

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL NO. 23 OF 2009

K.K. PROMOTE LTD.....APPELLANT

VERSUS

GRACE WAITHERA WANJIRU.....RESPONDENT

RULING

On 18th June, 2015 Justice Kiarie made an order dismissing the appeal herein under Order 42 Rule 35 (2) of the Civil Procedure Rules. There is now before me an application dated 9th March, 2016 by way of Notice of Motion to set aside the dismissal order.

The reasons therefor are that the respondent did not serve the appellant with any notice to dismiss the appeal; the file had been missing in the registry hence no hearing date was taken; the appeal was dismissed without giving the appellant a chance to be heard; no notice to show cause was ever served upon the appellant or the advocate on record; there was no mistake on the part of the appellant's counsel; no prejudice would be occasioned on the respondent if the appeal is reinstated because the appellant has already deposited security with the court and finally that, if orders sought are not granted the appellant will suffer great prejudice.

The application is supported by an affidavit of Karanja Kinuthia, a director of the appellant. There is also a supplementary affidavit sworn by the same person. Both learned counsel have filed submissions herein which I have noted. Order 42 rule 35 (2) of the Civil Procedure Rules reads as follows,

“(2) 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.”

I have gone through the record and my first observation is that the original court file from the lower court is not part of this record. There is of course the record of appeal but no directions have ever been made to facilitate the hearing, which in any case cannot take place without the original file.

I have also not seen any notice by the registrar to the parties giving notice of the intended dismissal of the appeal. The requirement of such notice, it would appear, is mandatory under the rule set out above. The submission by the appellant that security has been posted and is being held by the court has not been disputed. Indeed, such an order was made by Sitati J on 17th February, 2009.

No prejudice has been demonstrated on the part of the respondent while on the other hand, if the order is not set aside the appellant is likely to suffer prejudice. In view of the foregoing and in the exercise of the court's discretion, the dismissal order made on 18th June, 2015 is hereby set-aside.

The appeal is hereby reinstated and counsel shall take appropriate steps to have the matter listed for directions within 30 days from the date of this ruling to facilitate the hearing and determination of the appeal. As this is an old matter, priority should be given in allocation of dates for hearing.

Each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 28th Day of February, 2017

A. MBOGHOLI MSAGHA

JUDGE