



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 495 OF 2012

KANALE DAVID AMUKHUMA.....APPELLANT/APPLICANT

-VERSUS-

UNITED MILLERS LIMITED.....RESPONDENT

R U L I N G

1. The appellant/applicant herein has taken out the Notice of Motion dated 23rd April, 2019. The same is supported by the grounds presented on its face and the sworn affidavit of *Nelson Kaburu Felix*, advocate. The applicant is seeking the orders hereunder:

(i) THAT the dismissal order made on 27th June, 2016 be set aside.

(ii) THAT the appeal be reinstated.

(iii) THAT costs be in the cause.

2. The deponent explained that the reason for failing to file the applicant's record of appeal in good time was occasioned by the misplacement of the lower court records thereby hindering the availing of the typed proceedings.

3. The said deponent also asserted that the applicant was never served with a notice to show cause preceding the dismissal of his appeal, carefully adding that the applicant is desirous of prosecuting his appeal to the end.

4. I have carefully taken into consideration the grounds laid out in the Motion as well as the facts deponed to in the affidavit in support thereof.

5. The record shows that the applicant filed his memorandum of appeal on 21st September, 2012. However, it is apparent the record of appeal is yet to be filed. This has been explained; the letter dated 19th August, 2016 and addressed to the Chief Magistrate-Milimani Commercial Courts has been annexed thereto to reiterate the position. The said letter was copied to the deputy registrar though there is no indication of service thereof.

6. As concerns the issue of the notice to show cause, **Order 42 rule 35 (2)** of the **Civil Procedure Rules** expresses the following:

“If within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”

7. From the foregoing, the obligation lies with the deputy registrar to issue notices prior to the dismissal of appeals. In the present instance, there is nothing in the record to indicate that notices to show cause were in any manner effected upon the parties herein.

8. While I am aware that this appeal was filed way back in 2012 and is therefore fairly old, I have considered the explanation given by the applicant and find the same to be sufficient in the circumstances. Moreover, there is evidence that the respondent was served with a copy of the Motion and the same has not been opposed.

9. Consequently, I will allow the Motion as prayed subject to the following conditions:

a) The applicant shall file and serve his record of appeal within 14 days from today.

b) The applicant shall ensure prosecution of the appeal within 90 days from today, failing which the appeal shall stand dismissed.

c) Costs to abide the outcome of the appeal.

Dated, signed and delivered at NAIROBI this 27TH day of JUNE, 2019

.....

L. NJUGUNA

JUDGE

In the presence of:

.....**for the Appellant/Applicant**

.....**for the Respondent**