



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO.55 OF 2018**

**MICHAEL OKOTH.....APPELLANT**

**-VERSUS-**

**ABBA'S INVESTMENTS LIMITED.....RESPONDENT**

**RULING**

1. The matter come up for interparties hearing of an application dated **24<sup>th</sup> November, 2020** which is seeking to set aside orders dismissing the Appeal herein so that the same is heard on merit.
2. I have read through the record and confirm that as stated by the Applicant's/Appellant's Counsel, the Respondent's advocates were served with today's hearing notice on **16<sup>th</sup> March, 2021** but they have not attended court on the virtual platform. They have also not sent any representation to explain their absence. In the circumstances, the Applicant's Counsel has moved that the court allows their application dated **24<sup>th</sup> November, 2020** as the same is unopposed.
3. In considering the said application, upon reading through the record, it is established that the Appeal was dismissed under **Order 42 Rule 35(2)** of the **Civil Procedure Rules** on **19<sup>th</sup> April, 2021**.
4. This provision envisages two scenarios under which an Appeal may be dismissed for want of prosecution. The **first** scenario is when an Appellant fails to cause why the matter was listed for directions under **Section 79B** of the **Civil Procedure Act**. The **second** scenario is that, if after service of Memorandum of Appeal, the Appeal will not have been set down for hearing, the Registrar shall on notice to the parties list the Appeal before the Judge for dismissal.
5. From the record, the instant Appeal was dismissed under the second scenario but the Appellant/Applicant now submits that they were not served with Notices by the Registrar as stipulated **under Order 42 Rule 35(2)** of the **Civil Procedure Rules**.
6. Also, upon going through the court record, I have not seen any notices informing the parties that the Appeal was to be placed before the court on **2<sup>nd</sup> August, 2019** for dismissal. In any event, even if the notices were issued, then the same have not been placed in the court file. In this regard, the benefit of doubt goes to the advantage of the Appellant. This finding has been arrived at in the spirit of this court that no party should be shut out from accessing court or having their day in court.
7. This court is satisfied that failure to issue notice is a plausible reason hence denying the instant application would be shutting out the Appellant/ Applicant from accessing court which is contrary to **Article 50** of the **Constitution of Kenya**.
8. The other reason which is in favour of the Appellant is that although the Respondent was properly served with the Application, they have not responded to the same nor attended court for directions on the hearing of the same. As it stands, the application is unopposed and I find no prejudice that would be occasioned to the Respondent if the Appeal is heard on merit.
7. The upshot is that the application dated **24<sup>th</sup> November, 2020** is hereby allowed as presented with further directions that:-
  - a) The Appellant to fix the Appeal for hearing within thirty (30) days of the date herein since the Record of Appeal is already been filed.*
  - b) Failure to comply with (a) above, the Respondent be at liberty to take such steps as will be appropriate to safeguard its interest.*

It is hereby so ordered.

**DELIVERED, DATED AND SIGNED VIRTUALLY AT MOMBASA THIS 20TH DAY OF APRIL, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

**20/4/2021**