



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 158 of 1997

ALLAN MUKUNA MWATI
APPELLANT

VERSUS

JOHN GICHEHA GACHEGE
RESPONDENT

R U L I N G

The application dated on 3rd and filed in court on 4th October, 2001 asks this court to set aside this court's order of 21st May, 2001 (Amin, J) and to restate his directions of 30th March, 2001. There is also a further prayer for an order of stay of execution of the decree in Thika SRM's CC No.1193 of 1997 and for the costs of this application.

The application is based on the grounds on the body thereof and also on the supporting affidavit.

There have been several applications in this matter but for the present purpose, the respondent had, on 24th January, 2001 filed an application for the dismissal of the appeal for want of prosecution.

This application came before Amin, J as he was then on 15th February, 2001 on that day this is the order on the file:-

“Court: Appeal has not been admitted for hearing.

By consent : Effort to settle litigation H.S.O. 20.3.2001”.

The application was not heard on that day but instead parties went to the Registry and fixed the same for hearing on 30th March, 2001.

It was not heard on that day either but instead there is this order:-

“To be heard in Nairobi ½ day, one Judge”.

But on the left side of this order there are remarks

“Order vacated

Signed Amin, J

Then on 2nd April, 2001 the respondent appeared at the registry and fixed the appeal for hearing on 21st May, 2001, but on this day there are these remarks:-

“Mr. Kariuki : Does not wish to proceed with application.

Court : Appeal was dismissed on 15.2.2001.

Directions were misplaced.

Wishes to settle and liberty to apply”.

Signed Amin, J

All these orders or remarks have given rise to the present application. I have deliberately left our orders made herein on 3rd August, 2001 and 14th August, 2001 because they really do not concern the present complaint.

Counsel for both parties appeared before this court on 5th February, 2001 to either urge or oppose the application. Counsel for the applicant urged that the order should be set aside because it did not bear true reflection of the record of 15th February, 2001 and 30th March, 2001.

Counsel for the respondent relied on the preliminary objection of 16th October, 2001 and the replying affidavit of 25th October, 2001.

According to him present counsel for the applicant had no right of audience in court and that a similar application as the present one had been dismissed on 14th August, 2001.

That the orders sought do not fall within the ambit of Order XLIV of the Civil Procedure Rules.

In reply Counsel for applicant said he had sought leave to come on record and a consent order had been entered to this effect.

On question of previous application having been lodged, Counsel said it related to the order of 15.2.2001 but that the present application relates to the order of 21st May, 2001.

That an appeal could not have been dismissed before directions had been taken and further that the order of 21.5.2001 was made in error as the appeal had not been dismissed.

These are the submissions I have heard and recorded in this matter for consideration and decision.

When I perused the file before the hearing I thought the matter was simple on the face of it and even asked counsel for the parties to sort it out but counsel for the respondent insisted that was no way, he could agree to a compromise as the application had no merit according to him. He even referred me to the preliminary objection he had filed in the matter and thought it disposes of the application.

He insisted the appeal had been dismissed on 15th February, 2001 for want of prosecution which the Judge repeated on 21st May, 2001.

But I have reproduced the order of 15th February, 2001 and there is nothing like dismissing the appeal for want of prosecution in it.

The application dated 2nd August, 2001 was for stay of execution of the order of Thika Magistrate’s

Court Civil Case Number 1193 of 1995 and had nothing at all to do with the orders of this court of 15.2.2001 or 21.5.2001.

In any case even if the learned Judge had made any orders to dismiss the appeal for want of prosecution on 15th February, 2001 this would be contrary to Order XLI rule 31(1) of the Civil Procedure Rules which gives liberty to the respondent to either apply for dismissal of an appeal for want of prosecution or set it down for hearing within 3 months after the giving of directions the appellant has not set it down for hearing.

There is no way oral submissions can override a written record particularly on the court file.

I allow the application filed in court on 4th October, 2001 and set aside the order of 21st May, 2001 and reinstate the appeal filed herein on 18th June, 1997 to proceed to hearing after requisite directions have been taken. These are the orders of this court. There will be no orders as to costs of the application.

Delivered this 13th day of February, 2002 .

D.K.S AGANYANYA

JUDGE