



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT BUNGOMA**

**Civil Appeal 4 of 1999**

**SYLVESTER KHAEMBA KWANUSU :::::::::::::: 1<sup>ST</sup> APPELLANT**

**MACHESO KWANUSU :::::::::::::: 2<sup>ND</sup> APPELLANT**

**~VRS~**

**KHAEMBA CHIMAKILE :::::::::::::: 1<sup>ST</sup> RESPONDENT**

**NYONGESA KHAEMBA :::::::::::::: 2<sup>ND</sup> RESPONDENT**

**RULING**

**Mr. Onyando applied orally for dismissal of the appeal for want of prosecution. The Appellant has not moved the court for ten years now. The second ground was that the appeal record has a mix-up of names where the Appellants are named as Respondents and vice versa. The appeal record is therefore defective.**

**Mr. Situma replied that the anomaly on the appeal record was rectified by filing a supplementary record with leave of the court.**

**The court record shows that the leave to file a supplementary record was granted by Justice Sergon on 7<sup>th</sup> March, 2005. The record was filed on 31<sup>st</sup> March, 2005. This sorted out the problem of mix-up of the names of the parties. A hearing date was fixed on 12<sup>th</sup> October, 2005 for 12<sup>th</sup> October, 2006. Both counsels appeared before the court. The appeal was stood over pending the counsel for the Respondent to file an application to withdraw from acting.**

**The application was not filed but a notice of change of advocates was filed on 11<sup>th</sup> October, 2005 bringing in M/s Onyando & Co. to appear for Respondents and allowing the exit of Wasilwa & Co.**

**Since that time, the Appellant has not moved the court to fix a hearing date. Mr. Situma says he was not served with the notice of change of advocates. I agree with the Respondent's counsel**

**that this is not an excuse for Mr. Situma and his client to fix a date for hearing of the appeal. The Appellants must show interest in their appeal or else they may suffer the consequences. This court closed the 2010 diary in July 2009. It is not a sound or convincing reason to say that there are no dates. Being an appeal filed in 1999, it is a very old one running to ten (10) years. No good explanation has been given as to why no action has been taken since the supplementary record was filed.**

**I agree with the Respondent that the reasons given by the Appellant are not convincing. Order XLI Rule 31 allows the court to dismiss an appeal for want of prosecution. The Respondent ought to move the court by way of summons which they have not done. The court may dismiss the appeal on its own motion.**

**I am satisfied that the Appellant has not made any attempts to prosecute his appeal for the last three and half (3 ½ ) years. I invoke Order XLI Rule 31 (2) and dismiss the appeal accordingly with costs to the Respondents.**

**F. N. MUCHEMI**

**JUDGE**

*Dated, Delivered and Signed at Bungoma*

*This 10<sup>th</sup> day of November, 2009 in the presence of:*

*Mr. Situma for the Applicant and Mr. Onyando for the Respondent.*