



REPUBLIC OF KENYA

IN THE IGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 133 OF 2010

JAMES THOMAS ANDAFU.....APPLICANT/APPELLANT

VERSUS

HARRISON HOSEA OKUTU.....1ST RESPONDENT

JEMIMAH ANDEYO ANDEYO OKUTU.....2ND RESPONDENT

R U L I N G

The applicant herein has filed an application dated 23rd March, 2018 seeking for orders that the orders of this court dismissing the appeal herein be set aside and the appeal be reinstated for hearing. The application is premised on the grounds on the face of the application and is supported by the affidavit of the advocate for the applicant, Herbert J. Ashiruma . The advocate depones in his affidavit that they filed the appeal on behalf of the applicant on the 17th May , 2011 . That on the 19th march 2018, they received a letter from the respondents' advocates stating that the appeal had been dismissed and demanded payment of KSHS. 2,336,707.82 . That they have never received notice from the court with the intention to dismiss the appeal and only learnt it through the respondents' advocates' letter dated 19th march, 2018. That there would be no serious prejudice to be suffered by the respondents that cannot be compensated as the applicant has already paid them Kshs. 500,000/=. That the applicant has an arguable appeal with high chances of success and it would be in the interest of justice that this application is allowed. That the applicant shall suffer irreparable loss and damage if the application is not granted. That the court should proceed and reinstate the appeal for the same to be heard and determined on merit.

The application was opposed by the respondents through their advocates, Ameka & Company Advocates . Mrs Ameka for the respondents stated that the record of appeal was filed way back in 2010. That the appeal was dismissed on 21/4/2015. That justice delayed is justice denied. That article 159 of the constitution gives power to the court to dismiss suits where action has not been taken. That section 34 of the Civil Procedure Act gives the court unlimited power to dismiss cases. That no reason is set out in the supporting affidavit for the reason for the delay. The applicant has not made out a case for the court to exercise discretion in his favour. That the appeal does not raise an arguable case. That there are no reasonable grounds to set aside the dismissed appeal. The advocates urged the court to dismiss the application.

The applicant's appeal was dismissed on the 21/4/2015 for want of prosecution under Order 42 Rule 35(2) of the Civil Procedure Rules. The rule states that:

“ 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 appeal was thereby dismissed for failure by the applicant to set down the appeal for hearing. The above rule however requires for a notice to be issued to the parties for the court's intention to dismiss the appeal for non- prosecution. The court record does not show that there was such a notice issued to the parties, and more particularly so to the applicant. The court did not thereby follow its own procedure before it dismissed the appeal. This is sufficient ground alone to have the appeal reinstated.

Article 159(2) of the constitution of Kenya 2010 implores courts when dispensing justice to put more emphasis on substantial justice rather than procedural technicalities. The applicant herein has already paid a sum of Kshs. 500,000/= to the respondents. The applicant will suffer prejudice if the appeal is allowed to terminate on procedural technicalities rather than merit.

In the foregoing, the application dated 23rd March, 2018 is allowed and the appeal is reinstated for hearing. Parties to take a date for directions at the registry.

Delivered, dated and signed in open court at Kakamega this 22nd day of November, 2018.

J. NJAGI

JUDGE

In the presence of :

.....for applicant

.....for respondents

.....court assistant

Parties:-

Applicant –

Respondents-