the Registrar had been issued, and a hearing date taken thereon. Justice Sergon had previously indicated a procedure, given the unique circumstances, for the effecting of a notice of dismissal and the Respondent had been present in that proceeding. Notice had been fulfilled to that extent.

It appears to me redundant that a notice for attendance for directions should become again necessary given that the matter was ongoing, and the mischief intended to be cured or pre-empted by Rules 8A and 8B had already been cured or safeguarded against.

Further, I observe that the Appellant's Notice of Motion is stated to be premised on Order XXI Rule 22 of the Civil Procedure Rules and Sections 63 and 3A of the Civil Procedure Act. Order XXI Rule 22 concerns situations when the court may stay execution of decrees. There is no decree before me and that Rule is inapplicable here. The correct procedure would have been for the Appellant to invoke Order XLI Rule 16 for the re-admission of an appeal dismissed for default, and he is able to show that he was prevented by any sufficient cause from appearing.

The Court of Appeal in **Gerald Muchiri Ndungu and Timothy Kogi Versus Charles Ndumu Wanyoike[2005] e KLR** stated in relation to dismissal of appeals:

"**By Order XLII Rule 1(1) (2) of Civil Procedure Rues, an appeal lies as or right against the dismissal of an appeal under Order XIL Rule 31. However, Order XLI does not provide for an application for reinstatement of an appeal dismissed for want of prosecution under Order XLI Rule 31. The rules only provides for re-admission of an appeal dismissed in default of attendance on the hearing date (see Order XLI Rule 16)."**

Given the invocation of the incorrect Procedural Rules, herein, the general dilatory conduct of the Appellant in this matter, and all the circumstance already noted, I consider that the explanation of misdiarising the hearing for dismissal to be an insufficient reason in terms of Order XLI Rule 16.

For all the foregoing reasons, I hereby dismiss the Appellant's application to vacate and set aside the Order of 4th June, 2009, made by Hon. Justice Sergon. Costs to the Respondent.

**Dated and delivered this 18th Day of November, 2011**

**R.M. MWONGO**
**JUDGE**

**Read in open court**
**Coram**:
1. Judge: Hon. R.M. Mwongo
2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

a) ……
b) ……
c) ……
d)……