

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 61 of 2003

MEA LTD.....PLAINTIFF

VERSUS

JAMES OTOTA INZOFU.....1ST RESPONDENT

FRANCIS AKOYO OMBETA.....2ND RESPONDENT

RULING

On 8th December, 2008 I dismissed this appeal for want of prosecution and ordered the release to the Respondent's advocates of Kshs. 1,218,058.10 which had been deposited in a joint account as security for the due performance of the decree appealed against. Contending that that dismissal was in error as they were not notified, the Appellants have applied to set that dismissal aside and for the redeposit of that sum into the joint account. They have denied being indolent and contended that failure to fix the appeal for hearing was because the court file went missing soon after taking directions on 25th June, 2008 and that if the appeal is not reinstated and heard and determined on merit, they will suffer great prejudice. They have also argued that as the Appellant has no known means of refunding the amount released to him, they will be unable to recover the decretal sum if the appeal succeeds.

In opposition to the application counsel for the Respondent has sworn a replying affidavit contending that this appeal was meant to frustrate his client as the Appellants have since filing it in April, 2003 not taken any step to have it heard. According to him, on account of the Appellants' inertia and laches for now over 7 years, the court was perfectly entitled to dismiss the appeal on its own motion under Order 41 Rule 31(2) of the Civil Procedure Rules for having not been set down for hearing within one year after service of the memorandum of appeal. Counsel also contends that granting the prayer for the refund of the decretal sum will be an exercise in futility as the same has been released to the Respondent.

I have considered these submissions. Order 41 Rule 31(2) of the Civil Procedure Rules authorizes the court upon notice to the parties, to dismiss, on its own motion, an appeal which is not set down for hearing within one year after service of the memorandum of appeal. This is the provision under which this appeal was dismissed. I have perused the file and noted that the Appellants were not served with notice of the dismissal of the appeal for want of prosecution. As the Respondent has not disputed the fact that the court file went missing for some time, the allegation of lethargy leveled by the Respondent's counsel against the Appellants has no basis. In the circumstances I agree with counsel for the Appellants that this appeal was dismissed in error and I accordingly reinstate it and order the Respondent and/or his counsel do redeposit the decretal sum in the joint account within 30 days. The costs of this application shall abide the result of the appeal.

DATED and delivered this 18th day of May, 2009.

D.K. MARAGA

JUDGE.