



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 645 OF 2012**

**SIMON KARUKU MWANGI.....1<sup>ST</sup> APPELLANT**

**GLADYS WANJIKU MWANGI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**NETSEL KENYA LIMITED.....1<sup>ST</sup> RESPONDENT**

**MARTIN NYAMAL KAVUNA.....2<sup>ND</sup> RESPONDENT**

***(Appeal from the decision and decree of the Chief Magistrate's Court Nairobi CMCC No. 5635 of 2010***

***by Honourable P.W. Wasike, R.M. on 2<sup>nd</sup> November, 2012)***

**RULING**

The application before the court for determination is the Notice of Motion dated the 9<sup>th</sup> May 2018 seeking orders that the court order made on the 14<sup>th</sup> day of December 2017 that the Appeal stands dismissed if a mention date for direction is not obtained within 15 days of filing of the Record of Appeal on the 31<sup>st</sup> January, 2018 be set aside and/or reviewed, that the court grants extension of time within which to comply with the fixing of the Appeal for directions and the court do reinstate the Appeal.

The application is premised on the grounds on the body of the same and its supported by the affidavit sworn by Gladys Wanjiku Mwangi, on 9<sup>th</sup> May, 2018. It is deponed that, on the 14<sup>th</sup> day of December 2017, the court directed the Appellant to file the Record of Appeal on or before the 31<sup>st</sup> of January, 2018 which order was complied with. That the Appellant was not aware that the court further directed that the Appeal be listed for directions within 15 days after filing of the Record of Appeal failing which it would stand dismissed, hence the 2<sup>nd</sup> limb of the order was not complied with.

That, after filing the Record, the Appellant's counsel fixed the matter for mention on the 18<sup>th</sup> day of April 2018 and on the said date, the court indicated that there was no pending Appeal as the same stood dismissed when the Appellant failed to fix it for directions within the time ordered by the court.

The Appellant has urged the court to grant the orders sought and reinstate the Appeal for hearing.

The Respondents filed grounds of opposition on the 28<sup>th</sup> day of June, 2018. The application is opposed on the grounds that; it is incompetent, misconceived, bad in law, incurably defective and devoid of any merits, that the orders sought are untenable and are based on a grave misconception of the law and fact and that the same is an abuse of the court.

The court has considered the application, the grounds of opposition and the submissions filed herein. The reason given by the Appellant in the supporting affidavit for failure to comply with the court order is that he was not aware of that limb of the order. However, in the submissions, the Appellants averred that they were not able to comply with the court order because they could not get a date in the registry within the 15 days given by the court, due to constraints in the court diary. This shows that the Appellant is not being forthright to the court.

The Appellant in his submissions has relied on the case of **Chetar Lalit Kumar Vakharia & Another Vs. Dr. S.O. Owinga** where the court held as follows;

**“The court has to do justice between the parties without due regard to technicalities of procedure. That is, however, not to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the offending party if the court strikes out the document. The court in that regard exercised judicial discretion.”**

I wish, however, to point out that what we are dealing with in this case is not a technicality but a court order which was not complied with and the reason given for non compliance is not clear, as the court has noted herein above. In the interest of justice and noting that the appellant has filed the record of Appeal, its only fair that the Appeal be reinstated and time within which to fix the matter for directions be extended for a further 30 days from the date of this ruling. And it is so ordered.

The costs of the Application are awarded to the Respondent.

**Dated, Signed and Delivered at Nairobi this 4<sup>th</sup> day of October, 2018**

.....

**L. NJUGUNA**

**JUDGE**

In the presence of:

.....**For the Appellants**

.....**For the Respondents**