



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 82 OF 2017

JOSEPH KINYUA APPELLANT

VS

G.O. OMBACHI RESPONDENT

JUDGMENT

1. The Notice of Motion expressed to be brought under **Article 159 (1) (d) of the Constitution of Kenya 2010, Order 12 Rule 7, Order 51 Rule 1 of the Civil Procedure Act (CAP 21) and all other enabling provisions of the law.** The applicant seeks among other orders that this Honorable court be pleased to set aside and vary the dismissal order dated 10th May 2018 of the appellant's appeal dated 31st August 2017 and any subsequent order thereof. And, that the appeal be reinstated for hearing on merits.

2. The grounds upon which the application is grounded as set out in the application and the applicant's supporting affidavit sworn on 9th July 2018 are:-

- i. That the memorandum of appeal erroneously indicated his postal address to be P. O. Box 1374 Meru instead of Nanyuki. As a result, the hearing notice was posted to the wrong address.**
- ii. That a week prior to the hearing date scheduled for 16th May 2018 he visited the High Court registry where he was informed that the hearing date had been changed and another date given.**
- iii. That upon enquiry from the in-charge High Court civil registry of the new date he was informed that the new hearing date was communicated through the post office. He asked to be informed of the hearing date but he was told that the file cannot be traced. He made several visits at the registry on the issue to no avail.**
- iv. On 10th May 2018 he enquired from the same in-charge of the registry who informed him that the appeal was dismissed for want of prosecution and non-attendance.**
- v. That he is keen on prosecuting the matter but he suspects intentional motive and malice in the disappearance of the court file by the in-charge. His failure to inform him of the new hearing date was wrong. The post was to the wrong address.**
- vi. That no prejudice will be caused to the respondent if this appeal is reinstated.**

3. The application is asking for reinstatement of the appeal for hearing on merit. I will not re-invent the wheel on this subject. I stated the principles governing reinstatement of suit in the case of **John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR** as follows:

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the Constitution. Article 50 coupled with article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such act are comparable only to the proverbial “Sword of the Damocles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”

4. The applicant stated that his appeal had been scheduled for 16th May 2018. He stated further that he came to the High Court registry a week prior to the hearing date. He did not however state the exact date. On that visit, he was not informed of the hearing date because the file could not be traced. He made several other visits to the registry making similar inquiry only to be informed that his appeal was dismissed.

5. According to the letter the applicant wrote to the deputy registrar he stated that after he suspected foul play he proceeded to the office of the Ombudsman at Nairobi on 11th May 2018 and reported the loss of the file. This raises a lot of confusion on how the whole situation happened because the dates do not add up. What's more, how was the initial date scheduled and why did the appellant visit the registry a week prior if he did not know that the hearing had been changed. There are a lot of gaps in the explanation provided by the appellant of which he provides no answers. Secondly, on the issue of postal address the appellant was the one that filed his record and memorandum of appeal the mishap was occasioned from his end.

6. However, as I stated, dismissal is a draconian order which drives away the litigant from the seat of justice. Therefore, in spite of the gaps I have noted, I still think that justice would be served in reinstating the appeal but with strict condition. No prejudice will be suffered by the respondent in reinstating the appeal. Accordingly, I set aside the dismissal order and reinstate the appeal. However, the appellant shall set down the appeal for hearing within the 21 days of today which failing the appeal will stand dismissed. There will be no necessity for applying for dismissal as upon default it will stand dismissed. He shall also pay costs of the application to the respondents.

Dated, signed and delivered in open court at Meru this 31st January, 2019

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F. GIKONYO

JUDGE

In presence of

Appellant - present

No appearance by Respondent.

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F. GIKONYO

JUDGE