



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 44 OF 2012

CLEMENT KAMAU GITAU..... 1ST APPELLANT

MARGARET WAIRIMU..... 2ND APPELLANT

VERSUS

HANNAH NJERI MWANIKI..... 1ST RESPONDENT

VIDESIO KARIUKI MACHARIA.....2ND RESPONDENT

NGUGI GITONGA..... 3RD RESPONDENT

ELIZABETH WANJIRU KAMAU..... 4TH RESPONDENT

R U L I N G

On 22nd September, 2017, this court dismissed this appeal for want of prosecution pursuant to the provisions of Order 42 Rule 35(2) of the Civil Procedure Rules.

The Appellants have not taken out the motion dated 13th November, 2017, the subject matter of this ruling and sought to have the dismissal order set aside. The motion is supported by the affidavit of Clement Kamau Gitau. When served with the aforesaid motion the Respondents filed the affidavit of Lawrence Kinuthia to oppose the application.

When the motion came up for inter-partes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application.

I have also considered the rival written submission. It is the submission of the Appellants that they were never given the dismissal notice dated 4th September, 2017. The Appellants, however, pointed out that the notice was served upon their advocate but unfortunately, their advocate inadvertently forgot to diarize the date. This court has been beseeched not to visit the mistake of their advocate upon them.

The Respondents on the other hand are of the submission that the Appellants have lost interest in pursuing the appeal hence this court should not exercise its discretion in their favour. They pointed out that the Appellants are hell-bent to procrastinate the matter further.

Having considered the rival submission and the materials presented to this court, it is not in dispute that the notice of dismissal of the appeal was served upon both sides in this appeal. The record shows that both sides did not turn up in court on 22nd September, 2017, prompting this court to dismiss the appeal. The Appellants have argued that they were not personally served themselves with the aforesaid dismissal notice. They, however, admit that their advocate was served but the advocate inadvertently forgot to diarize. This assertion has not been controverted by the Respondents. Basically the Appellants are saying that their appeal was dismissed because their advocate failed to attend court to defend the notice to show cause. I am convinced this is a plausible reason. I am satisfied that the Appellants should be given a chance to answer the notice to show cause.

In the end, I allow the motion dated 13th November, 2011. Consequently, the order dismissing the appeal issued on 22nd September, 2017 is set aside. The appeal is reinstated. Consequently, the notice to show cause why the appeal should not be dismissed for want of prosecution is reinstated and is fixed for hearing on 27th July, 2018. Each party to bear its own costs of the motion.

Dated, signed and delivered at Nairobi this 20th day of July, 2018.

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J K SERGON

JUDGE

In the present

..... **for the Appellants**

..... **for the Respondents**