



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 110 OF 2007

KENYA NUT CO. (KIAORA ESTATE) LTD.....APPELLANT

VERSUS

FELISTAH WANJIRU.....RESPONDENT

RULING

1. By a notice of motion dated 11th February 2011 made under section 1A and 3A of the Civil Procedure Act and order 51 Rule of the Procedure Rules the appellant moved court for orders that the order made on 6th March 2009 dismissing the appeal herein be set aside and the appeal reinstated for hearing.
2. The application was grounded on the grounds that the appellant advocates were not served with the notice requiring them to attend court and show cause why the appeal should not be dismissed that the appellant was not in a position to prosecute the appeal since it had been pursuing the drawing of the decree by the trial court and that the appellant is desirous of pursuing the appeal and should not be denied the chance of doing so.
3. The application was supported by the affidavit of FREDRICK OTIENO MEGE Advocate in which he deponed that by a letter dated 26th May 2008 the appellant applied for certified copies of the proceedings and judgment of the lower court and on 2nd June 2008 when they went to check the position they were told that the file had been forwarded to this court.
4. That on 4th June 2008 he went to the D/R explaining the position and was furnished with a photocopy of the certified copies of the proceedings and judgment and that he subsequent went to Kandara Law Courts seeking the drawing of the decree for inclusion in the records of appeal which has not been done to date.
5. He further deponed that sometimes in mid December 2010 he sent his clerk to find out if the file had been returned to the lower court when the said clerk learnt that apparently the appeal had come up for notice to show cause on 6th March 2009 and was dismissed for want of prosecution without service of the hearing notice for the said notice to show cause.
6. From the record herein it should be noted that this appeal was admitted on 6th May 2008 and that there was no need for the appellant herein to include decree in his record of appeal the original file having been forwarded to the court and certified copies of proceedings produced to the appellant.
7. I have however looked at the records from the proceedings of 6th March 2009 when the application was dismissed for want of prosecution and note that there is no evidence that the said notice was ever served upon the appellant's Advocates.
8. In considering the applications of this nature the principles upon which the court has to rely are set out in the case of PATEL v EA CARGO HANDLING SERVICES[1974]EA 75 in which the court state:

“There is no limits or restrictions on the judges discretion expert that if he does vary the judgment he does so on such terms as may be just. The main concern of the court is to

do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules”

9. It should be noted that where service is irregular the court shall set aside any exparte orders issued as a matter of right in what has been called exhibitio justicia.
10. In the matter before court I note that there was no service and shall therefore allow the application herein set aside the dismissed orders and reinstate the appeal.
11. Taking into account the fact that this is an old matter (2007) this application is allowed upon condition that the record of appeal is prepared and the appeal fixed for hearing within the next 60 days from the date herein.
12. The cost of this application shall be in the cause and it is so ordered.

Dated, signed and delivered at Nyeri this 13th day of February 2014.

J. WAKIAGA

JUDGE

Court: Ruling read in open court in the presence of Mr. Njue for Mr. Otieno for the appellant.

J. WAKIAGA

JUDGE