



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 546 OF 2014

JOHN KINYUA MURAGE.....1ST APPELLANT/APPLICANT

JAMLECK MWANGI.....2ND APPELLANT/APPLICANT

M. W. KIBIGI.....3RD APPELLANT/APPLICANT

- V E R S U S -

JOSEPH ONYANGO OBURA.....RESPONDENT

RULING

1. On 13th October 2016, this court issued an order directing the appellants herein to file the record of appeal within 60 days in default the appeal to automatically stand dismissed. It would appear the appellant did not comply with the order therefore the appeal got dismissed after the lapse of 60 days. The appellants have now taken out the motion dated 19th January 2017 in which they sought for *inter alia* the reinstatement of the appeal. The motion is supported by the affidavit of Allan Odonyo. When served, Jonh Onyango Obura the respondent herein filed the replying affidavit of Nelson Kaburu Felix to oppose the iapplication. When the motion came up for interpatates hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions.

2. I have considered the grounds stated on the face of the motion and the facts deponed in support and against the application. I have also considered the rival submissions. The main ground put forward by the appellants in support of the motion is that the appellant's advocate took numerous steps to obtain typed proceedings of the trial court but was unsuccessful. The appellants exhibited several letters written to the deputy of this court seeking to be supplied with typed proceedings. The respondent was of the view that the various letters written to the Deputy Registrar of this court requesting for proceedings appear to have been manufactured to suit the motion. The respondent pointed out that there was no court stamp to acknowledge receipt of those letters. Having considered the two conflicting submissions, it is clear in my mind that the respondent does not perse deny the fact that the proceedings of the trial court have not been supplied to either party.

3. The respondent merely raised doubts against the genuinity of the correspondences from the appellants' advocate to the Deputy Registrar. I have examined some of those letters and it is clear that the person who received those letters on behalf of the executive officer of the trial court noted on the face of those letters that the trial court's file could not be traced. On my part, I am satisfied that the appellants have given plausible reasons why they did not file the record of appeal within the 60 days fixed by this court.

4. In the circumstances I will exercise my discretion in favour of the appellants. Consequently, the motion is allowed in the following terms:

i. The order automatically dismissing the appeal is set aside and as a result the appeal is reinstated.

ii. The appellant is given 30 days from the date of this ruling to have the record of appeal prepared, filed

iii. and served.

iv. The appeal to be listed for directions within 45 days from the date hereof.

v. The appellant to deposit ksh.1,000,000/= in an interest earning account in the joint names of the advocates and or firms of advocates appearing in this matter within 30 days from the date of this ruling.

vi. The respondent to have the costs of the motion.

Dated, Signed and Delivered in open court this 29th day of September 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent