



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 598 of 2003

JAMES MBURU MWANGI.....APPELLANT

VERSUS

FRANCIS NJOROGE KAGUNDA

KAMAU KAGUNDA.....RESPONDENTS

R U L I N G

Pursuant to a notice issued under Order XLI Rule 31(2) of the Civil Procedure Rules, the Hon. Mr. Justice Mutungi, on 21st October, 2005 having heard the counsels ordered that this appeal be dismissed for want of prosecution.

The appellant has now come back to this court seeking to have the order made on 21st of October, 2005 reviewed and the order dismissing the appeal substituted with an order reinstating the said appeal. It is contended that there is an error on the face of the record which was fatal to the notices issued under Order XLI Rule 31(2). It is further contended that the dismissal orders which are prejudicial to the appellant were a result of a mistake on the part of the appellant's former advocate.

In a supporting affidavit sworn by Gatitu Wang'oo, the appellant's new advocate, it is contended that the firm of Njoroge Musyoka who wrote to the registry to issue notice under Order XLI Rule 31(2) were strangers as they were not on record. The court was further urged not to punish the appellant for the mistake of his counsel whom he trusted to prepare the record of appeal. It was submitted that the appeal involves land and has overwhelming chances of success.

For the respondent, it was submitted that there was no error apparent on the face of the record as a notice of change was filed by D.G. Njoroge on the 11th March, 2004 long before the court was moved to dismiss the appeal. It was submitted that there was negligence in the conduct of the appellant's case and that if this negligence is not visited on the appellant it will cause great injustice to the respondent. It was further submitted that the application before the court was wrongly brought under Order XLV and Order I of the Civil Procedure Rules both of which have no relevance to the application for review. Finally it was maintained that under Order III Rule 9A leave is required for another advocate to come on record where there is a judgment on record, and that no leave having been granted to the appellant's counsel, he was therefore improperly before the court.

For the appellant it was submitted that Order III Rule 9A was not applicable as there was no judgment herein but simply an order dismissing an appeal.

I have carefully considered this application. The circumstances under which an order for review can be made by the court are clearly specified under Order XLIV Rule I of the Civil Procedure Rules. These are:

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a) When there is discovery of new and important matter or evidence and such matter or evidence was not within the knowledge of the applicant or could not be produced by him at the time the order was made notwithstanding the exercise of due diligence

or

b) where there is a mistake or error apparent on the face of the record

or

c) where there is any other sufficient reason.

d) The application for review must be made without unreasonable delay.

In this case, the application is said to be brought under Order XLV and Order I of the Civil Procedure Rules, however, none of these orders deal with applications for review. Secondly, it is evident from the grounds upon which the application is premised that the applicant contends that there is an error apparent on the face of the record. Apparently this error relates to the participation of the firm of Njoroge and Musyoka Advocates who were said not to be properly on record for the respondents. There is however no error apparent on the face of the record as Njoroge and Musyoka Advocates did file a notice showing that they had taken over the conduct of the appeal on behalf of the respondent. That notice was filed in March, 2005 long before the order for dismissal was made. Moreover, the notices issued under Order XLI Rule 31(2) of the Civil Procedure Rules were notices issued by the deputy registrar pursuant to powers given under the rules. The fact that the advocates for the respondents, may have written to the court urging the deputy registrar to exercise the said powers, is therefore not of any relevance. Further, it was maintained that under Order III Rule 9A leave is required for another advocate to come on record where there is a judgment on record and that in this case no leave was granted to the appellant's counsel. This is a matter which is not a new matter. It is a matter that ought to have been taken up by the appellant before the order of dismissal was made. Under Order XLII Rule I(1)(z) of the Civil Procedure Rules an appeal lies as of right from any order made under Order XLI Rule 31 of the Civil Procedure Rules. This is the remedy that the appellant ought to have pursued. I find that this is not an appropriate matter for review under Order XLIV of the Civil Procedure Rules.

Accordingly, the application is dismissed.

Dated and delivered this 28th day of May, 2008

H. M. OKWENGU

JUDGE