



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NUMBER 20 OF 2009**

**ISAAC RIBIRO KAMERE. ....**  
**APPELLANT**

**VERSUS**

**1. PATRICK NG'ANG'A KAMAU & NANCY NJERI NG'ANG'A (SUING AS THE ADMINISTRATORS OF**

**THE ESTATE OF PETER MBUGUA NG'ANG'A (DECEASED)..... 1<sup>ST</sup>**  
**RESPONDENT**

**2. DAVID AINAI. .... 2<sup>ND</sup>**  
**RESPONDENT**

**3. JOHN KAMAU NG'ANG'A. .... 3<sup>RD</sup>**  
**RESPONDENT**

**4. SAMUEL KIMANDU NG'ANG'A. .... 4<sup>TH</sup>**  
**RESPONDENT**

**5. SIMON KAMAU. .... 5<sup>TH</sup>**  
**RESPONDENT**

**R U L I N G**

This is an application by way of Notice of Motion dated 6<sup>th</sup> September, 2016 by the Appellant/Applicant brought under Order 42 and 51(1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking Orders that: -

- 1. That the orders issued on 21<sup>st</sup> June, 2016 dismissing the appeal be set aside.***
- 2. That this appeal be reinstated.***
- 3. That any other relief that the Honourable court may deem fit to grant.***

The application is premised on the grounds that:-

- 1. That the Appellant was not given any notice for dismissing the appeal before court embarked on the same course.***

**2. That the dismissal for the appeal was done wrongly as the appeal had never been admitted for hearing.**

**3. That the Appellant has never been informed by court on whether the appeal was admitted for hearing so as to enable the Appellant fix it for directions.**

**4. That the Appellant has written to Deputy Registrar on numerous occasions without response, so as to have the lower court file forwarded to the High Court to have the matter proceed for hearing.**

**5. That the Appellant has never received any response from the Deputy Registrar concerning the status of the case despite several letters inquiring about the same.**

**6. That the Appellant has a good appeal against the decision of the subordinate court and with high chances of success.**

**7. That the Appellant filed his record of appeal on 24<sup>th</sup> November, 2010.**

**8. That it is only fair just and in the interest of justice that the Appellant's appeal be reinstated, heard and determined on merit.**

The application is supported by the affidavit of Simon Kamere Advocate who is in conduct of this appeal who depones that the Appellant was the Defendant in Nairobi SRMCC 105/2005 whose judgment was entered against him. Being dissatisfied with the judgment delivered on 18<sup>th</sup> September 2008 he filed a memorandum of Appeal (Annexure SK 1). The Deputy Registrar, High Court wrote to the Chief Magistrate for original record to be forwarded. He then wrote to the Deputy Registrar to enquire if the appeal had been admitted but there was no response. On 8<sup>th</sup> July, 2016 while making further inquiries on the file he was informed the appeal had been dismissed for want of prosecution. He depones that they were not aware of nor given notice to show cause why the appeal should not be dismissed. He depones that it is in the interest of justice for the appeal to be reinstated as the Appellant has a good appeal with high chances of success. The Applicant by order of the court filed written submissions in support of the application.

Counsel for the Applicant submitted that Order 42 Rule 21 of the Civil Procedure Rules Provides that: -

***“Where an appeal is dismissed under Rule 20, the Appellant may apply to the court to which such appeal is preferred for re-admission of the appeal and where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing the court shall re-admit the appeal on such terms as to costs of otherwise as it thinks fit.”***

Mr. Mege holding brief for the Waiganjo opposed the application. He submitted that the Applicant should have made effort to follow up the appeal, that there was inordinate delay in prosecution of the appeal, which in this case will attract the doctrine of laches where the length of the delay and the prejudice that the Respondents will suffer if the application is granted are pre-dominant factors to be taken into account. He finally submitted that the Applicant has not given sufficient reason for not appearing when the appeal was called out for hearing and that this application is only meant to deny the Respondents the fruits of their judgment.

The parties were last in court on 21<sup>st</sup> November, 2009 before Justice Okwengu when an order was made for them to fix a hearing date for their application dated 24<sup>th</sup> February, 2009. No action was taken by the Applicant since then. On 16<sup>th</sup> June, 2016 after a period of seven (7) years of inactivity the court ordered that: -

***“Notice having been given to show cause why this suit should not be dismissed, and there being no satisfactory response, the suit is hereby dismissed under Order 17 Rule 2(1) and Order 42***

***Rule 35(2) of the Civil Procedure Rules.”***

Order 42 Rule 35(2) provides that: -

***“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.”***

In an application for reinstatement like this, the Applicant must establish that he was not to blame for the inordinate delay or guilty of laches; he must demonstrate steps taken to prosecute the appeal; and explain why he did not appear to show cause when notice was issued to him to show cause why the appeal should not be dismissed.

In this application, the Applicant has in his affidavit of support narrated steps he had taken to have the appeal admitted to hearing but which were frustrated by the non-response to his letters by the Deputy Registrar. He has annexed copies of the letters marked SKI – SK14. Secondly, the counsel for the Appellant contended that he was not served with any notice of the intended dismissal. I have perused the file and I find no such notice having been served on him. For these reasons, I would allow the application, set aside the dismissal order dated 21<sup>st</sup> June, 2016 and reinstate the appeal on condition that the Appellant do prosecute this 2009 appeal within six months. If the appeal is not prosecuted within six months from today’s date, the appeal will stand dismissed.

**Dated, signed and delivered at Nairobi this 22<sup>nd</sup> day of March, 2017.**

.....

**S N RIECHI**

**JUDGE**