



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 38 OF 2013**

**AKIDYA 2000 COMPANY LIMITED ..... APPELLANTS**

**VERSUS**

**JOSEPHAT WAMUYU GITAU..... RESPONDENT**

**RULING**

1. On 29<sup>th</sup> July 2015, this court dismissed three motions dated 19.02.2013, 15.03.2013 and 20.03.15 for want of attendance on the part of Akidya 2000 Co. Ltd, the Appellant/Applicant. The Appellant has now taken out the motion dated 1<sup>st</sup> September 2015 in which it sought for the dismissal orders to be reviewed and set aside. The motion is supported by the affidavit of Churchil Midwa. When served, Josphat Wamuyu Gitau, the Respondent herein, filed a replying affidavit he swore to oppose the application. The motion was disposed of by written submissions.
2. The Appellant has beseeched this court to take into account the fact that it took steps to have someone attend court to apply for the adjournment of the hearing of the aforesaid motions. It is the submission of Mr. Midwa this court made a grave error when it dismissed the motions for want of prosecution yet he had sent someone to hold his brief. He urged this court not to punish the Appellant for the mistakes of its advocate. The Respondent on the other hand has urged this court to dismiss the motion because no satisfactory reasons are advanced to support it. The Respondent also pointed out that the appeal has no chances of success.
3. I have carefully considered the rival submissions. I have also considered the material placed before this court. It is apparent from the court record that this court indeed, dismissed the Appellant's aforesaid motions for want of attendance. This court has been urged to review and to set aside the order on account of mistake on the face of record. It is argued that the Appellant's counsel had instructed another advocate to hold his brief and with specific instructions to adjourn the hearing of the motions. The question is whether or not there are sufficient reasons to enable this court exercise its discretion and whether there is an error apparent on record.
4. After a critical examination of the court record, it is clear to me that the Appellants advocate had instructed Mr. Bosire, learned advocate to hold his brief on 29.7.2015. Mr. Bosire informed this court that Mr. Midwa was at the time held up in the Court of Appeal hence he was not available to prosecute the aforementioned three applications. The application for adjournment was seriously contested by Mr. Kiplagat learned advocate for the Respondent. This court considered the arguments put forward and rejected the application for adjournment and instead gave Mr. Bosire upto 10.30 am to come back to prosecute the motions interpartes. At 10.35 am, the matter was called out and Mr. Bosire was nowhere near the court. This prompted the court to dismiss the motions for want of prosecution.
5. It is therefore incorrect to allege that there is an error on the face of record. The Appellant/Applicant has stated that its advocate made a grave mistake in the matter hence the client should not be made to pay the price for that mistake. With respect, I agree with the

Appellant's argument that what led to the dismissal of the motions is purely the mistake of the Appellant's advocate. I am persuaded by the argument that in the circumstances of this case the client should suffer for the mistakes of its advocate. However, the Respondent who was the vigilant party in this matter must be compensated by an award of costs.

6. In the end, I allow the motion dated 1<sup>st</sup> September 2015 by setting aside the dismissal order made on 29.7.2015. The motions dated 19.2.2013, 15.03.2013 and 20.03.2015 are ordered reinstated. Thrown away costs assessed at ksh.5,000/= to be paid to the Respondent within 15 days from the date of this ruling. In default, the motion shall be treated as having been dismissed. The motions to be fixed for hearing interpartes on priority basis.

**Dated, Signed and Delivered in open court this 11<sup>th</sup> day of December, 2015.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellants

.....for the Respondent