

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Civil Appeal 20 of 1998

**BAYUSUF BROTHERS & ANOTHER APPELLANTS
-VERSUS**

MATHEW MUREITHIRESPONDENT

RULING

Before me is an application by way of Notice of Motion dated 11th April 2003 brought by Messrs. Gimose and Company Advocates on behalf of the applicants Messrs. Bayusuf Brothers and Abdi Mohammed Musa. It is purported to have been brought under Order XVI and 5B and Order 2(1) Civil Procedure Rules, as well as section 3A of the Civil Procedure Act (Cap.21). It seeks for two orders –

- 1. That the appeal filed herein in this matter be dismissed for want of prosecution.**
- 2. That costs be provided for.**

The application has grounds of the face of the Notice of Motion and is supported by the affidavit of Charles G. Gimiose advocate sworn on 23rd April 2003. Though counsel for the respondent Messrs. A. G. N. Kamau and Company Advocates were served with a hearing notice on 14th April 2005, they did not attend court. Therefore the application proceeded for hearing exparte.

In my view this application was brought under the wrong procedure. It was brought under provisions of the law that relate to dismissal of suits for want of prosecution, and not for dismissal of appeals for want of prosecution.

The provisions of the law for applications for dismissal of an appeal for want of prosecution are under Order XL1 rule 31 of the Civil Procedure Rules. Such an application has to be made by Summons and not by way of Notice of Motion, as was done in this case.

Rules of procedure are meant to serve specific purposes, and they must be followed. This application was brought under the wrong procedure and is therefore incompetent and must be dismissed.

For the above reasons, I dismiss the application. As the respondent did not attend court, I make no order for costs.

Dated and delivered at Eldoret this 19th day of July 2005.

George Dulu

Ag. Judge

In the Presence of: No appearance for parties