



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 117 OF 2009**

**SALIM HAMISI MWANGANGA.....APPELLANT**

**VERSUS**

**MATANO MOHAMED KAKA**

**UMI K. MOHAMED.....RESPONDENTS**

**RULING**

1. The application dated 26<sup>th</sup> October, 2015 seeks the following orders:-

(i) That the order for dismissal of the appeal herein made on 20<sup>th</sup> July, 2015 be set aside and the appeal be re-admitted for hearing; and

(ii) That the costs of the appeal (sic) be in the cause.

2. The application is anchored on the grounds on its face and the supporting affidavit of Salim Hamisi Mwanganga dated 28<sup>th</sup> October, 2015. The applicant attached copies of the letters dated 27<sup>th</sup> May, 2009, 11<sup>th</sup> March, 2010 and 28<sup>th</sup> February, 2012 to the said affidavit to show that his Advocates then, Ong'era Adembesa & Company Advocates had written to the Subordinate Court, to request for copies of the proceedings and Judgment to enable them to file their client's appeal.

3. In his very brief submissions, Counsel for the applicant prayed for re-admission of the appeal that was dismissed on 20<sup>th</sup> July, 2015 and relied on the affidavit of his client in so doing.

The issue for determination is if the appellant should be accorded an opportunity to prosecute his appeal.

4. A perusal of the proceedings shows that on 20<sup>th</sup> July, 2015, the appellant's appeal was dismissed under the provisions of order 42 rule 35(2) of the Civil Procedure Rules for want of prosecution.

The said provisions read as follows:-

***“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.”***

5. The Memorandum of appeal was filed on 19<sup>th</sup> June, 2009. The appellant's Counsel pursued copies of proceedings by writing to the Senior Resident Magistrate once per year in the years 2009 and 2010, he then went to slumber throughout the year 2011, only to awake in the year 2012 when he sent the letter dated 28<sup>th</sup> February, 2012 to the Chief Magistrate, Civil Registry, Mombasa to request for copies of proceedings and judgment. After that, he relapsed into a deep slumber up to 20<sup>th</sup> July, 2015 when the appellant's appeal was dismissed.

6. Although the appellant deposes in paragraph 7 of the affidavit that he or his Advocates on record were not served with the notice to attend court on 20<sup>th</sup> July, 2015 as required by law, this court has no cause to doubt that the applicant or his Advocate were served with the Notice to Show Cause why the suit should not be dismissed. The Judge who dismissed the appeal on 20<sup>th</sup> July, 2015 was satisfied that Notice had been given. Furthermore, the appellant and his Advocates took no action for three (3) years that is from the 28<sup>th</sup> February, 2012 upto 20<sup>th</sup> July, 2015 to ensure that they obtained copies of proceedings and Judgment with a view of preparing the record of appeal to facilitate the hearing of the appeal.

7. It is my considered view the applicant has not shown good cause why the appeal should be reinstated. The respondents/defendants are entitled to the fruits of the judgment of the lower court. The upshot of the foregoing is that the application dated 26<sup>th</sup> October, 2015 is dismissed with costs to the respondents/defendants.

**DELIVERED, DATED and SIGNED at MOMBASA on this 27<sup>th</sup> day of January, 2017.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Gathuku holding brief Mr. Asige for the applicant

No appearance for the respondent

Oliver Musundi Court Assistant