

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 4 OF 2001

MOHSEIN MOHAMMED ALBEITYAPPELLANT

VERSUS

PETER MUCHERU NJUGUNA RESPONDENT

R U L I N G

The Notice of Motion dated 10th July 2002 under the provisions of order 41 rule 16, order 50 rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeks an order re-admitting the Appeal herein which was dismissed for want of prosecution on 24th June 2002. It is supported by an affidavit sworn by counsel for applicant Mr. Nyongesa Wafula.

In his submissions Mr. Akanga who argued the application on behalf of Mr. Nyongesa stated that Mr. Nyongesa who was in court when the matter was first called out on 24th June 2002 had left the court premises to see a physician as he was suffering from an Asthmatic attack. Before leaving court he had instructed a counsel M/S Pauline Osino to hold his brief and explain to the court what had befallen him but the said M/S Osino failed to appear too.

In support he has further attached a note from PALMLAND Pharmaceutical Ltd saying Mr. Nyongesa was at that time purchasing medication for Asthmatic condition. There is no letter from a Doctor to prove he indeed attended a physician as stated in his affidavit.

Mr. Alando opposed the application on the grounds that there were no good reasons given and no proof either of Mr. Nyongesa's sickness at material time.

I have carefully considered the reasons and agree with Mr. Alando that the reasons given are inadequate. However I have also considered the nature of the suit and the grounds of appeal raised and agree with Mr. Akanga that the applicant stands to lose should the appeal not be reinstated.

No doubt the mistake of the counsel should not be visited upon the client and for that reason I will re-admit the appeal on condition that Mr. Nyongesa will personally pay costs of KShs.5,000/- to the Respondent as costs before the appeal is set down for hearing.

Costs of this application shall be to the Respondent.

Dated this 19th day of September 2002.

P.M. TUTUI

COMMISSIONER OF APPEALS