



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 636 of 2004**

**OLE SOLIAN ENTERPRISES LIMITED .....APPELLANT**

**VERSUS**

**LUCY WAMBUI MUTURI (Suing as the Administrator**

**of the Estate of James Muturi (Deceased).....RESPONDENT**

**RULING**

On 15<sup>th</sup> February, 2019 this appeal was dismissed under order 42 Rule 35 (2) of the Civil Procedure Rules. On 27<sup>th</sup> February, 2019 the applicant herein lodged an application by way of Notice of Motion under Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, for orders that the order made on 15<sup>th</sup> February, 2019 dismissing the appellant's appeal for nonattendance be set aside, and the appeal be reinstated for hearing.

The grounds relied upon appear on the face of the application and there is a supporting affidavit sworn by the counsel for the appellant. The application is opposed and there is a replying affidavit sworn by the advocate for the respondent. Both parties have filed submissions addressing the issue for determination and cited some authorities. The Order sought is discretionary but the court is enjoined to consider the interests of both parties in making a determination in such a matter.

The submissions by both counsel have addressed the order by the court as if it was made under Order 17 Rule 2 of the Civil Procedure Rules. This being an appeal, the correct provision is Order 42 Rule 35 (2) of the Civil Procedure Rules. That rule states as follows,

**“(2) If, within one year after the service of the Memorandum of Appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a Judge in chambers for dismissal.”**

The notice to show cause clearly cited the above rule alongside the date when counsel was supposed to appear and show cause. Whereas the notice addressed to the advocate for the respondent was received on 6<sup>th</sup> February, 2019 and a stamp confirming the same endorsed thereon, the one addressed to the advocate for the appellant is endorsed with the words vacated to Ruiru 2<sup>nd</sup> Floor, Sunrise Avenue off Eastern by pass Super Highway junction. There is a stamp thereon dated 31<sup>st</sup> January, 2019 by the mail registry which suggests that notice was dispatched through the post office.

On the date the dismissal order was made, only the advocate for the respondent appeared. From the reading of the supporting affidavit to the application, the advocate for the appellant received the notice to show cause on the same date, but at 12.15 p.m. The court record shows that this matter was called out at 9.20 a.m. What this means is that as at the time this matter was called out the advocate for the appellant had no notice of the same.

There are submissions by both parties on the subject of service of the notice contemplated in civil process. Although this was in relation to order 17 (2) of the Civil Procedure Rules, I have deemed it necessary to comment thereon.

Black's Law Dictionary gives clarity to some of the terms that have been contested by the parties. The term 'give notice' is used when a person is informed that a suit is about to take place. 'Service of notice' is the term used for the giving of information to a person who is entitled to receive it.

The arguments advanced by both counsel in this matter amount to splitting of hairs because, information relating to any action must be directed to the person entitled to receive it. In this case therefore, notice is intended to either reach the advocate or the party, in the event one is acting in person. If such notice does not reach either the advocate or such a party, then notice will not have been served.

The record of appeal in this matter is complete. Systemic challenges have been identified by the advocate for the appellant which slow down the determination of the appeal. The letters annexed to the supporting affidavit and marked ' LMN 2 ' testify to this fact. No party should be locked out of the seat of justice for reasons he or she is not responsible for.

The policy of courts is to sustain a suit rather than dismissing the same, provided there is no prejudice to the other party. I have also looked at the cause of action leading to the present appeal. I am persuaded that the order sought by the applicant is merited.

Accordingly, the dismissal order of 15<sup>th</sup> February, 2019 is hereby set aside and the appeal reinstated. The appeal shall be listed for hearing within the next 120 days from the date of this ruling failure of which it shall stand dismissed. The costs of this application shall abide by the decision of the appeal.

**Dated, signed and delivered at Nairobi this 17<sup>th</sup> Day of October, 2019.**

**A. MBOGHOLI MSAGHA**

**JUDGE**