

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 77 OF 2018

ALBERT OGOSI MIRUKA.....APPLICANT

VERSUS

KUEHNE+NAGEL LIMITED.....RESPONDENT

RULING

1. This court on **18th March 2020** dismissed this appeal for want of prosecution. The applicant herein seeks by his **Notice of Motion** dated 23rd March 2020 to set aside the same and have it reinstated and be heard on merit.
2. The application is supported by the affidavit of Dennis Manono Nyatundo sworn on the same date. He avers that the applicant was not served with a notice of dismissal although the same had not been mentioned on 13th February 2020 when it had been placed for directions.
3. That the date of 18th March 2020 fell when there was Covid restrictions and thus he was unable to attend to the court.
4. The respondent via the replying affidavit of its counsel Caroline Chelangat opposed the application stating that the dismissal was warranted as the applicant had not prosecuted his appeal two and half years after filing. The dismissal was thus in line with **Order 42 Rule 35 of the Civil Procedure Rules**.
5. The court has perused the courts record, the application and the response. It is true that the court dismissed the appeal for want of prosecution. There was no evidence that the applicant had taken any step to ensure that the appeal was processed.
6. The notice however of dismissal although a copy is on record and is dated 22nd December 2020. There is no evidence that the same was served upon the applicant or the respondent. In the absence of the said service the applicant has a point of complain. It is however apparent that it is the court that moved on its own motion to dismiss the suit.
7. The issue of Covid pandemic and the curfew is too lame an excuse by the applicant. There was nothing to show that he was unable to attend court because of the curfew.
8. Be it as it may the respondent did not take any action to ensure that the appeal is dismissed or for that matter processed. It cannot therefore take much credit.
9. In the premises, and applying the discretion of this court, the application is hereby allowed. The orders of 18th March 2020 are hereby set aside. The applicant is granted 45 days to process his appeal for hearing and in default it shall stand dismissed automatically.
10. Costs shall be in the cause.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 10TH DAY OF FEBRUARY, 2022

H K CHEMITEI

JUDGE