

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 550 OF 2012

CHINA JIANGSU INTERNATIONAL LIMITED.....APPELLANT

VERSUS

HENRY ADEMA ARIGULARESPONDENT

RULING

1. The application dated 8th June, 2016 principally seeks orders that the order made on the 6th June, 2016 dismissing the appeal be set aside and or vacated and the appeal be heard on merit.

2. It is stated in the affidavit in support that the court dismissed the appeal herein without any notice to the parties. That there is an application which is still pending before the Lower Court and that the Lower court file had not yet been forwarded to the High court. It is further averred that the appellant has furnished security in the sum of Kshs.300,000/= in the Lower Court and is desirous of having the appeal heard on merit.

3. The application is opposed. The Respondent filed a replying affidavit sworn on 22nd June, 2016. It is deposed that the appellant was supplied with the record of the Lower court at least three years ago. That the decree in the lower court was issued on 23rd October, 2012 and there is no reason why the appellant has not filed the record of appeal. That the applicant has not informed this court how he became aware of the dismissal of the appeal, yet he claims not to have been aware of the listing of the matter. That if there are any applications filed by the appellant before the lower court, the same are meant to cause delay and to frustrate the respondent from realizing the fruits of the judgement.

4. I have considered the application, the reply to the same and the submissions made by the counsels for the respective parties.

5. The appeal herein was dismissed under **Order 42 Rule 35 (2) of the Civil Procedure Rule** which provides as follows:

“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.”

6. I have carefully perused this file. The appeal is yet to be admitted. Although the Deputy Registrar requested for the record of the Lower Court, the said record is yet to be availed. However, this court can in appropriate cases exercise its inherent jurisdiction to prevent the abuse of the court process by parties who lodge appeals then fail to take any steps to prosecute the same.

7. In the case at hand, there is no copy of notice sent by the Deputy Registrar before the appeal was listed for hearing. It is also not denied that this case is still active in the lower court.

8. With the foregoing, this court is inclined to allow the application to have the appeal heard on merit. Consequently, I allow the application with costs in cause.

Dated, signed and delivered at Nairobi this 20th day of July, 2016

B. THURANIRA JADEN,

JUDGE