



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**Civil Appeal 114 of 2006**

**LOCHAB BROTHERS LTD:.....APPELLANT**

**VERSUS**

**LILIAN MUMBI NGANGA.....1<sup>ST</sup> RESPONDENT**  
**MOSES NYONGESA:.....2<sup>ND</sup> RESPONDENT**  
**NANCY MWAURA:.....3<sup>RD</sup> RESPONDENT**

**RULING**

This is an application by way of summons in chambers brought under Order XLI Rule 3(1) (2) of Civil Procedure Act and all other enabling provisions of the Law. It prays for Orders that the Appeal herein filed be dismissed for want of prosecution and for the costs of the application. It is brought on the grounds that the Appellant has not taken any steps to file the Record of Appeal and the Respondents should not be kept in indefinite abeyance by the Appellant's reluctance in prosecuting the Appeal and that litigation must come to an end. The application is supported by the sworn affidavit of Donald O. Owang, counsel for the Respondents. In reply to the application counsel for the Appellant has sworn an affidavit in opposition and states that the delay in prosecuting the Appeal has been caused by no fault on the part of the Appellant. It is stated that the pre-liquisites to hearing the appeal have not been done and that the appeal has not even been admitted to hearing and no directions have been given and that there is nothing the Appellant was obliged to do which it has not done.

It is admitted by both sides that to date the Appeal has not been admitted to hearing. The function of having the Appeal admitted is not of the Appellant's but of the court, see S.79B of the Civil Procedure Act and Order XLI rule 8B which require the Registrar of the court to list the Appeal for purposes of giving directions by a judge in chambers has also not been done and thereby Rule 31 (1) of the Civil Procedure Rules under which the application is brought cannot apply. The Appellant's assertion that the 3<sup>rd</sup> Respondent has since passed on and no substitution has been done was not controverted and that would appear to be yet another reason why the appeal herein is not ready for hearing.

This appeal is not for dismissing for the reason of its none prosecution. However the application under consideration must have stirred the Appellant to quickly and diligently move the Deputy Registrar of this court to process the Appeal.

For those reasons the application under consideration is found to be premature and it is accordingly dismissed with costs.

**DATED AND DELIVERED AT ELDORET THIS 25<sup>TH</sup> DAY OF FEBRUARY 2010.**

**P.M.MWILU**  
**JUDGE**

**IN THE PRESENCE OF:-**

Paul Ekitela - Court Clerk

Mr. Manani - Advocate for the Respondent

Mr. Chemoiyai holding brief for Mr. Marube for Mr. Kimondi.