



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 237 OF 2009

(Being an appeal from the judgment in the original CMCC No. 1201 of 2003 at Kisii – A.A. Ingutya, SRM)

BETWEEN

**KENYA TEA DEVELOPMENT AGENCY
LIMITED.....APPELLANT**

VERSUS

**CHEPKWONY WESLEY
CHERUIYOTRESPONDENT**

RULING

This file was transmitted to this court from the High Court of Kenya at Kisumu where the appeal had been registered as Civil Appeal No. 2 of 2005. On 23rd September, 2009, Mwera, J. dismissed the appeal. The appellant filed an application dated 30th September, 2009 seeking to set aside the dismissal order and to have the appeal reinstated to hearing. The application was filed on 29th October 2009. In an affidavit sworn by Patrick J.O. Otieno in support of the application, he deposed that the memorandum of appeal was filed on 5th January, 2005. The court on its own motion fixed the appeal for dismissal on 23rd September, 2009 but no notice was served upon the appellant's advocate.

When the matter was called out, Mr. Maobe advocate held brief for him as he was indisposed. Mr. Kelenga advocate for the respondent told the learned Judge that no affidavit had been filed to show cause why the appeal could not be dismissed.

Mr. Otieno contended that the appeal was wrongfully dismissed because directions had not been taken.

Mr. Ogwen for the respondent filed a replying affidavit and stated that the appeal was dismissed pursuant to the provisions of **Order XLI rule 31 (2)** of the **Civil Procedure Rules**. Due notice having been served on both parties, the court was right in dismissing the appeal.

I have perused the file and noticed that on 31st March, 2009 the respondent's advocates wrote to the deputy registrar at Kisumu and informed him that more than one year had passed since they were served with the memorandum of appeal. They requested that the appeal be listed down before a judge in chambers for dismissal pursuant to the provisions of **Order XLI rule 31 (2)** of the **Civil Procedure Rules**. The same states as hereunder:

“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.”

Following the respondent’s advocate’s letter aforesaid, the deputy registrar issued a notice dated 20th April, 2009. Although the heading of the notice was wrongly stated as having been issued under **Order XVI rule 2**, there is no denial that the notice was supposed to be issued in terms of the appellant’s advocate’s letter aforesaid.

When the appeal was called out before Mwera, J. there was no affidavit filed by the appellant’s advocate stating any reason as to why the appeal could not be dismissed. The judge must have seen the deputy registrar’s notice and was satisfied that it had been served upon both parties. Mr. Otieno had even seen the matter in the cause list several days before it was listed before Mwera, J.

In the circumstances, I cannot interfere with the orders made by my brother on 23rd September, 2009. Consequently, this application is dismissed with costs to the respondent. This ruling shall also apply to HCCA No. 45 of 2010 since counsel for the parties had so agreed.

DATED, SIGNED AND DELIVERED AT KISII THIS 28TH DAY OF JULY, 2010.

D. MUSINGA

JUDGE.

28/7/2010

Before D. Musinga, J.

Mobisa – cc

N/A for the Appellant.

Mr. Ogweni for the Respondent

Court: Ruling delivered in open court on 28th July, 2010.

D. MUSINGA

JUDGE.