

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

Civil Appeal 169 of 2002

ALI SHEE BWANAKWELI.....APPELLANT

VERSUS

JUMA IDDI SALIMRESPONDENT

J U D G M E N T

In a summons filed under Order XLI rule 31 of the Civil Procedure Rules, Juma Iddi Salim urged this court to dismiss the appeal for want of prosecution. He filed an affidavit in support of the summons. The summons did not attract any response from the appellant hence the same proceeded for hearing exparte under order L rule 16(3) of the Civil Procedure Rules.

The main ground raised by the Respondent is that the appeal should be dismissed because the appellant did not take any step to make the appeal ready for hearing.

I have carefully considered this ground vis a vis the provisions of order XLI rule 31 of the Civil Procedure rules. In that rule, the law is clear that an application under it shall only be made after directions in the appeal have been taken pursuant to Order XLI rule 8 B (1) of the procedure rules. I have perused the court's record and it is clear that such directions have not been taken. The only open option for the Respondent is to prompt the registrar to place the file before a judge for dismissal under Order XLI rule 31(2) of the Civil Procedure rules. Without belabouring so much on the matter, I hold that the summons is incompetently before this court. It is ordered struck out with no order as to costs.

Dated and delivered at Mombasa this 4th day of October, 2006.

J.K. SERGON

J U D G E