

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Appeal 53 of 2001

MUSA MUDAKHA SHIMINI

SARAH SIDIA

JAMIN MUDAKHA..... APPELLANT

VERSUS

DAVID LUGALIA.....RESPONDENT

RULING

The Respondent, DAVID LUGALIA, applied on 8-8-2002 by way of a Notice of Motion dated 7-8-2002 under Order XVI Rules 5 of the Civil Procedure Rules to have the appeal herein dismissed for want of prosecution. The application was supported by the affidavit of Advocate Charles Keverenge who averred in it that the appeal was admitted to hearing. The record shows that the admission was on 14/01/02. The application does not show that directions have been given in this appeal. Rule 8B (1) of Order XLI shows that the Registrar is enjoined to enlist the appeal for the giving of directions by a judge in Chambers. Rule 8B (1) of Order XLI stipulates:-

“8 B (1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the registrar shall list the appeal for the giving of directions by a judge in chambers.”

Dismissal of an appeal for want of prosecution is not premised on order XVI Rule 5 of the Civil Procedure Rules. It is under Rule 31 (1) of Order XLI of the Civil Procedure Rules which reads:-

“Rule 31 (1)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.”

The application was based on the wrong provisions of the law. It is incompetent. It is truck out.

Dated at Kakamega this 8th day of November, 2007.

G. B. M. KARIUKI

J U D G E