

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 32 of 1999

BENSON MAINA KAMAU APPELLANT

VERSUS

NJOKI MAINA.....RESPONDENT

***(Being Appeal against the judgment of J. B. A. Olukhoye, Ag. Resident Magistrate, Murang'a,
in Principal Magistrate's Succession Cause No. 260 of 1992 delivered on 12th March 1999)***

JUDGMENT

On the 28th day of November 2008, this Court dismissed this appeal for want of prosecution. When the Appellant learnt of the dismissal order, he invoked the inherent jurisdiction of this Court through the Motion dated 16th July 2009 and applied for the dismissal order to be set aside. The Motion was served but the Respondent did not file any reply hence the Applicant was granted leave to proceed for hearing exparte under *Order L rule 16 (3)* of the Civil Procedure Rules.

Benson Maina Kamau, the Appellant/Applicant herein, blamed the firm of Waithira Mwangi & Co. Advocates for the delay to have the appeal ready for hearing. He said he was kept in the dark on the progress of the appeal. He beseeched this court not to let him suffer for the mistakes of his advocate. He accused his erstwhile advocate for failing to notify him of the notice to show cause why the appeal should not be dismissed served upon him.

I have considered the grounds set out on the face of the Motion and the facts deponed in the affidavit filed in support of the Motion. The facts deponed in the aforesaid affidavit have not been controverted by the Respondent. I have no reason to doubt the averments made by the Appellant/Respondent. I am convinced that the delay to make the appeal ready for hearing was caused by the firm of Waithaka Mwangi & Co. Advocates. There is no evidence that the aforesaid firm ever communicated with the Appellant. It is clear he kept the Appellant in the dark of the progress of the appeal. I am of the view that the Appellant should not be punished for the mistakes of his advocate. For the above reason, I hereby exercise my inherent power by setting aside the order dismissing the appeal made on 28th November 2008. The appeal is reinstated but should be prosecuted within a period of 60 days failure to which the same shall automatically stand dismissed. Costs of the Motion be in the appeal.

Dated and delivered at Nyeri this 26th day of February 2010.

J. K. SERGON

JUDGE

In open court in the presence of the Appellant. No appearance of the Respondent.