

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Appeal 11 of 1993

NGELI MAITHYA APPELLANT

VERSUS

KILONZO MUTHUKU RESPONDENT

**(Appealing from the Judgement of the District Magistrate's Court at Kilungu G.J. K Kiia Esq. of
3rd March 1993)**

R U L I N G

The Appellant/Applicant seeks the dismissal of the applicant/Respondent's application dated 29/3/99 for want of prosecution. The application is brought under Order 41 Rule 31 (1) of the Civil Procedure Rules and Section 3 A Civil Procedure Act and is dated 27/5/04. The application is supported by the affidavit of Ngeli Maithya. He contends that Judgment was delivered in this appeal on 13/11/98 in favour of the appellant/applicant and that on 26/5/99 the Respondent filed an application for review of the court's judgment and that, that application was last in court on 11/4/02 and has never been set down for hearing since, and since no steps have been taken for over two years, it is only fair that it be dismissed. Mr Matata, counsel for the Respondent was served with the present application on 6/5/05 as confirmed by the Hearing Notice annexed to the Return of Service filed in court on 8/7/05. No reply had been filed by the Respondent despite the fact that the application has come up for hearing before. Mr Matata, did not attend the hearing.

From the record, the current applicant is the appellant whereas the Respondent is the Respondent in this appeal. On 11/11/98, this court allowed the appeal with costs to the appellant. It is as a result of that Judgment that the Respondent filed the application dated 29/3/99. It is obvious that the Respondent has lost interest in that application as he has done nothing towards its prosecution since April 2002, and he never opposed this application, filed any papers or made an appearance at the hearing of this application seeking the application's dismissal. That application dated 26/5/99 has stalled the process of the applicant realizing the fruits of his appeal since 1999. There is no reason why it should continue to remain on record.

I notice that the applicant's application is brought under Order 41 Rule 31 which deals with dismissal of appeals for want of prosecution. This application does not seek to have the appeal dismissed but an application. The court was not properly moved but even then the court finds that there is no reason why it should continue pending when the Respondent is not interested. In its own inherent jurisdiction the court order the application dated 29/3/99 hereby dismissed with costs to the applicant.

R.V. WENDOH

JUDGE Dated at Machakos this 17th day of August 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE