



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL APPEAL NO. 283 OF 2013**

**AS CONSOLIDATED WITH:**

**(CIVIL APPEAL NO. 285 OF 2013 AND 286 OF 2013)**

**BETWEEN**

**PATRICK MWITI MURITHI**

**ANTHONY KIRIMI CHABARI.....APPELLANTS/APPLICANTS**

**-VERSUS-**

**JUDITH MWENDWA MUKINDIA.....RESPONDENT**

-----  
**AND WITH**

**CIVIL APPEAL NO. 284 OF 2013**

**PATRICK MWITI MURITHI**

**ANTHONY KIRIMI CHABARI.....APPELLANTS/APPLICANT**

**-VERSUS-**

**CYPRIAN MERO MUNGANI.....RESPONDENT**

-----  
**AND WITH**

**CIVIL APPEAL NO. 283 OF 2013**

**PATRICK MWITI MURITHI**

**ANTHONY KIRIMI CHABARI.....APPELLANTS/APPLICANTS**

**-VERSUS-**

-----  
**RULING**

**Reinstatement of appeal**

[1] In effect, the Motion dated 17<sup>th</sup> June, 2018 seeks for reinstatement of appeals which were dismissed by court on 11<sup>th</sup> June 2018. The application is expressed to be made under Order 42 rule 21, Order 50 rule 1 of the Civil Procedure Rules (CPR), sections 1B, 3 and 3A of the Civil Procedure Act (CPA). The reasons given for the setting aside of the order dismissing the appeal is that:

- a. The appeals were dismissed on a date set for mention of the case;
- b. The respondents' advocates did not notify the appellants' advocates of directions made on 18<sup>th</sup> January 2018 as had been ordered by the court. Again, they were ordered on 9<sup>th</sup> April 2018 to notify the appellants of the directions made on 18<sup>th</sup> January 2018 but in vain. ;
- c. Despite the foregoing omission, the appellants filed and served the record of appeal.
- d. They should not therefore be punished for omissions of the respondents.

[2] The Applicants filed submission in support of their quest for setting aside of the dismissal orders and emphasized on the need to serve substantive justice on the basis of merits of the case as opposed to summary dismissal of party's claim. They cited the case of .T. DOBIE and GEORGE MUNYAKA.

[3] The Respondents were served with the application with the hearing date thereof, i.e. 17<sup>th</sup> July 2018. On the hearing date, the Respondents did not appear and the court reserved ruling on the application to be delivered on 9<sup>th</sup> October 2018. The record is clear that the respondents' advocates were to notify the appellants' advocates of the directions of 18<sup>th</sup> January 2018. The directions were substantive as they were in relation to the hearing of the appeal by way of and filing of submissions thereto. There is no evidence of service of the directions upon the appellants' advocates. I will therefore treat this as a case of *ex debito justitiae* as no notice was given to the appellants of directions requiring them to file submissions on the appeal. Such omission is substantive and not merely a technicality as service of pleadings and orders of the court are at the heart of fair hearing and trial. See the decision in the case of *Ramco Ltd Vs. Mistry Jadva Parbat & Co. Ltd. HCC No.171 of 2001* that:-

***“If there is no proper or any service of the summons to enter appearance to the suit, the resulting default judgment is an irregular one which the court must set aside ex debito justitiae (as a matter of right) on application by the defendant. Such a judgment is not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself. Secondly, if the default judgment is a regular one the court has an unfettered discretion to set aside such judgment and any consequential decree or order upon such terms as are just as ordained by Order IXA rule 10 of the Civil Procedure Rules. Case law on the exercise of the discretion is plenty”.***

[4] Accordingly, I set aside the order dismissing these appeals and direct that the appeals shall now be heard on merit. I also direct that directions issued on 18<sup>th</sup> January 2018 shall now be complied with but from the date of this ruling. Failure to comply, the appeals will be deemed to be dismissed. It is so ordered.

**Dated, signed and delivered in open court in Meru this 9<sup>th</sup> day of October, 2018.**

.....

**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Ojiambo advocate for Anyonje for applicant

Non appearance for Respondents

.....

**F. GIKONYO**

**JUDGE**