



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 116 OF 2012

MICHAEL MATHENGE MAINA.....APPLICANT/APPELLANT

VERSUS

KALOKI KABURA1ST RESPONDENT

BENEDICTA WAYUA KALOKI2ND RESPONDENT

RULING

What is before the court for determination is the application dated 23rd August, 2016 brought under **Order 51 rule 1 of the Civil Procedure Rules** and **Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya**. The applicant/appellant has sought orders that the orders issued on 20th June, 2016 dismissing the appeal herein for want of prosecution be set aside and that the appeal be reinstated for hearing.

It is premised on the grounds set out on the body of the same and it's supported by the affidavit sworn by MAK' OGONYA T.T. TIEGO on 23rd August, 2016.

The summary of the facts as captured in the affidavit are that; the appeal was filed on 16th March, 2012 and it was served upon the respondents. That the record of appeal was filed on 14th August, 2013 and on 8th October, 2015, the appellant was served with a notice to appear before the court on 27th November, 2015 for directions on which date the matter was taken out of the day's causelist.

That on 28th June, 2016, the appellant's advocate prepared an invitation letter dated 13th July, 2016 with a view to fixing a mention date for directions and it was at that point in time when their clerk was informed that the matter was dismissed on 20th June, 2016.

That the appellant further avers that no notice of intention to dismiss the appeal was served on the advocate and that the dismissal was erroneous as the matter had been active. That it is in the interest of justice that the matter be reinstated for hearing. That the application herein was lodged without undue delay.

The respondents filed grounds of opposition on 9th January, 2016. They have opposed the application of the following grounds:

- a) *That the appellant has not demonstrated there was no delay in presenting the instant application noting that the order for dismissal was made on 20th June, 2016 whilst the application was filed on 23rd August, 2016.*

b) Whereas the appellant admitted knowledge that the matter was taken out of the cause list on 27th November, 2016, he only took a step towards the prosecution of the appeal on 13th July, 2016 approximately eight months later.

This court has considered the application, the grounds of opposition and the submissions by the learned counsels. The court record shows that the appeal was admitted on 31st July, 2015 and since the admission, no other action had been taken by either party until the same was dismissed on 20th June, 2016. Though counsel for appellant has averred that the matter was scheduled for directions on 23rd November, 2015, there is no evidence to that effect going by the court record.

This court however notes that the appellant did file a record of appeal on 14th August, 2013 and on 19th May, 2015, he had invited the respondents to fix the matter for directions. This letter is duly stamped with the Civil Appeals Division stamp but there is no indication as to whether a date was taken or not. Between that date and the dismissal of the matter, it was exactly one year. It is true that there was a delay in filing the present application but in the interest of justice and considering that the appellant has filed a record of appeal, I find that it's only fair and just that he be allowed to prosecute the appeal.

In the circumstances aforesaid, the application dated 23rd August, 2016 is dismissed with no orders as to costs. The appeal is hereby certified ready for hearing. The same to be heard in Nairobi for half a day before a single judge. The same to be prosecuted within 90 days, failing which it shall stand dismissed.

Dated, signed and delivered at Nairobi this 27th day of April, 2017.

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L. NJUGUNA

JUDGE

In the presence of:

.....**for the Applicant**

.....**for the Respondent**