



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL 139 OF 1998**

**SIMON MAKILI MALUKI ..... PLAINTIFF**

**VERSUS**

**DAVID MUTIE MOSYOKI ..... DEFENDANT**

**RULING**

The application dated 22.2.2004 is brought pursuant to Order XLIV Rule I; XLI Rule 16, XXI Rule 35 (3), XX Rule II, Order IXB Rule 3 and 8 Civil Procedure Rules, Section 3A, 99 and 100 of Civil Procedure Act.

The applicant Simon Makili Maluki seeks the following Order:

1. That there be stay of the certificate of costs dated 3.9.2003 pending inter partes hearing.
2. This courts orders of 12.3.2003 dismissing the applicants appeal be reviewed, and set aside and the appeal be re-admitted to hearing.
3. That the Deputy Registrar's order of 3.9.2003 taxing the bill of costs at Kshs. 76,580/- be reviewed and set aside and in the alternative the bill of costs dated 5.11.03 to be taxed inter partes and the appellant be allowed to pay the costs by instalment.

The grounds upon which the application is brought are found in the body of the application. The application was also supported by the affidavit of the applicant Simon Maluki and that of his former advocate Mr. D. M. Mutinda. It is the applicants contention that the order of 12.3.2003 is erroneous as the failure by the applicants advocate to arrive in court was not wilful neglect, but due to breakdown in communication; that this appeal has merit and is arguable; that the applicant was condemned unheard when the bill of costs was taxed without notice to the applicants advocate; that there is an error apparent on the face of the record and that there has been no delay in filing of this application and that the applicant only earns Kshs. 6,250/- as salary and hence the prayer that he be allowed to pay in instalments. The grounds listed above are reiterated in the 2 affidavits by applicant and former counsel.

A replying affidavit was filed by Dauti Kibanga who was then counsel for the respondent who depones that the appeal was dismissed because the court's orders of 15.12.1999 were not complied with and that even if counsel had been present, the dismissal order would still have been made and further that there has been inordinate delay in filing this application as the applicant was all along aware of the dismissal and the taxed costs for which he was arraigned before court, promised to pay and instead came up with this application.

The order dismissing the applicant's appeal for non-attendance was made on 12.3.2003. Mr. Mutinda then counsel for the applicant depones that he arrived at the court after 11.00 a.m. after the vehicle he travelled in broke down. He then asked the court clerk what transpired in the appeal and was told it was stood over generally. The counsel did not name who the clerk was. Further, counsel never bothered to check the record for himself to ascertain the orders made by the court. He went away and sat back. This being their appeal it would have been expected that counsel would move the court to have it set down for hearing. He did not do this.

By 11.10.2003 the applicant was served with notice to show cause in the appeal. This was evidence that

the appeal has been concluded. Again no steps were taken by either the applicant or his counsel to move the court for appropriate orders once the said discovery was made. Both counsel and applicant did not act diligently in the circumstances and a delay of 11 months from 12.3.2003 to 23.2.2004 is inordinate and unreasonable delay in the circumstances. Order 44 Rule 1 under which this application is brought provides that an application for review shall be brought without unreasonable delay. The delay of 11 months is unreasonable in the circumstances.

For an order of review to be made there must be discovery of a new and important matter or evidence, which the court after exercise of due diligence was not within the applicants knowledge or could not be produced by him at the time of the decree or order. The applicant has not demonstrated that there has been discovery of any new matter or evidence which could not be availed at the time of hearing. For an order of review to issue the applicant has to show that there was an error or mistake apparent on the face of the record or show sufficient reason that would warrant the court to grant the order for review. No such error or mistake has been pointed out by the applicant. Neither has he sufficient reasons to warrant the court order review. All the above considered together, the court is satisfied that the applicant has not placed sufficient material before the court to enable the court grant an order of review and the court declines to order review of the dismissal order of 12.3.2003.

After dismissal of the appeal the respondent filed a bill of costs which was taxed on 3.9.2003 at Kshs. 76,580/-. The applicants counsel denies that the bill was served on him. I have noted that the said notice of bill of costs was sent to Mr. Mutinda by post. It was posted to Box 2129 Machakos whereas the address of Mr. Mutinda Advocate is indicated as Box 2149, Machakos. All documents on record show that Mr. Mutinda's address is 2149 Machakos. It is apparent that the said notice was posted to the wrong address and that is why counsel did not attend the taxation. The applicants were therefore not served with notice of taxation. It is the respondents who were negligent in posting the notice to a different address and it is only fair that the applicant be given a chance to be represent himself at taxation. I will therefore set aside Deputy Registrar's order of 3.9.2003 taxing the bill of costs and subsequent certificate of costs. The bill of costs is remitted back to Deputy Registrar to be taxed interpartes before the Deputy Registrar.

The applicant prays for payment by instalment. That prayer is premature since taxation has to be done afresh and it is unknown how much the bill will be taxed at. That prayer cannot be granted at this stage. In any event it is the Deputy Registrar who deals with applications for payment by instalment and that prayer should be made before the Deputy Registrar. In sum the appeal stands dismissed as per court order of 12.3.2003. However, order taxing the bill of costs is set aside and Deputy Registrar to tax the bill afresh. Parties to share costs of this application as the application partly succeeded.

Dated at Machakos this 11th day of November 2004.

Read and delivered in the presence of

R. V. WENDOH

JUDGE