REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 59 of 2006

ELISHIPHA WANJIKU THIONGO……..... APPELLANT

VERSUS

1. **TIMOTHY MUCHINA CHEGE**
2. **CHARLES WACHIRA CHEGE**
3. **JAMES MUGI CHEGE..…….....…… RESPONDENTS**

RULING

The respondent in the appeal has brought a Chamber Summons dated 1st February 2008. It seeks the dismissal of the appeal for want of prosecution. It is contended on behalf of the respondent that since the filing of the Memorandum of Appearance on 13th July 2006 the appellant has not served the same on the respondent to date. That the registrar served a notice to the appellant to fix the appeal for hearing. That it does seem that the appellant has lost interest in his appeal and since the matter has been pending before court since year 2004 the same should be dismissed for want of prosecution. The appellant in the replying affidavit stated that the application was frivolous and an abuse of the court process. That the respondent had used the wrong provisions in filing the present application. That since directions had not been given in this appeal there has not been delay in fixing the appeal for hearing.

The Memorandum of Appearance was filed on 13th July 2006. The record of appeal was filed on 4th October 2007. It is clear from the Lower Court's file that the proceedings were ready for collection by at least 29th December 2006. Order XLI rule 31(1) provides that where directions are given in an appeal and where no action is taken within three months a party can apply for the dismissal of appeal for want of prosecution. Sub-rule 2 of that order provides that within one year after the service of the Memorandum of Appellant and the appellant fails to fix the appeal for hearing the registrar on notice to the party shall list the appeal before a judge in chambers for the dismissal of the appeal. From the above rules it is clear that there is no provision for a situation where a party who does not serve the Memorandum of Appeal and does not take out directions. Clearly the court cannot be straight jacketed by such rules where it is clear that a party is abusing the process by hiding behind the rules. In other words the appellant cannot be heard to say that the appeal cannot be dismissed for want of prosecution because directions have not been given. Even where directions are not given the court can invoke its inherent jurisdiction to stop the abuse of the process of the court. The respondent in this case was correct in going under section 3A of the Civil Procedure Act in the present application. The appellant even having been served with the present application made no effort to try and get a hearing date for directions in this matter. The court however will give the appellant an opportunity to prove that she is serious with her appeal and in that regard the court grants the following orders:-

1. The appellant shall serve the respondent with a record of appeal hereof within seven days from this date hereof.

2. The court does direct that the appeal be heard at Nyeri for half a day.

3. In default of the appellant serving the record of appeal on the respondent within seven days as stated in No. 1 above the respondent is granted leave to seek the dismissal of the appeal for non

confirmative to that order.

4. The appeal is fixed for hearing on 16th June 2008.

Dated and delivered at Nyeri this 5th day of May 2008.

MARY KASANGO

JUDGE