



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 24 OF 2012

WOCHE HUSSEIN HIRBO..... 1ST APPELLANT

DARO CHATO. 2ND APPELLANT

VERSUS

ROSE KHAUSI. 3RD APPELLANT

RULING

The application before the court is the Notice of Motion dated 31st January, 2014. It seeks a review of this court's order dated the 21st November, 2013 dismissing this appeal for want of prosecution.

The facts as are on the record are that this appeal was originally filed by the appellant who went through the process of preparing the appeal for a hearing and fixed the same on 21st January, 2013 for directions. On this date Mr. Oloo who represented the Appellant sent a Mr. Odhiambo to court to hold his brief. The Respondent who was represented by the Mr. Kaburu sent a Mr. Mutua to hold his brief.

When the suit was called out Mr. Mutua stated that the Appeal was for directions but he did not have sufficient information to assist the court to take directions. He sought for leave to and was allowed by the court to cease acting on behalf of Mr. Kaburu for the Respondent. He should have said that Kaburu was acting for the Appellant but he did not.

That is when Mr. Odhiambo for Oloo seized that dramatic moment and asked the court to dismiss the appeal since the Appellant's advocate was absent and the counsel he had sent to hold his brief had walked out for lack of sufficient instructions. The court in an earlier order of .10th October, 2013 had directed that the appeal would be dismissed if the Appellant did not show up in court and show sufficient interest to proceed with directions on 21st November, 2013.

The tragedy however, was that Mr. Odhiambo holding brief for Mr. Oloo, was actually representing the Appellant and not Respondent and seeking to have the appeal dismissed, was against his principal's client's interest.

Mr. Oloo seeks review of the order of dismissal because, the request made on his behalf by Mr. Odhiambo was inadvertent, misinformed and strange under the circumstances it was made. That it was against common sense to seek for the order of dismissal against his own client and the whole conduct was simply a mistake which needs correction. That reinstatement of the appeal through review will not prejudice the respondent and on the other hand, it will facilitate the suit to be heard inter parties thus giving both parties opportunity to present their cases.

On the other hand Mr. Kaburu opposed the application. He said that the delay in approaching the court to correct a mistake caused solely by the Applicant was 81 days and therefore inordinate. That the applicant/Appellant is solely to blame and should bear the deed that he himself was responsible of. That Appellant was eager to dismiss the other party's suit without mercy and should now suffer the consequences of his attitude and conduct.

I have considered the facts. I am satisfied that the dismissal of the appeal on 21st November, 2013 was a simple mistake which arose from lack of carrying sufficient information and instructions by both advocates who acted on instructions from the advocates who had sent them.

The Appellant/Applicant has shown sufficient interest in the appeal. There is no evidence that the actual Appellant had committed any fault in respect to the conduct of the parties on that particular day. This means that the fault or mistake lay purely in the hands of the advocate and in an occasion like this, the mistake of the advocate should not be allowed to prejudice the party the advocate represented.

Furthermore, the mistake that brought this misfortune, can adequately be compensated in costs. Also the Respondent will not suffer much prejudice and there is a reasonable ground or cause for the court to act in the interest of fairness and natural justice.

In the circumstances, I allow this application by reviewing the courts order of 21st November, 2013. The order is hereby reviewed and set aside. The appeal is hereby reinstated. Costs are to the Respondent. Orders are made accordingly.

Dated and delivered at Nairobi this 22nd day of April, 2015.

.....

D A ONYANCHA

JUDGE