

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CIVIL APPEAL CASE NUMBER 4 OF 2003

KIPKOECH CHUMO APPELLANT

VERSUS

JOEL KIPROTICH KERICH RESPONDENT

RULING

The Appellant, Henry Kipkoech Chumo, has filed an application under **order L rule 17, order XIB Rule 3 of the Civil Procedure Rules** seeking for order of this Court that the order of dismissal issued on the 5th July, 2004 dismissing the Application dated the 25th May, 2004 be set aside and the said Application be reinstated for hearing. The application is supported by the annexed affidavit of the Appellant and is based on the grounds stated on the face of the application. The Appellant has stated that he did not deliberately fail to attend court; that the matter involved a violated order of the court; that the subject matter of the suit was land which was a very sensitive issue. The application is opposed. The Respondent through his Advocate, Mrs. Alice Chepng'etich Bett, has sworn a replying affidavit opposing the Application.

At the hearing of this application, Mr Obwatinya, Learned Counsel for the Appellant submitted that the Application which was dismissed had sought the orders of this court to punish the Respondent for contempt of court for violating an order of this court which had earlier been issued. Counsel urged this court to order that the said application be reinstated as the failure by the Appellant and his counsel to attend court on the day the application was fixed for hearing was not deliberate. The Appellant urged this court to allow the said application to enable him to be heard and his application determined on merits before the pending Appeal filed can be heard. Mrs. Bett, Learned Counsel for the Respondent opposed the Application. She submitted that Application was incompetent having been brought under the wrong provisions of the law. Counsel further submitted that the application was meant to delay the determination of the pending appeal. The Respondent further submitted that no grounds were advanced nor reasons given why the Appellant and his counsel failed to attend court when the application was scheduled to be heard. The Respondent submitted that the averment by the Appellant that his Advocate was late in arriving at the court was not supported by the affidavit of the Advocate in record. Counsel for the Respondent submitted that the failure to attend court by the Applicant was deliberate. Counsel further submitted that no purpose would be served by the dismissed application being reinstated as the said application was fatally defective. The Respondent urged this court to disallow the application with costs to the Respondent.

In response, Mr Obwatinya submitted that the Application filed by the appellant was competently before court. Counsel submitted that this court had unlimited discretion to set aside orders made *ex parte*. Counsel further submitted that as the said application was meant to uphold the obedience of court order it should be reinstated. I have considered the rival submissions made by the parties herein. I have also read the application together with the annexed affidavit thereto and the replying affidavit filed by the Respondent.

I have also had the opportunity of perusing the record of this court. The appellant, on the 6th of June, 2004 made an application under certificate of urgency seeking to have the Respondent committed to civil jail for allegedly disobeying an order issued by the lower court. The Application was certified as urgent and the application was fixed for hearing on the 5th of July, 2004. An order was made that the Respondent be served with the said Application. The Appellant presumably served the Respondent because the Respondent filed grounds of opposition to the Application. On the 5th of July, 2004 neither the Appellant nor his advocate appeared in court. The Respondent was represented in Court. The Application was consequently dismissed for want of prosecution.

This Application is seeking that the said dismissed application be reinstated to hearing. The Appellant has not given any reason why he failed to attend court the day that the Application was fixed for hearing. The Appellant has stated in his affidavit that on the day the Application was dismissed he was in court but was oblivious to what was going on. Considering the fact that it is the Appellant who rushed to court to be heard under certificate of urgency, the Appellant's failure to attend court is inexplicable. I have perused the record of this court and cannot escape concluding that the Appellant's failure to attend court has a pattern. The Appellants suit in the lower court was dismissed for failure by the Appellant to attend court. His application to have the said suit reinstated to hearing was dismissed provoking this pending Appeal. The Appellant stated that the lower court ordered that status quo to be maintained pending the hearing and determination of Appeal upon the Appellant depositing the sum of Ksh.20, 000/- as security for costs.

The Appellant was subsequently evicted from the suit land. The Appellant contends that the said eviction was done in contravention of the orders of the lower court granting stay of the said eviction. It is the alleged breach of the said stay order that the Appellant sought to have the Respondent committed to civil jail for contempt of court.

I have looked at the said application. I have noted that the said application was filed without the leave of this court being sought. The argument by counsel for the Respondent that it would serve no useful purpose to reinstate the said application is therefore not without merit. Having analysed the affidavit evidence on record and the submissions made, I do find that the Appellant has not given any reason that would make this court exercise its discretion to reinstate the dismissed application. I am aware that courts should lean towards deciding cases on merits. As stated above, the Application for committal of the Respondent having been filed without leave of this court was incompetent. Further no order was annexed to the said dismissed application to show that an order was actually issued by the lower court, which order had been disobeyed. In the circumstances of this case, even if I were inclined to allow the application, no useful purposes would be served to allow the hearing of an incompetent application.

This application is therefore disallowed. The Respondent shall have the costs of **the application**.

DATED at KERICHO this 29th day of October 2004

L. KIMARU

AG JUDGE