



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 665 OF 2006**

**SOCFINAF COMPANY LIMITED.....APPELLANT**

**-VERSUS-**

**PAULINE NYAMBURA MATU.....RESPONDENT**

**RULING**

1. The appellant has brought the notice of motion dated 12<sup>th</sup> June, 2018 under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 42, Rule 35 (2) and Order 51 of the Civil Procedure Rules. The aforesaid motion is supported by the grounds set out on the body thereof and the facts deponed in the sworn affidavit of **Caroline Wanjiru Githae**. The appellant seeks the orders hereunder:

*i) THAT the order of 21<sup>st</sup> July, 2017 dismissing the appeal be set aside and the appeal be reinstated for hearing.*

*ii) THAT the costs of the application be in the cause.*

2. In her supporting affidavit, **Caroline Wanjiru Githae** being the advocate for the appellant, stated that her firm came on record for the appellant vide a notice of change of advocates filed on 15<sup>th</sup> February, 2013. She averred that prior to its dismissal on 21<sup>st</sup> July, 2017 the matter was last in court before the deputy registrar on 19<sup>th</sup> November, 2015 at which point, parties were advised that the file would be placed before a judge for admission of the appeal.

3. It was the deponent's averment that the notice to show cause issued by the court was erroneously served upon the appellant's former advocates, whose firm has since been wound up.

4. There has been no response by the respondent, who was served with a copy of the abovementioned motion by way of registered post.

5. This court has considered the grounds set out in the motion together with the affidavit in support thereof. It is well noted that the key issue arising in this instance is on whether the court order made on 21<sup>st</sup> July, 2017 should be set aside and the appeal reinstated.

6. The appeal was dismissed pursuant to *Order 42, Rule 35 (2)* of the Civil Procedure Rules. Prior to the dismissal, a notice was issued by the deputy registrar on 3<sup>rd</sup> July, 2017. The appellant argued that the aforementioned notice was served upon its former advocate despite there being a notice of change of advocates on record. This court has perused the file and ascertained that a notice of change of advocates was indeed filed on 15<sup>th</sup> February, 2013. It has similarly been confirmed that the notice was addressed to the firm of Kantai & Co. Advocates who happen to be the appellant's former advocates.

7. The deponent averred in her supporting affidavit that by serving the notice upon the previous advocates, the deputy registrar erred since the aforesaid firm is no longer acting for the appellant. That being the case, to this court's mind it would have been unlikely if not impossible for the appellant's current advocate to be aware that the matter was scheduled to come up for dismissal on the relevant date.

8. Further to the above, the record reveals that the appeal was yet again before this court for dismissal on 17<sup>th</sup> June, 2015. It was noted at the time that the appellant had taken steps towards prosecuting the appeal and consequently, this court ordered that the matter be mentioned before the deputy registrar for purposes of taking directions on the same. Thereafter, the matter was mentioned on a number of occasions with no progress.

9. It is true that prior to its dismissal on 21<sup>st</sup> July, 2017, the matter was last in court on 19<sup>th</sup> November, 2015 at which point the deputy registrar observed that the appeal had not been admitted. Follow up letters were written to the court by the appellant with a view to confirming whether the appeal was admitted, the most recent bearing the date of 10<sup>th</sup> March, 2017. To add on, the appellant vide its letter dated 18<sup>th</sup> May, 2018 requested the deputy registrar to list the appeal for directions. By that time, the appeal had already been dismissed and the appellant explained in its motion that it was oblivious to this fact.

10. In view of the foregoing, the appellant has been persistent in following up on the progress of the matter. The appeal, it seems, was never admitted neither were directions given. This was through no fault of the appellant. The appellant's advocate on record was never served with the notice of dismissal and hence could not have possibly known that the appeal was scheduled for dismissal. The court is thus satisfied with the explanation given by the appellant.

11. It is without a doubt that this is quite an old appeal and it remains unclear why directions are yet to be given. However, the appellant has well explained the delay in prosecuting the same and this court is persuaded by the reasons given. With the sole aim of accommodating the appellant's pursuit of justice, this court deems it fit to grant the prayers sought.

12. In the end, prayer i) of the motion is allowed. Consequently, this court makes the following orders:-

(i) The appeal be listed for directions within 28 days of the date hereof.

(ii) Thereafter, the Applicant shall set down the appeal for hearing within 90 days from the date the directions shall be given, failure to which the appeal shall stand dismissed.

(iii) Costs shall abide the outcome of the appeal.

Dated, signed and delivered at **NAIROBI** this **20<sup>th</sup>** day of December, 2018.

**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent