



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MACHAKOS**

**Civil Appeal 76 of 2002**

**1. CHARLES MUNYAO KITHOME**

**2. THOMAS MUNYAO KITHOME ..... APPELLANTS**

**VERSUS**

**DANIEL MUSILA MUTISO ..... RESPONDENT**

***(Being an application to set aside an order dismissing an appeal)***

**RULING OF THE COURT**

1. The appellants'/applicants' application dated 26/06/2006 and brought under Order 50 Rule 1, Order 23 Rule 8 (2), Order 41 Rules 16 and 31 of the Civil Procedure Rules (CPR) and Section 3A of the Civil Procedure Act, Cap 21 and all other enabling provisions of the law seeks an order that the dismissal of the appeal herein be set aside and the appeal be reinstated and re-admitted for hearing.
2. The application is premised on 4 grounds on the face thereof, the main one being that the appeal was prematurely dismissed since no directions had been taken in terms of the relevant provisions of Order 41 and in particular Rule 31 G thereof. Further, that the dismissal order was erroneous since some vital steps required to be taken in bringing an appeal to the stage of being dismissed for want of prosecution had not been taken; that the dismissal order was irregularly made and finally that the re-admission and reinstatement of the appeal will meet the ends of justice.
3. The application is supported by the sworn affidavit of CHARLES MUNYAO KITHOME, the only surviving appellant/applicant, and son to the 2<sup>nd</sup> appellant/applicant (now deceased). He says that in or about mid March 2006, he discovered that the appeal herein had been dismissed on 22/09/2005 for want of prosecution. He also says that following the death of the 2<sup>nd</sup> appellant, their advocates on record had advised them to take out substitution proceedings – see annexure CMKI which is the advocate's letter dated 10/01/2005. The deponent also says that by another letter from their advocates dated 10/01/2005, he had been advised of the impending dismissal of this appeal, but he says that that letter was not received by himself. The letter marked "CMK2" by F.M. Mulwa advocate advised the deponent that the appeal had been fixed for mention on 22/06/2005.
4. According to the affidavit, the deponent and his brother JULIUS WAMBUA KITHOME were appointed administrators of the deceased estate as per annexure "CMK3". He also says that according to his advocate's advice, the appeal was not ripe for dismissal because Order 41 rules 8B (3) and 31(2) had not been complied with.

5. The Respondent filed Grounds of Opposition in accordance with the provisions of Order 50 Rule 16. The appellants/applicants are accused of inordinate delay in bringing this application, and the respondent contends that there is no good reason given for the delay between 22/09/2005 when the appeal was dismissed and 26/06/2006 when this application was filed; that the issues being canvassed by the appellants/applicants now, ought to have been canvassed on 22/09/2005; that the appeal was properly dismissed under the provisions of Order 41 Rule 31 (1) of the CPR; and that having failed to comply with court orders to compile the Record of Appeal, the appellants/applicants deprived themselves of the opportunity to be heard on the appeal; that between 25/09/2002 when the appeal was admitted to hearing and 3/12/2003 the appellants/applicants took no step towards setting the appeal down for hearing and further that the purported administrators of the estate of the deceased 2<sup>nd</sup> appellant/applicant have no capacity to bring this application on behalf of the deceased since no substitution has been made. Finally, it is contended by the respondent that the sworn affidavit of CHARLES MUNYAO KITHOME contravenes the provisions of the Oaths and Statutory Declarations Act (Cap 15 Laws of Kenya).

6. Mr F.M Mulwa argued this application on behalf of the applicants. He reiterated the grounds on the face of the application and said that infact an essential step as provided by Order 41 Rule 8 (B) had not been taken so that at the time of dismissing the appeal on 22/09/2005, the appeal was not ready for hearing, and further that the Deputy Registrar did not issue any notice to the parties requiring them to appear before the judge in chambers for dismissal of their appeal. Counsel for the applicant relied on the case of JOHN NJIRU MUYA vs NGUU MUYA & ANOTHER – Civil Appeal (Court of Appeal at Nyeri) No. 270 of 1999. In the said case the Court of Appeal said that an appeal from the subordinate court once filed has to go through the following stages:

- a. The appeal is to be placed before a judge of the High Court under Section 79B of Cap 21 for perusal and if the judge considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against, he may, notwithstanding section 79C, reject the appeal summarily.
- b. If the appeal is not summarily rejected under section 79B, it should then be placed before a judge in chambers for directions under Order 41 Rule 8B (3) of the CPR.
- c. Before allowing the appeal for hearing, the judge shall also satisfy herself as to the provisions of Order 41 Rule 8B(4) relating to the documents required for the hearing of the appeal.
- d. Within three months after the giving of directions under Rule 8B the appeal shall be set down for hearing by the appellant, otherwise the Respondent may choose to set the same down for hearing or to apply to have the appeal dismissed for want of prosecution as per Rule 31 (1).
- e. 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 as provided under Rule 31(2).

