



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MALINDI

Civil Appeal 16 of 2006

KILIFI TOWN COUNCILPLAINTIFF

VERSUS

WILSON BAYA NYUNDO.....DEFENDANT

R U L I N G

By a Notice of Motion dated, 1st October, 2007, pursuant to the provisions of Order XLI Rule 31(1) and Order L Rule 1 of the Civil Procedure Rules, the applicant seeks orders:

- (1) that the appellant's civil Appeal No. 16 of 2006 be dismissed with costs for want of prosecution.
- (2) that costs of this application be in the cause.

The application is based upon the grounds:

1. That the appellant has not taken any steps to set down this appeal for hearing ever since directions were given.

The application is supported by the annexed affidavit of Wilson Baya Nyundo sworn on 1st October 2007.

On behalf of the applicant it was argued, that directions were taken on 13th December 2006. Since then the appellant has never taken any steps to set down this appeal for hearing. The respondent's advocates have set down this appeal for hearing on two different occasions, to wit, 26th March 2007 and 14th May 2007. On both occasions, neither the appellant nor his advocate attended.

Consequently, the honourable Court ordered that the appellant's advocates on record, do file an application to withdraw from acting for the appellant, if he had no further instructions.

The applicant's advocates on record, served the said order on the appellant's advocates on 22nd May 2007, as per affidavit of service exhibited as "WB – 2". That notwithstanding, the said advocate is still on record. The judgment and decree herein still remain unsatisfied since 3rd August 1995.

The application was served upon the firm of Kupalia & Co Advocates, as per affidavit of service sworn on 17th October 2007, of Patrick Shujaa Wara.

Order XLI Rule 31(1) of the Civil Procedure Rules provides:

“Unless within three months after the giving of directions under rule 8B the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution”.

I have carefully perused the proceedings herein, and find as a fact that the appeal was filed on 31st October 2006. Directions were taken on 13th December 2006. It was first set down for hearing on 26th March 2007, when it was adjourned to 14th May 2007. On 14th May 2007 I ordered that Mr. Kupalia should withdraw from acting for the appellant, through a formal application within 30 days. In default, the respondent to move the court to dismiss the appeal for want of prosecution. Mr. Kupalia failed to do so. Consequently, the applicant’s advocate has now moved the court for dismissal of the appeal.

I have evidence from the applicant through his affidavit in support. I have no evidence in rebuttal from the respondent though served. In the foregoing circumstances, I have no option but to dismiss the appeal herein with costs to the applicant/respondent.

Dated and delivered at Malindi this 23rd day of April 2008.

N. R. O. Ombija

JUDGE