

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI
Civil Appeal 52 of 2003

1. GERALD MUCHIRI NDIRANGU)
2. TIMOTHY KOGI) APPELLANTS
VERSUS
CHARLES NDUMU WANYOIKE RESPONDENT

(Appeal from original Judgment in the Chief Magistrate's Court at Nyeri in Civil Case No. 739 of 2002 dated 26th March 2003 by Mr. Kaburu Bauni – C.M. – Nyeri)

R U L I N G

Charles Ndumu Wanyoike who is the Respondent in this appeal, has moved this court under Order XLI rule 31(2) of the Civil Procedure Rules and section 3A of the Civil Procedure Act seeking orders that the appeal filed against him be dismissed for want of prosecution and that alternatively the appellant be ordered to pay the applicant the entire decretal amount.

It is the applicant's contention that the appellant has taken no action to prosecute his appeal since it was admitted in the year 2003.

Though duly served with this application neither the appellant nor his advocate attended court for the hearing of the application.

I have considered this application and the court record. Although the applicant contends that the appeal was admitted in the year 2003, this is not the position the memorandum of appeal was filed on 25th April 2003. There is no evidence in the court record of the appeal having been placed before a Judge for action under section 79B of the Civil Procedure Act, nor is there any evidence of admission or rejection of the appeal.

Further there is no evidence that the Registrar has taken action under order XLI rule 8A of the Civil Procedure Rules so as to require the appellant to serve the memorandum of appeal. In the circumstances the application before the court is brought prematurely.

Finally Order XLI rule 31(2) does not provide any room for the Applicant to apply for dismissal of the appeal for want of prosecution. That particular provision reserves the power to the Registrar of the High Court who can only place the file before the Judge for dismissal of the appeal after admission of the appeal and after Order XLI rule 8A of the Civil Procedure Rules has been complied with and no action taken to prosecute the appeal within one year.

For the above reasons this application must fail and it is accordingly dismissed. I make no orders as to costs.

Dated signed and delivered this 13th day of July 2005

H. M. OKWENGU

JUDGE