

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 588 OF 2011

BOTOL IBRAHIM MUSA SAID. RESPONDENT/APPELLANT

VERSUS

ALFRED RATEMO. APPLICANT/RESPONDENT

RULING

The Application before the court is the Notice of Motion dated 1st December, 2014 filed by the Respondent in this appeal. It seeks dismissal of the Appeal for failure to comply with the court order that the appeal required to be fixed for a hearing within 14 days or the same would be dismissed on application.

The facts show that the appeal, on an application by the Respondent to have it dismissed for want of prosecution, was saved by this court. The court on 19th September, 2014 ordered that the Appellant was under obligation to file the Record of Appeal and fix the saved appeal for directions within 45 days hence.

On default the appeal dated 16th November, 2011 was mandatorily to stand dismissed.

The Applicant/Respondent urged that the Record of Appeal was not served nor appeal prosecuted by the Appellant within the 15 days ordered by the court on 19th September, 2014 when it saved the appeal from being dismissed for a similar reason.

Although, the file record shows that on 7th January, 2015 the Respondent/Applicant herein fixed this application on 5th March, 2015 for hearing, there is no indication that the Appellant himself did anything to comply with the cited order of 19th September, 2014. The Appellant claimed that he within 10 days of the said, served the Record of Appeal upon the Applicant/Respondent. How he failed to demonstrate any other action on his part to comply with the said order of 19th September, 2014 which mandatorily required him to serve the Record of Appeal and fix the Appeal for hearing within 45 days.

It is observed from the file record minutes also, that once the Appellant had failed to comply with the said order within 45 days ordered by court it became difficult and somewhat irrelevant what steps he thereafter took to comply. This is because this Respondent's application to dismiss the appeal overshadowed him. On 5th March, 2015 when the application came for hearing, all he could do is seek that the application be argued by way of written submission which the court granted. He purported to fix the appeal for directions but that could not work in the face of this active application to dismiss the appeal. That situation persisted until 4th May, 2015 when the court heard this application and reserved it for this Ruling.

The Appellant's case is that he failed to comply with the Order of 19th September, 2014 to fix directions because the court file was missing. He failed to back that argument. He failed to annex letters to court complaining of a missing file. He failed to explain how the alleged missing court file was always available to the Respondent who was pursuing this application to dismiss the appeal. The Appellant instead tried to introduce the substance of the lower court suit which was irrelevant to the order of 19th September, 2014 which he failed to comply with.

The said order of 19th September, 2014 by Ougo J, stated as follows: -

“...It (the Appellants earlier delay) could be explained by the Respondent/Appellant that the court file has been missing and the thus I will give the Respondent the benefit of doubt and a chance to prosecute their appeal. The Respondent shall prepare their Record of Appeal and fix the matter for directions within 45 days from the date of this Ruling, failure to which the Memorandum of Appeal dated 16th November, 2011.... shall stand dismissed.”

It is not disputed that the Appellant did not fix the matter for directions within 45 days. As earlier stated above, the Appellant also failed to reasonably or sufficiently explain his reasons for failure to comply. This court's orders, especially mandatory order must be obeyed. The Appellant failed to obey and comply. He had shown similar conduct before although the court saved the situation by sustaining the appeal though upon conditions which were mandatory by use of the word **“shall”**. This court is not inclined to give further indulgence and in fact has no room to do since the order of 19th September, 2014 was mandatory.

In these circumstances, this court has no alternative but to comply with its said mandatory orders by allowing this application and dismissing the Appeal with costs. The court adds that even were it to have discretion from the said order, it would have still dismissed this appeal because the Appellant's conduct does not deserve a favourable discretion again. Orders accordingly.

Dated and delivered at Nairobi this 23rd day of July, 2015

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JUDGE