

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 597 OF 2012

JOHN N. MUGAMBI & ANOTHER..... APPELLANTS

- V E R S U S -

DR. KIAMA WANGAI RESPONDENT

RULING

1. On 5th September 2017, this court issued a notice to have this appeal dismissed for want of prosecution. The aforesaid notice was duly served upon the appellant's advocates, Gachie Mwanza & Co. Advocates. The notice to show cause was fixed for hearing on 6/10/2017. On the aforesaid date the respondent appeared while neither the appellant nor his advocate appeared. The respondent successfully beseeched this court to have the appeal dismissed for want of prosecution. The appellant has now taken out the motion dated 11.10.2017 in which he sought to have the dismissal order set aside. The motion is supported by the affidavit of Stephen Mwanza Gachie. When served with the motion Dr. Kiama Wangai filed a replying affidavit to oppose the application.
2. When the motion came up for interpartes hearing, learned counsels made oral submissions. I have considered the grounds stated on the face of the motion plus the facts deponed in favour and against. I have also taken in account the rival submissions. It is argued by the appellant that at the time of hearing the matter, his counsel was busy in the court presided over by Lady Justice Njuguna attending to another matter therefore he failed to attend to this appeal. The appellant urged this court to allow the motion. This court was further urged not to allow mistakes of counsel not to be visited upon the client. The appellant informed this court that immediately after the dismissal order was pronounced, the respondent approached the trial court and had the amount deposited as security for the due performance of the decree released to him.
3. The respondent on the other hand has opposed the application and beseeched this court to find that there was considerable delay in prosecuting the appeal thus prompting this court to issue a notice to show cause. It was pointed out that the appellant had failed to tender tangible evidence to show that his advocate was in another court. The respondent further pointed out that the appellant had failed to file as an annexure the cause list for the fateful date to show that, indeed, his advocate was before another court.
4. Having considered the rival oral submissions plus the material placed before me, there is no doubt that the appellant and his counsel failed to attend court to answer to the notice to show cause. It is admitted that the failure to attend court was not intentional but an accidental slip on the part of the advocate. In my humble view, I do not think the reason advanced by the appellant is plausible. It is not conceivable for an advocate of the standing of the appellant's advocate to send a pupil to instruct an advocate hold his brief. The alleged unnamed pupil did not swear an affidavit to confirm what Mr. Mwanza Gachie had deponed. In any case, Mr. Mwanza Gachie has failed to state before this court the answer to the notice to show cause why the appeal should not have been dismissed. This is one of those cases where a party should be left to suffer for the mistakes of his counsel. With respect, I agree with the submissions of Mr. Wangai that the appellant has failed to present credible evidence showing that he was by the material time before Lady Justice Njuguna.
5. In the end, I find no merit in the motion. The same is dismissed with costs to the respondent.

Dated, Signed and Delivered in open court this 16th day of February, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent