



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL APPEAL NO. 260 OF 2010

JASON WACHIRA MUGO..... APPELLANT

V E R S U S

NAOMI NJOKI MWANGI..... RESPONDENT

RULING

By Notice of Motion dated 4th December 2012, the Appellant seeks orders to reinstate his appeal that was dismissed for non-attendance on 9th November 2012. The application is brought under **Section 3A** of the **Civil Procedure Act** (the **Act**) and **Order 42 Rule 21** of the **Civil Procedure Rules** (the **Rules**). A period of one month two days had elapsed since delivery of the ruling dismissing the appeal for non-attendance and the filing of the current application.

The issue in this application is whether the applicant has given a satisfactory explanation for non-attendance on 9th November 2012. The affidavit in support of the application is sworn by Benjamin Mwikya Musyoki Counsel for the Appellant. It is explained that the non-attendance was occasioned by the fact that the hearing notice was received on 8th November 2012 in his office and he only got to see it on the afternoon of 9th November 2012 when it was brought to his attention by his secretary; that due to inadvertence the notice for directions was only placed on his desk but was not diarized by his clerk; that the non-attendance was not deliberate hence appellant should not be made to suffer due to the mistakes of his Counsel; that the Respondent does not stand to suffer any prejudice if the application is allowed.

In response, a replying affidavit was sworn by the Respondent on 6th February 2015. It is stated that since the appellant filed this appeal in year 2010 he has never served her with the memorandum or record of appeal; that it is almost 4 years since the appeal was filed and 19 (nineteen) years since the original suit was filed but the appellant has failed to take any steps towards prosecution of the same; that the appeal is solely meant to deny her the fruits of the judgment in the lower court; that she is old and sickly hence the dismissal is timely; the application does not meet the threshold of setting aside the dismissal order as he has not given cogent reasons to warrant exercise of court's discretion in his favour.

I have read the supporting and replying affidavits. I have also considered the submissions of the learned counsels appearing, including the authorities cited.

Order 42 rule 21 states –

“Where an appeal is dismissed under rule 20, the appellant may apply to the court to which such appeal is preferred for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.”

The rule donates to the court an unfettered discretion, subject only to such terms as are just. I am satisfied from the supporting affidavit that failure of attendance in court by or for the Appellant on 9th November, 2012 was occasioned by a probable mistake. Though it is always prudent for litigation to come to an end, it is imperative that all parties are heard on merit so that substantive justice can be administered.

Article 159 of the Constitution enjoins this Court to administer substantive justice. I am also cognizant of the fact that Sections 1A, 1B and 3A of the Act through the overriding objective principles mandate this Court to act justly and fairly. The overriding objective principle is not aimed at giving justice to one party at the expense of another.

This is a case in which justice demands that the Appellant should not be shut out of court. An award of costs will adequately compensate the Respondent for any inconvenience that she may suffer. She will certainly suffer no prejudice by allowing the Appeal to proceed to hearing.

I will in the circumstances allow the application. The order of 9th November, 2012 by which this Appeal was dismissed with costs for want of attendance is hereby set aside, and the Appeal reinstated for hearing. The Respondent shall have the costs of this application, hereby assessed at Kshs. 5,000/=. Those shall be the orders of the court.

Dated and delivered at Nairobi this 21st Day of October, 2015.

A.MBOGHOLI MSAGHA

JUDGE