

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 553 OF 2010

SHIMECHERO MARY SHINYEKHA.....APPELLANT/APPLICANT

VERSUS

MOSES OTIENO ADO.....RESPONDENT/RESPONDENT

RULING

1. By Notice of Motion dated 20th June, 2016, the appellant seeks to reinstate her appeal that was dismissed for want of prosecution on 16th June, 2016.

2. The issue in this application is whether the applicant has given a satisfactory explanation for failure to prosecute the appeal. It was contended that the appellant's advocate had been trying to trace the court file with a view of fixing the appeal for directions to no avail, since the court file was missing. That the appellant's advocates then wrote to the deputy registrar for assistance and when the court file was finally traced, they discovered that the Appeal was dismissed on 16th June 2016. The appellant prays that the mistake of file disappearance ought not to be visited on him. That the appellant has a strong appeal and stands to suffer immeasurable loss if the orders sought are not granted.

3. Despite service of this motion, the respondent did not file any response.

4. In the submissions made on behalf of the appellant it was stated that the failure to set the appeal for hearing was as a result of matters that were beyond the appellant's control. The appellant cited **Jared Ombarara Oima v. Muigai Mututa (2016) e KLR** and **Alexander Shikond v. James Muriithi Mwanini & another (2016) e KLR** where the courts reinstated the appeal due to lack of service of notice to show cause. The appellant then reiterated the averments on the loss likely to be suffered.

5. I have considered the motion, the grounds cited in support thereof and submissions. In the instant case, the applicant lodged the application within 4 days and there is no inordinate delay. **Article 159** of the **Constitution** enjoins this Court to administer substantive justice. The provisions of **Sections 1A, 1B** and **3A** of the **Civil Procedure Act**, through the overriding objective principles mandate this Court to act justly and fairly. The overriding objective principle is not aimed at giving justice to one party at the expense of another. Considering that there was no delay in bringing this application and being satisfied with the explanation for failure to prosecute the Appeal, I am inclined to allow the application. The orders given on the 16th June, 2016 dismissing the appeal are hereby set aside and the same is reinstated for hearing. A date for directions to be taken within 14 days.

Dated, signed and delivered at Nairobi this 30th day of March, 2017.

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L NJUGUNA

JUDGE

In the presence of

.....***For the Appellant/Applicant***

..... ***For the Respondent/Respondent***