



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 46 OF 2017**

**CHARLES MUTINDA MUASYA.....APPELLANT**

**AND**

**ROSE WANINA.....RESPONDENT**

**R U L I N G**

1. The application before court seeks to reinstate the appeal which was dismissed on the 7<sup>th</sup> of December 2017.
2. Counsel for the Applicant states that due to inadvertence of his office he was not aware of the mention date and, secondly counsel has been sick.
3. Further counsel cites lack of proceedings from the lower court as another hindrance for pursuing the appeal. Counsel contends that circumstances leading to the dismissal of the appeal were beyond his control.
4. The application was opposed through the Respondent's affidavit of 19<sup>th</sup> February 2019, to the effect that the application is brought under the wrong procedure; no satisfactory reasons have been given to reverse the orders; there has been lethargy on the part of the applicant's counsel; application is late in time and that the same is meant to delay the case for determination of the matrimonial property.
5. The matter was slated for mention for purposes of obtaining direction directions on the 7<sup>th</sup> of December 2017. From the record it is not very clear whether the applicant's counsel was present or represented. The court on its own motion following a comment by the Respondent's counsel that the Applicant was not interested in the matter, dismissed the same for lack of interest. I also have noted that the record of appeal had not been filed at the time and therefore the matter was not ready for hearing.
6. In my view against the above background sufficient reasons have been laid out why the Applicant ought not to be shut out of his case.  
Admittedly the matter is not old as such and for now may not even qualify for a hearing date, considering pending matters which are old.  
Further the court is not inclined to consider technicalities at the expense of substantive justice in the circumstances of this case.
7. Consequently, I reverse and vacate the orders issued on 7<sup>th</sup> December 2017 on two conditions;
  - i. The Applicant do file the Record of Appeal within the next 60 days and
  - ii. The Applicant obtains a hearing date for the Appeal within the next 90 days.
8. Throw away costs of Kshs.5,000/= will be paid to the Respondent in any event.

**DATED, SIGNED and DELIVERED at NAIROBI THIS 28<sup>TH</sup> DAY OF MARCH, 2019.**

.....

**ALI-ARONI**

**JUDGE**