



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CIVIL APPEAL NO. 71 OF 2013**

**ANTHONY KAMWETI KARIUKI.....APPELLANT**

**VERSUS**

**P. N. MASHRU LIMITED.....RESPONDENT**

**RULING**

1. The appellant prays that this appeal be *reinstated*.
2. On 29<sup>th</sup> November 2017 the appeal had been listed, on the court's own motion, for *Notice to Show Cause*. In lieu of dismissal, the appellant was ordered to file and serve the *Record of Appeal* within 30 days. In default the appeal would stand dismissed.
3. The appellant did *not* comply. On 13<sup>th</sup> March 2018, the appellant purported to list the matter for mention for "directions". The court *re-affirmed* the order dismissing the appeal.
4. The appellant has filed a notice of motion dated 17<sup>th</sup> April 2018. He now contends that there was a related appeal being *High Court Civil Appeal 174 of 2013* to which the original lower court file was tagged. He only got to learn of the mix-up on 31<sup>st</sup> May 2018. It was thus not possible to comply with the directions of the court issued on 29<sup>th</sup> November 2017.
5. The appellant has in the meantime lodged and served the *Record of Appeal*. Those matters are detailed at length in a deposition sworn by the appellant's counsel on 17<sup>th</sup> April 2018. I heard learned counsel to say that the delays emanated from factors beyond *his* control.
6. The application is contested by the respondent. There is a replying affidavit dated 12<sup>th</sup> July 2018. They are two-fold: that the application is incompetent; and, it is *mala fides* or an abuse of court process.
7. On 10<sup>th</sup> June 2019 I heard learned counsel for the appellant and respondent.
8. The directions of the court of 29<sup>th</sup> November 2017 were unequivocal: the appellant was to file and serve the *Record of Appeal* within 30 days. In default the appeal would stand *dismissed*. I thus readily find that when the appellant sought further directions on 13<sup>th</sup> March 2018, the appeal had been *dismissed* by operation of *time*.
9. The High Court is a court of record. I examined the record in *High Court Civil Appeal 174 of 2013*. I am satisfied that the original file of the lower court in *Murang'a PMCC 70 of 2011* was attached to that appeal file. I have no reason to doubt the appellant's counsel that he only learnt of it on 31<sup>st</sup> May 2018.
10. I am fortified because on the date of hearing of this appeal, I made a formal order to transfer the records of the lower court from that other appeal to this one. I am thus satisfied that the appellant was not entirely at fault in failing to meet the *timelines* set by the court.
11. Furthermore, the appellant has since filed and served the *Record of Appeal*. The *overriding objective* of the court dictates that he be reinstated to the seat of justice *ex debito justitiae*. See *Remco Ltd v Mistry Jadv Parbat & Company Ltd & others* [2002] 1 E.A. 233.
12. The upshot is that the order dismissing the appeal is unconditionally *set aside*. Costs shall be in the appeal.

It is so ordered.

**DATED and DELIVERED at MURANG'A this 27<sup>th</sup> day of June 2019**

**KANYI KIMONDO**

**JUDGE**

***Ruling read in open court in the presence of-***

Mr. Gitonga holding brief for Mr. Ngare for the appellant instructed by S. N. Ngare & Company Advocates.

No appearance by counsel for the respondent.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.