



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 17 of 2000**

**JOHN NJUGUNA NJOROGE.....APPELLANT**

**PETER NGOTHO.....APPELLANT**

**VERSUS**

**MARY WANGARI NJAU.....1<sup>ST</sup> RESPONDENT**

**DAVID GATHIKU KIBE.....2<sup>ND</sup> RESPONDENT**

**NJOROKI FARM LTD.....3<sup>RD</sup> RESPONDENT**

**SAMUEL KARIUKI MBURU.....4<sup>TH</sup> RESPONDENT**

**R U L I N G**

On the 17<sup>th</sup> January, 2000 John Njuguna and Peter Ngoto (hereinafter referred to as the appellants), filed a memorandum of appeal against the judgment of Mrs. Lichuma, SRM, delivered on 30<sup>th</sup> November, 1999. On the 16<sup>th</sup> June, 2000, a notice was sent to the appellant's advocate informing him that the appeal had not been admitted to hearing as no certified copy of the decree appealed against had been filed. A record of appeal was subsequently filed on the 14<sup>th</sup> September, 2000. That record did not contain a copy of the decree. On the 29<sup>th</sup> March, 2004, another notice was sent to the appellant's advocate requesting them to comply with the provisions of Order XLI Rule 1A of the Civil Procedure Rules. However, no action was taken by the appellant. On 19<sup>th</sup> April, 2005 notices were forwarded to the parties counsel under Order XLI Rule 31(2) of the Civil Procedure Rules. There is however no record on what transpired on 2<sup>nd</sup> June, 2005.

The advocates for the 3<sup>rd</sup> and 4<sup>th</sup> respondents have now moved this court under Order XLI Rule 3 of the Civil Procedure Rules seeking to have the appeal dismissed as against them. The appellants' advocate contends that they were unable to secure a copy of the decree from the lower court.

I have considered this application. Order XLI Rule 3 of the Civil Procedure Rules does not provide for dismissal of appeals for want of prosecution. This is provided for under Order XLI Rule 31(1) and (2) of the Civil Procedure Rules. An application for the dismissal of an appeal can only be initiated by a respondent to the appeal under order XLI Rule 31(1) of the Civil Procedure Rules where the appeal has been admitted to hearing and directions have been given but the appellant is taking no action to have the appeal listed down for hearing. In this case, this appeal has not even been admitted to hearing because the appellants have failed to provide a copy of the decree. The explanation that the appellants are unable to secure a copy of the decree from then lower court cannot hold. Indeed no evidence of any efforts to secure the decree have been exhibited. It is obvious that the appellants have taken no action to prosecute this appeal which was filed more than 8 years ago. The appellants have frustrated the prosecution of the appeal by failing to provided the decree. It is evident that the appellants have lost interest in this appeal and its continued existence is a clear abuse of the court process.

This is therefore an appropriate case in which the court should prevent such abuse of the court process by exercising its inherent powers. Accordingly, I dismiss the appeal.

**Dated and delivered this 28<sup>th</sup> day of May, 2008**

**H. M. OKWENGU**

**JUDGE**