

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 179 OF 2010

JARED BWACHA NYAMOSI.....APPELLANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

ERASTUS K. MUSERA.....2ND RESPONDENT

RULING

By virtue of a Notice to Show Cause dated 16th February, 2017 issued under the provisions of Order 42 Rule 35 (2), of the Civil Procedure Rules, this court listed the Appeal herein for dismissal on 24th March 2017 for want of prosecution. On the said date the Appeal was dismissed for lack of satisfactory explanation.

The Plaintiff then filed the instant application via a Notice of Motion dated 9th December, 2017 under the provisions of Order 10 Rule 10, Order 12 Rule 7, Order 42 Rule 35 and Order 51 Rule 1 and 10 seeking an order that the Appeal be reinstated and readmitted for hearing and determination.

From the grounds on the face of the Application as well as from the Supporting Affidavit sworn by **MARGARET AMEKA**, and dated 11th December, 2017, it was averred that the Notice to show cause dated 16th February, 2017 which was scheduled for hearing on 24th March, 2017, was indeed posted to the Applicant on 4th April, 2017 by which time the matter had already been dismissed. The Applicant depones that in view of such circumstances, he was denied an opportunity to be heard as no valid notice to show cause had been issued by then. In a bid to explain why the Applicant took such a long time to file the application, it was deponed that the Applicants Advocate’s spouse passed away on 28th March, 2017 as per the annexed death certificate and he took time to adjust to the change of circumstances. The Applicant further deponed that considerable time was lost as the lower court file had been misplaced hence they could not extract the decree and complete the record of appeal. He prays that the orders dismissing the appeal be set aside as the Applicant is desirous of prosecuting the same.

The Respondents did not file a Reply to the Application.

I have considered the Application and the grounds advanced by the Applicant. Annexed to his Supporting Affidavit is the Notice with a postal stamp as evidence to show that indeed the Notice to show Cause was posted on 4th April, 2017 by which time the Notice had been considered and the Appeal dismissed. It is true that the matter was heard without the knowledge of the Applicant and he was not accorded an opportunity to defend himself. In the circumstances and considering the fact that the Applicants Advocate’s spouse passed away, the Applicant will be afforded an opportunity to prosecute the Appeal.

However, I have to note that this is an old matter. The Appeal herein was lodged on 19th May, 2010 more than 7 years down the line. There is, therefore, a need to have the Appeal prosecuted promptly in the interest of time and justice. Section 3A of the Civil Procedure Act, preserves the *inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court* and in the circumstances I order that the Applicant do set down the Appeal for directions within the next 30 days from the date of this ruling and have the same prosecuted within 60 days thereafter failing which it shall stand dismissed.

There shall be no orders as to costs.

Dated, Signed and Delivered at Nairobi this **19th** Day of **March, 2018**.

.....

L. NJUGUNA

JUDGE

In the Presence of

..... *For the Applicant*

..... *For the Respondent*