



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

Civil Appeal No. 2 of 2008

between

DAHIR ADAN JIMALE1ST APPELLANT/APPLICANT

A.S. SHEKH TRANSPORTERS2ND APPELLANT/APPLICANT

VERSUS

PATTERSON KARIUKI MUTURI (suing as personal representative of

EDWIN NJIRU KARIUKI (DECEASED)DEFENDANT

(An Appeal from the Judgment and Decree of the learned Principal magistrate Hon. OMENTA sitting at SIAKAGO PMCC No.15 of 2007 delivered on 6/12/2007).

RULING

This is the application dated 5/3/2012 brought under Order 12 rule 7 Civil Procedure rules and section 1A, 1B and 3A Civil Procedure Act for setting aside of the dismissal order dated 17/1/2012 and reinstating of the appeal herein. The grounds are on the face of the application. A supplementary affidavit by Manasses Kariuki Karoki advocate has been filed. The gist of this affidavit is that all along the Appellant has been keen to have the Appeal heard. It was not his mistake that there was no representation in Court on 14/12/2011 when he had been called upon to show cause why the Appeal should not be dismissed. It's all explained in the affidavit which is on record.

The Respondent filed a replying affidavit. He opposes the application saying it was his advocates who have all along been pushing the Appellants for mention of the matter. And when the Notice to Show Cause was issued the Appellant did not turn up.

Mr. Kimathi for the Appellant/Applicant submitted that the Appeal raises triable issues and the Appellant should be given an opportunity to be heard. He cited the cases of;

1. PROF WALTER GITAU -VS- E.A. BUILDING SOCIETY [2005] e KLR

2. ASSUMPTION SISTERS OF NAIROBI REGISTERED TRUSTEE -VS- STANLEY KEBATHI, ARBITRATOR & ANOTHER [2006] e KLR

Mr. Wambiliangah on the other hand opposed the application saying there was nothing to show that the matter was not cause listed. And the Respondent had waited for the end to this matter for too long. There had been no negotiations going on as they had informed the Appellant's Counsel that they had no instructions to enter into such negotiations.

I must first of all point out that this is an Appeal of 2008. The same was admitted on 18/3/2009. The record of Appeal was filed. Directions on how to proceed have not been taken. The Respondent filed an application for dismissal of Appeal. This Court directed that a Notice under Order 42 rule 35(2) Civil Procedure rules be issued. The same was issued and served for 14/12/2011. On 14/12/2011 there was no appearance for or by the Appellant/Applicant. In his supporting affidavit Mr. Manasses Kariuki Karoki has explained what transpired on 14/12/2011. I have not had the opportunity to confirm indeed if this matter was or was not in the cause listed for 14/12/2011. But the fact is that the Court gave this date and Counsel was served.

That aside, the duty of the Court is to ensure that Justice is done to all parties appearing before it. Setting aside of any Judgment or orders involves Judicial discretion which must be exercised judiciously.

The authorities cited by the Applicant are cases in point. This is a matter where the record of Appeal has been filed and served. The parties should simply take directions on how to proceed with the Appeal and I am sure there will be a Judgment before the end of the year.

In the case of **GIRADO -V- ALAM & SONS (U) LTD [1971] EA 448** it was held that the Court has inherent power to restore a suit dismissed for default even if no sufficient cause has been shown.

The Court leans more on the side of hearing parties and making a decision on merits other than technicalities. In the case of **PHILLIP CHEMOWLO & ANOTHER -VS- AUGUSTINE KUBENDE [1982-88] KAR 103** the Court of Appeal had this to say;

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits. The broad approach is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court as is often said exists for the purpose of deciding the rights of the parties and not imposing discipline”.

I do appreciate what the Respondent has gone through in the period waiting. The decretal sum has been deposited. It's only fair that the Appeal be heard and determined on merit. The Respondent can be compensated by way of costs.

I therefore allow the application and set aside the order dismissing the Appeal on 14/12/2011. The Appeal is reinstated. Costs to the Respondent. The parties are at liberty to take directions even today under Order 42 rule 13 Civil Procedure Rules.

DATED AND DELIVERED AT EMBU THIS 25TH DAY OF SEPTEMBER 2012.

**H.I. ONG'UDI
J U D G E**

In the presence of;

Mr. Kathungu for Kariuki for Appellant

Njue – C/c