

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 67 OF 2010

LUKE KING'ARE NDUNG'U1ST APPELLANT

CLEON EVANS ODOUR2ND APPELLANT

VERSUS

JAMES MAINA MUTURARESPONDENT

RULING

On 6th June, 2016 Njuguna J made an order dismissing this appeal under Order 42 Rule 35 (2) of the Civil Procedure Rules. The appellant subsequently knew about the order and filed an application by way of Notice of Motion dated 1st September, 2016 to set aside the said dismissal order. The application is opposed and both counsel have filed submissions.

My perusal of the record shows that a record of appeal was filed on 2nd April, 2014. Thereafter no steps were taken to facilitate the hearing of the appeal. It is also clear from the record that no directions were ever given under rule 13 of the same order. This duty was supposed to have been performed by a Judge in chambers at the instance of the appellant.

The order for dismissal under Order 42 Rule 35 (2) which was given in this appeal can only be made after the said directions have been given. Further, there is a duty bestowed upon the registrar to give notice to the parties before the appeal is placed before a Judge for dismissal.

The record before me does not contain any notice to that effect and that in itself would justify the lifting of the dismissal order. I have also considered whether or not any prejudice would be occasioned to the respondent if the application is allowed. Going by the submissions on record and my observations above, I see no prejudice at all.

It is the duty of the court to do justice to both parties and notwithstanding the delay in prosecuting the appeal, I am inclined to invoke the discretion of the court under Section 3A of the Civil Procedure Act and allow the application.

Accordingly, the order made on 6th June, 2016 is hereby lifted and the appeal reinstated. Directions shall be taken within 30 days from the date of this ruling and since this is an old appeal, the hearing date shall be taken in the registry on priority. Each party shall bear their own costs.

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

A. MBOGHOLI MSAGHA

JUDGE