



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 241 OF 2015

DICKSON MWANGU NDEVA.....APPELLANT

VERSUS

CHRISTOPHER KUSALU NDEVA.....RESPONDENT

R U L I N G

1. **Dickson Mwangi Ndeva**, being aggrieved by the decision of the Lower Court appealed on the **12th day of November, 2015**. The Deputy Registrar, High Court, requested for the original record to be forwarded to the High Court from the Chief Magistrate's Court on **9th May, 2016**. Thereafter no step was taken.

2. On the **13th June, 2017**, a notice of dismissal of the Appeal pursuant to the provisions of **Order 42 Rule 35(2)** of the **Civil Procedure Rules** was sent out to the parties. When the matter came up on the **27th day of July, 2017** none of them appeared. Consequently the Appeal was dismissed.

3. On **3rd July, 2018** the Appellant/Applicant filed a Notice of Motion seeking to set aside the orders issued ex parte on the **27th July, 2017** dismissing the Appeal for want of Prosecution so that the Appeal could be reinstated to be heard on merit.

4. The application is premised on grounds that the Applicant did not receive the Notice to Show Cause why the Appeal should not be dismissed for want of Prosecution; the Applicant is still interested in prosecuting the Appeal, he has applied for proceedings and has not been supplied with the same, as such he has not prepared the record. He swore an affidavit in support of the application where he deposed that he was not aware that the Appeal had been dismissed and he has now engaged an Advocate to follow up the Appeal and do all that is expeditious to ensure the Appeal is heard in the shortest time possible.

5. The Respondent on the other hand filed a Replying Affidavit where he deposed that the delay on the part of the plaintiff in prosecuting the Appeal was inordinate and that the Advocate retained by the Applicant was not properly on record.

6. At the hearing **Mr. Kilonzi** learned Counsel for the Applicant reiterated what is stated in the application and affidavit in support while the Respondent faulted him for not being properly on record.

7. I have considered submissions by both Counsel for the Applicant and the Respondent in person. I do note that Counsel for the Applicant filed a Notice of Appointment dated **9th June, 2018** therefore he was properly on record.

8. **Order 42 Rule 35(2)** of the **Civil Procedure Rules** provides thus:

“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.”

9. **Section 3A** of the **Civil Procedure Act** provides thus:

“Nothing in this Act shall limit or otherwise affect 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.”

10. The question of reinstating an Appeal that is dismissed for want of Prosecution is therefore a matter of discretion. The reasons given must be genuine and the Court should consider if it is just to do so.

11. It is explained by the Applicant that after he served the Respondent with the Memorandum of Appeal on the **6th May, 2016** he was not

able to get typed proceedings. He was not served with the Notice of Dismissal but only learnt of the dismissal of the Appeal for want of Prosecution when he visited the Court to establish if proceedings had been typed.

12. No evidence has been adduced to rebut the averment that Applicant was not served with the Notice for Dismissal of the Appeal. It will therefore be in the interest of justice to give the Applicant an opportunity of prosecuting the Appeal.

13. Therefore I allow the application by having the Appeal reinstated.

14. The costs shall abide the Appeal.

15. It is so ordered.

Dated, Signed and Delivered at Kitui this 28th day of August, 2018.

L. N. MUTENDE

JUDGE