REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL NO. 94 OF 2006

EPHRAIM GATHIGO KARANJA……..……..APPELLANT
VERSUS
STEPHEN GAKURE KIIRU…….…….RESPONDENT

R U L I N G

The Application at bar is the notice of motion dated 25.02.2010. Prayer 1 which seeks to consolidate **Civil Appeals No. 94 of 2006. 95 of 2006, 96 of 2006, 97 of 2006 and 98 of 2006** for purposes of hearing and determining the Application is not opposed. The same is therefore allowed. In any event the ruling that dismissed the 5 appeals and which the applicant now seeks to have reviewed is one and it dealt with all the appeals in question. The said Ruling dismissed the Appeals in question for want of prosecution. Counsel for the Applicants wants that Ruling reviewed and/or set aside so that the Appeal can be heard and determined on merit.

From the outset, I must say that none of the 6 grounds on the face of the application has stated that there has been a discovery of new and important material which was not within the Applicants knowledge as at the time the application for dismissal was allowed. They have just repeated the issues that were canvassed at the hearing of the said application and ruling given on the same.

The only new material is stated in paragraph 3 of the supporting affidavit which reads
"That I know of my own knowledge and from my file records that the appeals herein were filed on15.12.2006 pursuant to a consent agreed upon by the Respondent on 29.11.06."
This averment must have been prompted by my observation in the ruling dated 6.10.09 to the effect that
"It is not clear whether the Appeals were filed pursuant to leave granted by the court. If there was leave, the memorandum should clearly indicate that the Appeal was filed pursuant to the leave of the court dated…."
The position in law is the same, the appellant should have indicated in the memorandum of Appeal that the same was filed pursuant to a consent of both parties. In any event, that was not the reason why the appeals were dismissed. Be that as it may, Section 79G of the Civil Procedure Act has no place whatsoever for enlargement of time within which to file an Appeal out of time by consent of both parties. The legal requirement that the Appellant satisfy the court that he had good and sufficient cause for not filing the Appeal in time is not optional. That consent was therefore non-consequential unless endorsed by the court which does not appear to have been the case.

The other issue the applicant seems to rely upon is that the Appeals had not been admitted to hearing and so they were not ripe for dismissal. This averment is not however something that was not in the knowledge of the applicants since it is their Appeal. Nor was it information that they could not have gotten then with exercise of due diligence. They cannot therefore rely on that to seek review orders. In any event, the dismissal was sought on the memoranda of Appeal and since there cannot be an appeal without the Memorandum of Appeal, once the memoranda were dismissed, then the Appeals could not subsist and so they stood dismissed. The dismissal was not under Order XLI Rule 31(1) of the Civil Procedure Rules but under Order XLI Rule 32(2) which provides:-
"If within 1 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 sub-rule applies to situations where the appeal has not been admitted and directions have not

therefore been taken. This was meant to counter situations such as this where parties just file the appeal, in some cases they get orders of stay, and then they refuse to move the court for the admission of the Appeal or even for the Record of Appeal to be prepared. The memoranda of appeals were served on 15.08.2007. The court was therefore in order to dismiss the Appeals. On the other hand, even assuming that I am wrong in the above interpretation, then this is wrong exposition of the law. Its recourse or correction lies on appeal but not by way of review.

The Applicant has not convinced me that there are any grounds for reviewing or setting aside my ruling. It having been heard inter partes, counsel for the applicant had every chance to raise the issues he is raising now as none of them are subject to a recent discovery. His application lacks merit and I must which I hereby do dismiss it with costs to the Respondents.

W. KARANJA
JUDGE

Delivered, signed and dated at Embu this 26th day of October 2010
In presence of:- Mr. Musundi for Applicant.