

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO.12 OF 2002

SOSPETER GESORA KIBANGA APPELLANT

VERSUS.

JOHN ATUTI NYANDIKA DEFENDANT

RULING

The applicant/appellant seeks court to set aside an order issued dismissing the appeal and reinstate the same for hearing. He also prays for stay of execution of the lower court's decree.

The appeal was fixed for hearing by the respondent on 19/2/04. M/S. Nyariki & Co Advocates were then, and even now, on record for the appellant. They were served with the hearing on 5/4/04. However on the hearing day neither the appellant nor the counsel was in court. The appeal was therefore dismissed for non-prosecution.

Mr. Soire who argued the application, having come on record to act together with Mr. Nyariki said that the appellant was not informed by the counsel about the hearing date. That is why he was not in court.

The application was opposed.

I have considered the application and find it has no merit. The explanation by the applicant through his affidavit that his counsel did not inform him of the hearing date is not credible and is not satisfactory. There is no denying that his counsel was served with the hearing on 5/4/04 – one month and 15 days before the hearing date. M/S. Nyariki & Co., Advocates are still on record as appearing for the applicant in this appeal. The advocate has not sworn an affidavit to confirm that indeed he did not inform the appellant about the hearing date. He further has not explained why he himself did not come to court on 19/5/04 to prosecute the appeal even in the absence of the appellant.

This is an appeal and the appellant was not expected to give evidence or say anything during the hearing. It was his counsel who would have argued the appeal. He has not said where he is. Thus though mistake of counsel should not be vested on a party, there is no good explanation why the two of them did not appear in court. It seems to me that Mr. Nyariki, who is still on record, is trying to hide behind another counsel. There was nothing which would have been easier than to swear that indeed he did not inform the appellant of the hearing date. That he fears to depone to such facts makes me believe that it is not a true fact.

I therefore find that the application has no merit. The same is dismissed with costs.

Dated 10th November 2004.

KABURU BAUNI

JUDGE

10/11/04

Mr. Mongare for the Respondent.

N/A for applicant.

KABURU BAUNI

JUDGE.