REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 17 OF 1992

MUTONGA MUTHAMA……APPELLANT

VERSUS

KILONZO NGAO…….RESPONDENT

R U L I N G

By notice of motion dated 13.5.2003, brought under LR1, O.XLI rule 16 CPR, the applicant prays that the courts order dated 16.7.1999 dismissing the appellants appeal be set aside and costs of the application be in the cause. Grounds in support of the application which are in the body of the application are that the respondent misled the applicant into believing that the matte was settled and so applicant failed to instruct his advocate to prosecute the appeal and yet the trial raises serious triable issues which have high chances of success and it is only fair that the appeal be re-admitted to hearing. The application is also supported by the affidavit of the applicant Mutonga Muthamba who depones that after the appeal was filed and directions on hearing were given on 20.7.1995, the appeal was fixed for hearing on 18.7.1995 when it was SOG for respondent to be served personally with record of appeal. They started to settle on 2.11.1996 and respondent made a vow not to pursue the matter which was treated as settled and for that reasons he did not give the advocate instructions. Appeal was dismissed on 16.7.1999 and on 21.1.2003 was served with MTSC which he should not be committed to civil jail in execution of a subordinate courts order and when he attended court for MTSC he learnt that respondents advocates had filed a bill of costs assessed at Kshs.15,220/= and he feels deceived by respondent and respondent slowed not be allowed to respondent fruits of fraud.

The application was opposed and a replying affidavit filed by Kilonzo Ngao in which he denies that any vows were made between them to have appeal abandoned and parties were always represented and if they had agreed, such agreement would have been recorded and that the applicant was another of his own problem by not taking his advocate of a settlement and that the litigation has gone on for over 10 years and should be detained.

I have considered submissions by counsels, affidavits filed. I have also looked at the court file and do find that the order of 16.7.1999 cannot be read on its own without considering the orders of 13.5.1999 and 18.6.1999. On 13.5.1999 this matter came up for notice pursuant to order XVI 2 and order XLI rule 31 (2). It was for the parties to show cause why the appeal could not be dismissed for want of prosecution.The appeal had been lost yet down for hearing on 21.11.1996 over years ago. No steps had been taken by either party to prosecute it. On this date counsel for applicant was present and court ordered that appeal be taken the next 2 months and gave a mention date of 18.6.1999. On 18.6.1999, counsel for applicant was present and indicated that client was not responding and a final mention was given on 16.7.1999. On that date neither of the counsels was present and the court went ahead to dismiss the suit. The suit was dismissed in pursuance to the notice which came up in 13.5.1999 and the mentions were a follow up. The court had brought up the matter for dismissal and only gave the parties a chance to set it down for hearing which was not done and I find that the court did not error in dismissing the appeal.

Counsel for applicant having been present on 18.6.1999,should have made if a follow up 16.7.1999 to find out what happened. The exercise given by applicant for not instructing his advocate cannot be sustained because ……..they reached an agreement with respondent.It was upon him to inform his advocate. The matter was in court and it was upto him to find out what would happen to the

matter even if they had settled out of it and not keep off only to show up several years later to claim a settlement that the court is not aware of. Counsel for applicant having been aware of the notice of 13.5.1999 would have proceeded with the appeal even without the applicant. Reasons given by applicant for wanting order of 16.7.1999 set aside have no merit.

This is an old matter which should be laid to rest and the court will dismiss application with costs to respondent.

Dated, read and delivered at Machakos this……day of……..,2004.

R. WENDOH

JUDGE