

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 193 of 2002

DOUGLAS MAINAPLAINTIFF

VERSUS

1. TERESIA WANYONYI

2. JOEL TITUS MUSYA t/a

MAKURI ENTERPRISESDEFENDANTS

R U L I N G

On the 19th day of September 2007, this court dismissed this appeal when the appellant and his counsel failed to turn up for the hearing of the appeal before Justice Maraga. The proceedings of that date shows that Mr. Obwa, learned advocate for the 1st Respondent had prompted Justice Maraga to dismiss the appeal for want of attendance. The appellant has now taken up the notice of motion dated 5th December 2007, the subject matter of this ruling in which he seeks for interalia that the appeal be re-admitted for hearing. The motion is supported by the affidavit of Douglas Maina Muhoro sworn on 5th December 2007. The 1st Respondent filed grounds of opposition to resist the motion.

The appellant confirms that the appeal was dismissed when his advocate failed to attend court for the substantive hearing of the appeal. It is the averment of the appellant that his learned advocate, Mr. Sifuna, has not explained to him the reasons which made him fail to attend court. The appellant states that he has made numerous visits to Mr. Sifuna's offices situate at Shanzu but has been unable to trace him, as his offices have been shut. He urged this court not to punish him for the mistakes of his advocate. The appellant claims in one of the grounds set out on the face of the motion that he was present within the court premises on 19th September 2007.

It is the submission of Mr. Obura, learned advocate for the 1st Respondent that the motion lacks merit and that the same was filed too late in the day.

I have considered the submissions of learned counsels from both sides. I have also perused the material placed before me. What comes out clearly is that the appeal was dismissed for want of attendance on the part of the appellant and his counsel. It was incumbent upon the appellant to explain the reasons which made his advocate fail to attend court. It is not enough for the appellant to allege that failure of an advocate to attend court amounted to mistake of counsel. It may be so, but reasons must be given to explain whether or not the mistake was genuinely made. In this case there is no affidavit or oral evidence to explain why Mr. Sifuna abandoned the appellant. There is also no evidence to show what steps the appellant has taken to pursue his erstwhile advocate.

Even assuming that there was a genuine mistake on the part of the advocate, still the appellant is not safe in that he delayed to file the motion. The appellant claims he was within the court premises on 19.9.2007. He has not stated to this court when he came to learn of the dismissal of this appeal. I can only infer that the appellant must have learnt of the order on the same date because there is no indication that he had other matters to attend to in court. If he learnt of the dismissal order on 19.9.2007 then why did he wait until 5th December 2007 to file this motion? I find the delay to be inordinate and inexcusable. In the circumstances of this case I am convinced that this is one of those cases where the

mistakes of the advocate must be visited upon the litigant.

For the above reasons I find no merit in the motion. The same is dismissed with costs to the Respondent.

Dated and delivered at Mombasa this 5th day of May 2008.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Obara for the Respondent and

N/A for the Applicant