



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 141 OF 2016

CATHERINE WAITHIRA WAGARA (*Suing as personal*)

representative of the estate of **PAUL WAGARA KIMANI.....APPELLANT**

VERSUS

MARK KAHENYA)

NORMAN WANJAU KIRUTU).....RESPONDENTS

RULING

1. The Appellant herein filed a Notice of Motion dated the 16th August, 2016 brought under Order 45 Rule 1 of the Civil Procedure Rules and Section 1A, 1B & 3A of the Civil Procedure Act seeking orders that;

(a) The order made on 4.5.2017 dismissing the Appeal herein be set aside.

(b) The appeal herein be reinstated.

(c) The Costs of the application be in the cause.

2. The application is supported by the affidavit of **ANDREW NDUVA KITONGA** and is premised on the grounds on the face of the application.

3. From the affidavit in support, it is deponed that no notice was served on the Appellant's Advocate prior to the said dismissal and that the Appellant was not aware that the same was coming up for hearing on 4.5.2017 during the high court service week.

4. The Respondent's advocate filed a replying affidavit on 11th September, 2017 in which he deponed that the appeal was filed in December, 2016 and served therein. It was averred that the Appellant has shown no interest in prosecuting the appeal and therefore the orders sought will serve no useful purpose.

5. The parties opted to dispose the application by relying on the rival affidavits filed which this court has duly considered.

6. The Appeal herein was dismissed under Order 42 Rule 20 (1) of the Civil Procedure Rules which provides as follows;

“Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, and has not filed a declaration under rule 16, the court may make an order that the appeal be dismissed.”

7. The court did set down the Appeal for mention for directions. The Appellant contends that he was not aware that the matter was listed for dismissal for he established that the matter was fixed for mention for directions. A clear reading of Order 42 Rule 20 (1), does not indicate dismissal for want of prosecution but for dismissal for non-appearance on the day fixed for directions.

8. Order 42, rule 21 provides for Re-admission of appeal dismissed for default. It states that

“where an appeal is dismissed under rule 20, the appellant may apply to the court to which such appeal is preferred for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.”

9. The court is prepared to take judicial notice and has indeed taken judicial notice of that fact that the application is not brought under the correct provisions of the law. Even if it were under the correct provisions, the appellant has not demonstrated sufficient cause as to why he did not appear on the day when the appeal was called out for hearing.

10. The court also notes that the Appeal was filed way back in the year 2016 which is three years ago and it's still pending in court. I also note that the Appellant has not filed the Record of Appeal and therefore has shown no efforts to prosecute the Appeal. In keeping in line with the overriding objective and being guided by the reasoning of **Waweru J in Britania Oils Limited v B.P. Kenya Limited (2006) eKLR** where he observed thus;

“Shutting out a litigant from the court should be the last indication of justice. Parties should be accorded all due opportunity to be heard and their matters determined on merits unless there are very good grounds to deny them this right.”

11. I do hereby allow the Appellants application and order that the Appeal be reinstated to hearing. I further order that the same be prosecuted within 120 days from today failing which it shall stand dismissed.

12. The costs of the application are hereby awarded to the Respondents.

It is so ordered

Dated and Delivered at Machakos this 21st day of May, 2019.

D.K. KEMEI

JUDGE