



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

OF KISII

Civil Appeal 271 of 2004

(Being an appeal from the ruling/order in CM's court at Kisii in Civil Case No. 92 of 2002)

JULIUS MATARA OMITI APPELLANT/APPLICANT

VERSUS

JAMES OBURU NYANGAYA RESPONDENT/RESPONDENT

RULING

On 11th March, 2008 the respondent's application dated 27th March, 2008 seeking dismissal of this appeal for want of prosecution came up for hearing. Mr. Soire for the appellant was not in court when the application was called out for hearing in the morning hours. The court allowed the application as prayed.

On 12th March, 2008 the appellant filed an application under **Order L rule 17** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. He prayed for setting aside of this court's orders dated 11th March, 2008 and reinstatement of the appeal to hearing.

Mr. Soire for the appellant told the court that he believed that the application would be heard at 2.30 p.m. as is the court's practice of dealing with applications in the afternoon and full hearings in the morning hours. On that day he was within the law courts attending to other matters when he was informed by the appellant that he came to court at about 9.15 a.m. and found the respondent's counsel on his feet. On checking the court file, he realized that the appeal had been dismissed for want of prosecution.

He urged the court to consider that the dispute between the parties is over a parcel of land and allow the application.

Mr. Ombachi for the respondent opposed the application and relied on grounds of opposition filed on 11th July, 2008. He submitted that:

- ~~€€€€€€€€~~ the application was brought under the wrong provisions of the law.
- ~~€€€€€€€€~~ the application was grounded on contradictory facts which are incapable of any reasonable explanation.

- €€€€€€€ there had been inexcusable delay in prosecuting the appeal.
- €€€€€€€ the application was merely calculated to delay further conclusion of the matter.

I note that the appellant's application was filed one day after dismissal of the appeal for want of prosecution. There was no delay whatsoever. It is also a fact that this court ordinarily deals with applications in the afternoon hours but on that day the respondent's application was listed as though it was a matter coming up for directions. The cause list for that day shows that it was coming up for directions at 9.30 a.m. If Mr. Soire had been diligent to come to this court at 9.00 a.m. before proceeding to the subordinate courts he would have realized the time that was indicated on the cause list.

I have no reasons to disbelieve the appellant's contention that he was in court at about 9.15 a.m. It is his advocate who failed him for the aforesaid reasons. In the circumstances, it would be improper to punish the appellant by not giving him another chance to prosecute his appeal.

Consequently, I allow the appellant's application dated 12th March, 2008. The appellant shall however bear the costs of the application assessed at Kshs. 5,000/=.

DATED, SIGNED AND DELIVERED AT KISII THIS 11TH DAY OF JUNE, 2010.

D. MUSINGA
JUDGE.
11/6/2010

Before D. Musinga, J.

Mobisa - cc

Mr. Soire for the appellant

Mr. Ombachi for the respondent

Court: Ruling delivered in open court on 11th June, 2010.

D. MUSINGA
JUDGE.