



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL NO. 796 OF 2006

TERESIA WAMBURA MUTIEAPPELLANT

VERSUS

DICKSON MUSYOKI MAUNDU RESPONDENT

RULING

By way of a Notice of Motion dated the 22nd December 2015, the applicant/appellant has moved this court under sections 3A, 63(e) of the Civil Procedure Act and Orders 12 Rule 7 and 50 Rule (1) of the Civil Procedure rules, seeking the following orders;

- (1) The Honourable court be pleased to set aside the orders made on 18th June, 2015 dismissing the Appellants/Applicant's Appeal and all other consequential orders thereto.
- (2) That the Honourable court be pleased to reinstate the Appellant/Applicant's Appeal.
- (3) That the Record of Appeal produced and marked as 'SWK1' be deemed as duly and properly filed.
- (4) That this Honourable court be pleased to give a date for taking directions for purposes of hearing the Appeal.
- (5) That the costs of the application be in the cause.
- (6) That the court be pleased to grant any other order that may seem just and necessary in the circumstances.

The application is premised on the grounds set out on the body of the same and its supported by the annexed affidavit sworn on 22nd December, 2015 by Susan Wangui Kairu.

The summary of the facts in support of the application are that, the appellant/applicant has always been willing to prosecute the appeal and had made concrete steps to get the Record of Appeal ready for filing. That the firm's efforts to trace the court file has been hampered for a considerable period of time as the same was missing at the court registry. That the firm got the typed proceedings and as they were about to file the Record of Appeal they were shocked to learn that the appeal had been dismissed on the 18th June 2015 for want of prosecution.

It is further averred that the firm was not served with a Notice to show cause why the matter should not be dismissed for want of prosecution and they were not aware that it was coming up for dismissal. That the matter was not listed among the matters that were coming up for dismissal on the 18th June 2015. That the appellant has an arguable appeal with high chances of success. That the respondent will not be prejudiced in any way and that the mistake of court's Registry should not be visited upon the appellant herein.

In addition to the replying affidavit, the applicant also filed a supplementary affidavit on the 12th day of August 2016 sworn by Lucy Muthoni Kamburi Advocate in which she deposes that, the matter herein was not among the matters listed for dismissal on the 18th June 2015. That on the said date, she perused a copy of the cause list and noted that two matters with the same case number (Civil Appeal No. 796 of 2006) were listed for dismissal as numbers 75 and 77 on the cause list as follows;

Lobhson Ltd (Osoro Omwoyo & Co. Advocates) Vs Spa Engineering Ltd. (Kipkenda Lilan & Co. Advocates)

and

Peter Karomo (Muriuki Ngunjiri & Co. Advocates) Vs Francis Wainaina Karanja (A.G. Opiyo & Co. Advocates) but the parties and Advocates on record were different.

The appellant has urged the court to reinstate the appeal and grant the appellant an opportunity to prosecute the same.

The court has considered the application and the submissions by the learned counsel for the appellant.

The same proceeded ex-parte as counsel for the Respondent failed to file a response and/or attend court during the hearing yet, the record shows that he had been served with a hearing notice notifying him that the matter was coming up for hearing on the 25th October 2016.

The court notes that the appeal was filed on the 21st November 2006, and since it was filed, the appellant had not taken any steps to have it prosecuted until it was dismissed on 18th June 2015 during the service week.

On the said date, both the Appellant and the Respondent did not attend Court. The appellant avers that she was not aware that the matter was coming up for dismissal and the advocate had not been served with a notice to show cause.

This court has perused the cause list for 18th June 2015, which is annexed to the supplementary affidavit sworn by Lucy Muthoni Kambuni and marked as annexure 2. It is true, the case was not among those listed for dismissals on that day and its difficult to understand how the matter ended up in court and an order made dismissing the appeal.

For that reason, the court will allow the application dated 22nd December 2015 and make the following orders;

- (a) The dismissal orders made on 18th June 2013 dismissing the appellant/applicant's appeal are hereby set aside.
- (b) The appellant's/applicant's appeal is hereby reinstated.
- (c) The appeal is hereby admitted under section 79B of the Civil Procedure Act.
- (d) The record of appeal to be filed within 7 days from the date hereof.

(e) The appeal to be prosecuted within 120 days from today failing which it shall stand dismissed.

Dated and delivered at Nairobi this 2nd day of February, 2017.

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LUCY NJUGUNA

JUDGE

In the Presence of

..... for the Appellant

..... for the Respondent