



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 364 OF 2005**

**JAMES MUANGE MUSYOKI.....APPELLANT**

**VERSUS**

**EAST WEST VEG. LIMITED.....1<sup>ST</sup> RESPONDENT**

**CHARLES KIMOTHO.....2<sup>ND</sup> RESPONDENT**

***(Being an Appeal from the Ruling of the Hon. P. Gichohi (Mrs) in objecting proceedings in Civil Case No. 768 of 2004 in the Chief Magistrate's Court in Nairobi given on the 17<sup>th</sup> of May 2005)***

**RULING**

There is an application on record dated 18<sup>th</sup> October, 2016 seeking an order that the dismissal of the appeal for want of prosecution on 24<sup>th</sup> March, 2015 be set aside and the appeal be reinstated. The application is opposed and there is a replying affidavit sworn by counsel for the respondent and also a Notice of Preliminary Objection challenging the capacity of the appellant's advocate because it is said, he had no authority to file the application. It is observed there is no Notice of Change filed as required under Order 9 Rule 5 of the Civil Procedure Rules.

I have considered the rival affidavits and the submissions filed herein. I have related the said submissions to the substratum of the main suit leading to the present appeal. My first observation is that notwithstanding the provisions of the Civil Procedure Rules, I cannot strike out the appeal just because counsel has not filed a Notice of Change of Advocate. This is a step that can be regularised, and in any case that is a technicality that has been outlawed by the Constitution. Further, no prejudice may be occasioned to the respondents by that omission.

Counsel for the appellant has explained the reasons for his absence on the date the appeal was dismissed and although the reasons may appear flimsy, I am persuaded such an omission should not be visited upon the appellant. I am prepared to reluctantly set aside the dismissal order, on condition that the appellant pays all the costs occasioned to the respondents this far which costs shall be agreed and if not, be subjected to taxation. Further, the appellant shall prosecute the appeal within 120 days from the date of this ruling. In default of the above conditions the appeal shall stand dismissed without any reference to the court.

***Dated, signed and delivered at Nairobi this 19<sup>th</sup> day of December, 2018.***

**A. MBOGHOLI MSAGHA**

**JUDGE**