



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 385 "B" OF 2005

MISHACK MUINDI MBONDO..... APPELLANT

VERSUS

STEPHEN GICHURU.....1ST RESPONDENT

BUSCAR LTD.....2ND RESPONDENT

RULING

The memorandum of appeal in this matter was filed on 13th day of June, 2005. There after no action was taken in the matter prompting the court to list the same on the 17th June, 2015 for notice to show cause why it should not be dismissed for want of prosecution.

On the said date, there was no appearance by both parties and the appeal was dismissed under Order 42 Rule 35(2) of the Civil Procedure Rules. In July, 2019, the appellant moved this court by way of the notice of motion dated the 10th day of July 2018, seeking to set aside the dismissal order.

When the application came up for hearing on the 14th November, 2019, there was no appearance on the part of the Respondent though a hearing notice had been served upon his advocate on record by way of registered post as evidenced by the affidavit of service filed on the 11th November, 2019.

In arguing the application the appellant/applicant entirely relied on the grounds set out on the body of the same and on the annexed affidavit in support of the same sworn by himself on the 10th day of July, 2019.

In the said affidavit, the appellant depones that he was not served with the notice to dismiss the appeal.

He averred that his former Advocate wrote to him a letter dated 8th day of July, 2005 informing him that they were unable to proceed with the matter and he was advised to collect his file from their offices. That thereafter, he tried to procure the services of an advocate from various law firms but he was unable to pay the legal fees required.

He further deponed that eventually, he was referred to Kituo cha Sheria who advised him to check whether the appeal had been dismissed and its only after so doing that he was informed that the same was indeed dismissed for want of prosecution. He deponed that he has a good appeal which has high chances of success and has urged the court to reinstate the same, in the interest of justice further contending that the Respondent will not be prejudiced in any way if the orders he has sought are granted.

The court has considered the application and the affidavit in support. I have also perused the record of proceedings and it is noted that indeed since the appeal was filed way back in the year 2005, no step had been taken by the appellant as a consequence of which the court dismissed the same on the 17th June, 2015 for want of prosecution.

The reason given by the appellant for non prosecution of the appeal is that after his advocate pulled out of the case, he did not have money to engage another advocate. I have perused the letters dated 8th July, 2005 annexed to the affidavit in support dated 8th July, 2005 and the other dated 17th February, 2006 from his former advocates informing him of their inability to continue acting for him in the matter.

He avers that he sought services of various advocates between 2005 and 2019 but he was not successful due to his financial inability. The court notes that the appellant filed a notice of intention to act in person on 24th July, 2019 which means that he is now ready to pursue the appeal on his own. Though he took too long to do so, I find that justice can still be done, the delay notwithstanding.

In the interest of justice and pursuant to Article 159(2) of the Constitution, I will allow the application dated 10th July, 2019 and order that

the appeal be prosecuted within 120 days taking into account that the appellant is appearing in person. If it is not so prosecuted, it shall stand dismissed.

Dated, signed and delivered at NAIROBI this 21ST day of NOVEMBER, 2019.

.....

L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents