



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION
HIGH COURT CIVIL APPEAL NO. 666 OF 2006

PETER MUCHIRI.....APPELLANT/APPLICANT

VERSUS

CELINICO FLOWERS LTDRESPONDENT

RULING

The Applicant brought an application dated 26th January, 2016 that sought the following orders:

- “1. That this honourable court be pleased to set aside the dismissal orders issued on 17th June 2015.**
- 2. That this appeal be reinstated and set down for hearing.**
- 3. That costs be in the cause.”**

2. The application is supported by the affidavit sworn by the Applicant’s counsel, Regina Wambui Muhuhu. In the said affidavit the Applicant’s explanation for the delay is that he requested the Deputy Registrar to admit the appeal vide a letter dated 6th May, 2014. It is argued that before the appeal could be set down for hearing, the Respondent filed an application seeking the deposit of security and that there was a response to the application vide a replying affidavit filed in court on 8th July, 2014. It is further stated that the Applicant on two occasions invited the Respondent to fix the appeal for hearing vide two letters of invitation dated 22nd July 2015 and 5th August, 2015, which letters he annexed to the supporting affidavit.

3. The application is opposed by the Respondent on the grounds that:

- “1. The application is misconceived and bad in law**
- 2. The application has no merit.**
- 3. The Applicant is guilty of laches.”**

4. The application was canvassed by way of written submissions which I have duly considered.

5. The appeal herein was dismissed under the provisions of Order 42 rule 35 (2) Civil Procedure Rules which provides 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.”

6. A perusal of the court record reflects that the appeal was admitted on 13th May, 2014 and dismissed on 17th June 2015, a period of more than one year later. The Appellant was last in court on 2nd July, 2012. There is however on record a letter written by the Appellant dated 6th May, 2014 which requested for the process of admission of the appeal to be finalized so that the matter could proceed to hearing. Following the admission of the appeal, the Applicant wrote the letters dated 22nd July 2015 and 5th August, 2015 inviting the Respondent to the registry for the purpose of fixing a hearing date. Although I have not seen the copies of the said letters on the record, the same have not been denied by the Respondent. Indeed the letters have a stamp which shows they were received by the Respondents Advocates Ms. C.W. Githae & Co Advocates.

7. My view of all the letters referred to above is that the Appellant has demonstrated that he is interested in the appeal and was still actively sending invitation letters to have the appeal fixed for hearing by the time the appeal was dismissed. It appears the said letters never reached the court file, hence the dismissal of the suit. Consequently, I am inclined to give the Appellant a chance to prosecute the appeal. The application is allowed on condition that the appeal is fixed for directions within 60 days from the date hereof. In default the appeal to stand dismissed. Costs of this application in cause.

Dated, signed and delivered at Nairobi this 15th day of Feb., 2017.

B.THURANIRA JADEN

JUDGE