

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 33 OF 2005

DWA ESTATE LIMITEDPLAINTIFF

VERSUS

FREDRICK MUSYOKA MULEIDEFENDANT

RULING

The Hon. Mr. Justice Ombija heard an application by the respondent on 15th December, 2015 and reserved the ruling to be delivered on 18th February, 2016. That ruling was never delivered and as matters stand now, the judge retired before the ruling.

The application was by Notice of Motion under Articles 50 (1), 159 (2)(d) of the Constitution, Order 12 Rule 7, Order 51 of the Civil Procedure Rules and Section 3A of the Civil Procedure Rules for orders that, the appeal dismissed on 15th June, 2015 for want of prosecution be reinstated. The application is opposed and the counsel for respondent has filed grounds for objection.

There was an earlier attempt to strike out the appeal which however was dismissed by the court on 9th June, 2010. The appeal was filed on 28th April, 2015 but no steps have been taken by the appellant to prosecute the same. Whatever the case, if the appeal was filed on 28th April, 2015 as the record shows, then the application of Order 42 Rule 35 (2) was not applicable as at 15th June, 2015 when the dismissal Order was made. Further to the foregoing, there is no notice on record from the registrar addressed to both parties informing them that the appeal shall be listed before the judge for dismissal as required under the said rule.

The order sought is discretionary and the dismissal of any case should be the last resort. The record also does not show that the appeal has ever been placed before a judge for directions. Additionally, the original record from the lower court has not been availed and therefore the delay cannot be attributed to the appellant alone. In view of the foregoing, the application hereby fails. The Deputy Registrar shall facilitate the availability of the lower court file and place the appeal file before a judge for directions within 30 days from today. Considering that this is an old appeal, the allocation of the hearing date shall be done on priority.

Costs in the cause.

Dated and delivered at Nairobi this 26th Day of April, 2017

A.MBOGHOLI MSAGHA

JUDGE