

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 41 OF 1996

NASHEE MOHAMED APPELLANT
=VERSUS=
JAMAL S. OMAR.....RESPONDENT

RULING

On the 5th April, 2001 I reinstated the Appeal, earlier dismissed, for hearing on four conditions namely:

“(1)The Appellant’s Advocates shall personally bear the costs of the application assessed at Kshs. 10,000/-

(2) The Appellant’s Advocates shall personally bear the costs thrown away in the appeal assessed at Kshs. 30,000/-.

(3) Both amounts in (1) & (2) shall be paid within 14 days.

(4) The Appeal shall be set down for hearing and be disposed off within 60 days.

(5) In default of compliance with any of the above terms the Appeal shall stand dismissed without further application.”

The first three orders were complied with. But not the fourth. Sixty days from 5th April 2001 expired on 4th June, 2001. The 5th condition therefore took effect as at that date and the Appeal stood dismissed.

On 6th June 2001 however the Appellant returned to court and took out a Notice of Motion seeking a review of the orders made on 5th April, 2001; further orders for maintenance of the status quo-and an order that certified copies of proceedings and judgment of the lower court be dispensed with. Order 44 r 1 & 2 Civil Procedure Rules were invoked. That is the subject matter of this ruling.

The grounds for seeking review under O44 r 1 were not stated and learned counsel for the Applicant Mr. Mwakisha did not make submissions there under. He was content to say that since under O41 there is no provision for reinstatement of a dismissed Appeal, the matter falls under the discretion of the court under S.3 A of the Civil Procedure Act. The Application before me however was for Review under O44 r 1 Civil Procedure Rules and the Applicant is bound to state under what limb or limbs of that Rule the application is based and to satisfy the court on the exercise of its discretion there-under. That was indeed one of the objections taken up by learned counsel for the Respondent Mr. Gathuku and I think properly so. The other objection taken, and I think rightly so, is that there is no Appeal on record since the default clause took effect on 5th June, 2001 and there was no application made before then to arrest the situation. A vigilant Appellant would have known long before 5th June, 2001 whether or not they would be able to comply and sought orders for extension of the period. But true to character in this particular Appeal the Appellant waited until it was too late to salvage the situation. He has himself to blame as equity does not aid the indolent.

I dismiss the application with costs.

Dated this 11th day of July 2001.

P. N. WAKI

JUDGE