7. Mr Mulwa argued that since the Deputy Registrar never issued any notice to the parties in accordance with the Rules, the appeal was not ready for dismissal as at 22/09/2005.

8. Mr P.M. Mulwa appeared for the respondent and relied on the grounds of opposition which I have already set out above. To shed some light on this matter, it is necessary to establish the events leading up to the dismissal order of 22/09/2005. The appeal was filed on 8/08/2002 with directions under Section 79B being taken on 25/09/2002 when the appeal was admitted to hearing. On 3/12/2003, the matter came up for mention before the judge pursuant to a notice as per copy of a letter by the Deputy Registrar advising the parties to appear for mention. Mr F.M Mulwa for the appellants/applicants told the court that the mention notice was in response to a letter written to the court by the respondent's counsel but which letter was never served upon the appellants. Mr F.M. Mulwa asked that the parties should be asked to compile the record of appeal and then proceed to hearing.

9. Counsel for the respondent (Mr Nyakweba) told the court that the purpose of the mention was to obtain an order dismissing the appeal in accordance with Rule 31(2) of Order 41 CPR since a year had

elapsed after the respondent was served with the Memorandum of Appeal on 26/08/2002.

10. The court rejected the respondent's plea for an order of dismissal on the ground that the parties had not been notified that the appeal had been admitted to hearing. The court ordered that the original record be availed, the Record of Appeal be compiled and the appeal set down for hearing.

11. The matter again came up for mention on 8/06/2005, but without notice to the appellants. A further mention was fixed for 22/06/2005 and on that date, counsel for the appellants informed the court that the 2<sup>nd</sup> appellant was since deceased and that they needed a month to take proper instructions on the matter. On that date too, the appellants were given a last adjournment to decide on how to proceed with the appeal. The next mention date was 21/07/2005. Come 21/07/2005, the matter was by consent fixed for mention on 22/09/2005. On the 22/09/2005, it was apparent that the appellants' counsel had not prepared the Record of Appeal, and at the same time, counsel for appellants informed the court that he was yet to receive instructions from the surviving client regarding the substitution of the deceased 2<sup>nd</sup> appellant. Counsel for the respondent argued that since the parties had appeared before the court pursuant to a notice issued to them under Rule 31 (2) of Order 41, CPR, then the appeal should be dismissed for want of prosecution.

12. The court proceeded to dismiss the appeal for want of prosecution. The court found that the appellant's counsel had even failed to comply with the court order dated 3/12/2003 requiring the appellants to compile the Record of Appeal so as to facilitate hearing of the appeal.

13. That order of 22/09/2005 is the one the appellants/applicants now seek to have set aside. Are the appellants entitled to the order sought? What appears from the record is that all the appearances up to 22/09/2005 were mentions only. The last mention on 22/09/2005 was ideally to deal with the matter of confirming how the appellant intended to proceed with the appeal. A reading of Rule 31 seems to say that an appeal can be dismissed for want of prosecution in either of two ways:-

a. when the appellant fails to set down the appeal for hearing within three months of the giving of directions under rule 8B or:

b. If, within one year after service of the Memorandum of Appeal, the appeal shall not have been set down for hearing and upon notice being issued by the Deputy Registrar.

14. In this case, it is not disputed that directions under Rule 8B were taken on 3/12/2003. It is also not disputed that the appellants were given a notice to show cause why their appeal could not be dismissed for want of prosecution under Rule 31 (2). All the court appearances from 8/06/2005 to 22/09/2005 dealt with the issue of dismissal. The record shows clearly that the appellants were given an opportunity to compile the Record of Appeal and to set the appeal down for hearing but they failed to do so. In the circumstances, I do not think that there is any justification for setting aside the dismissal order of 22/09/2005.

15. In the result I decline to grant the application and proceed to dismiss the same with costs to the respondent. It is so ordered.

Dated and delivered at Machakos this 8<sup>th</sup> day of February, 2008.

**R.N. SITATI**

**JUDGE**