



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 504 OF 2011**

**NIXON AZARIA OOKO.....APPLICANT/APPELLANT**

**VERSUS**

**DIRECTOR GENERAL NATIONAL ENVIRONMENT**

**MANAGEMENT AUTHORITY (NEMA).....1<sup>ST</sup> RESPONDENT**

**NICHOLAS KARUME WEKE.....2<sup>ND</sup> RESPONDENT**

**RULING**

On 7<sup>th</sup> June, 2016, this court issued orders dismissing the Applicant's suit pursuant to a Notice which had been issued for the parties to show cause why the suit should not be dismissed. The Applicant did not attend court to show cause and it is his argument that he was never served with the notice and that he became aware of the dismissal later on. It is because of the foregoing that the Applicant filed this Notice of Motion dated 9<sup>th</sup> February, 2017 under the provisions of sections 1A, 1B, 3A of the Civil Procedure Act and article 48 of the Constitution of Kenya 2010 seeking orders that;

- a) This Honourable Court be pleased to set aside the orders of Hon. Miss. Njuguna made on 7<sup>th</sup> June, 2016 and re-instate the Applicant's/Appellant's appeal filed on 22<sup>nd</sup> October, 2013.
- b) This Honourable Court be pleased to extend the time within which the Applicant/ Appellant herein may set down Appeal for hearing.
- c) This Honourable Court be pleased to give directions as to an early hearing date for the Applicant/Appellant's suit.

The Application is supported by the Affidavit of **FRANCIS ERIC WASUNA**, the Appellant's Advocate and a further affidavit of **MOSES ONYANGO OTONGO**, the Advocate's court clerk, both sworn on 9<sup>th</sup> February, 2017. From the Affidavits, the grounds upon which the Application is premised are that the Applicant was never served with the Notice to show cause and he was therefore deprived vital information. The reason why the Applicant was not able to set the appeal for hearing, according to the supporting Affidavit, is that the 1<sup>st</sup> Respondent has failed/ignored to forward the trial file to the High Court. The Applicant wrote a letter to the 1<sup>st</sup> Respondent on 26<sup>th</sup> February, 2016 requesting for the file to be transferred to the High Court and a follow up letter on 17<sup>th</sup> January, 2017. It is deponed that when the applicant's advocate went to follow up on whether the file had been transferred to the High Court, they learned that the matter had been dismissed on 7<sup>th</sup> June, 2016. It is deponed that the delay was not out of negligence and the Applicant prays that the Application be allowed.

The 2<sup>nd</sup> Respondent filed a Replying Affidavit dated 7<sup>th</sup> April, 2017 wherein he deponed that the Applicant failed to show cause upon being served with the notice and that the appeal had been pending for 6 years. It was further deponed that the matter herein is the subject of Kisii High Court Civil Case No. 270 of 2010 hence the matter is subjudice. It is also averred that while knowing the pendency of the said Civil Suit in Kisii, the Appellant in a style reminiscent to forum shopping filed suit no. 76 of 2011 before the National Environment Tribunal which was dismissed with costs on 6<sup>th</sup> September, 2011 and that the Appellant also instituted the subject appeal which he has never bothered to prosecute. He further avers that the Applicant delayed in filing this Application and that his conduct in this matter does not make the Applicant eligible for the orders sought.

The 1<sup>st</sup> Respondent filed Grounds of opposition dated 19<sup>th</sup> June, 2017 stating that the application is a non-starter and reinstating the appeal would be a waste of the precious judicial time.

The parties were directed to file written submissions but it is only the Applicant who filed his submissions dated 12<sup>th</sup> February, 2018. I have considered the Applicant's submissions, the Application together with the Affidavits and Grounds of opposition.

Order 42 Rule 35 of the Civil Procedure Rules provides:-

35 (1) *Unless within three months after the giving of directions under rule 13 the Appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the Appeal for hearing or to apply by summons for its dismissal for want of prosecution.*

(2) *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.*

The Applicant has explained that he was not served with the Notice to show cause and that is the reason he was not able to respond to the same. I have perused the file and it is true that there is no evidence of service or a copy of the Notice which was received by the Applicant. On why the Applicant has not been able to prosecute the Appeal, it is his submission that the 1<sup>st</sup> Respondent had not transferred the trial file to the High Court. Annexed to the Supporting Affidavit are two letters to the 1<sup>st</sup> Respondent. The first letter is dated 26<sup>th</sup> February, 2016 whereas the second is dated 17<sup>th</sup> January, 2017. It is only the second letter which was served on the 1<sup>st</sup> Respondent. The first letter dated 26<sup>th</sup> February , 2016 requesting for transfer of the file to High Court was not received by the 1<sup>st</sup> Respondent and in absence of the 1<sup>st</sup> Respondent’s stamp and or evidence of receipt, I cannot not presume the same was served.

The 2<sup>nd</sup> Respondent has averred that the Suit is sub judice by virtue of Kisii High Court Civil Case No. 270 of 2010. I have to point out that at this stage, the court is not called upon to look into the merits of the Appeal but rather to consider the application for reinstatement of the appeal on the face of it.

I have considered the material before me. It has not been established that the Applicant was served with the notice to Show Cause and it is my finding that the dismissal orders were made without his knowledge. It’s only fair that the Applicant be given a chance to prosecute his Appeal. Nonetheless, the Appeal has been pending for a long period of time and it is in the interests of justice that the same be prosecuted promptly. Therefore, in the spirit of section 3A of the Civil Procedure Act, which 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*, I will make the following order in the interest of justice for both parties;

- a) That the dismissal orders made on 7<sup>th</sup> June, 2016 are hereby set aside and the appeal reinstated.
- b) That the Appeal be prosecuted within 120 days from the date of this ruling failure to which it shall stand dismissed.
- c) Costs of the application shall be in the cause.

**Dated, Signed and Delivered at Nairobi this 19<sup>th</sup> Day of April, 2018.**

.....

**L. NJUGUNA**

**JUDGE**

**In the Presence of**

..... *For the Applicant*

..... *For the Respondent*