



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 32 OF 2013

SALMA KASSIM SAID.....APPELLANT/ APPLICANT

VERSUS

WAHIB SAAD ALI.....RESPONDENT

RULING

By a notice of motion dated 8.8.16 brought under Order 12 rule 7 of the Civil Procedure Rules, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act; the appellant/applicant prays for orders:-

- 1. THAT this application be certified urgent and service thereof be dispensed with at the first instance***
- 2. THAT this court be pleased to set aside its order dated 2.11.15 dismissing the suit for want of prosecution***
- 3. THAT the appeal herein be unconditionally reinstated for full hearing and disposal***
- 4. Any other order that this Honourable court may deem fit to grant***

The application is based on the grounds among others among others that when the matter was mentioned on 28.9.15 for filing of submissions, the appellant's counsel was in another court and submissions had still not been filed as at 2.11.15 when the court made an order that the appeal had been abandoned.

The application is also supported by an affidavit sworn on 8.8.16 by Ben AduolNyanga, advocate for the applicant who reiterates the grounds on the face of the application. Attached to the affidavit is a copy of his diary for 28.9.15..

The application is opposed on the grounds set out in a replying affidavit sworn by the respondent on 16.11.16. He avers that the applicant has not come to court with clean hands since he has not deposited Kshs. 100,000/- security for costs as ordered on 28.11.14.

I have considered the notice of motion in the light of the supporting affidavit and replying affidavit. Prayer 1 has already been spent.

The order for deposit of Kshs. 100,000/- as security for costs was meant to secure a stay of execution and not the prosecution of this appeal. The noncompliance means that the respondent can proceed to execute the judgment of the court but it does not deny the applicant his right of appeal.

The applicant's counsel has not explained why he did not attend court on 2.11.15 when the appeal was

dismissed. His mistake notwithstanding, it should be the court's last resort to deny a party a chance to be heard on the basis of mistake of counsel.

The overriding objective of the law is to facilitate the just, expeditious, proportionate and affordable resolution of disputes. Under the powers granted to this court by section 3A of the Civil Procedure Act, the notice of motion dated 8.8.16 is allowed and the applicant is condemned to pay Kshs. 10,000/- to the respondent as throw away costs.

DATED AND DELIVERED THIS 28TH DAY OF APRIL 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Clerk Felix

Appellant/Applicant N/A

Respondent In Person