

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 573 OF 2009

JOSEPH KIRIMA MUNGAI 1ST APPELLANT

SUSAN WANJIKU KIRIMA 2ND APPELLANT

VERSUS

NJOROGE NJUGUNA 1ST RESPONDENT

ELIZABETH GATHONI KAMUNYU 2ND RESPONDENT

RULING

The appellants/applicants have moved the court by way of a notice of motion dated 1st March, 2017 seeking orders that the court be pleased to set aside the order made on 3rd February, 2017 dismissing the appeal and that the appeal be reinstated for hearing and determination on merits.

The application is based on the grounds set out on the body of the application and it's supported by the affidavit of the 1st appellant **JOSEPH KIRIMA MUNGAI** sworn on 1st March, 2017.

He avers that the notice to show cause was served upon him through the post office and he received the same on 1st February, 2016. That the said notice indicated that the appeal was coming up for hearing on 3rd February, 2017. That despite the fact that he has an advocate on record, his advocate was not served with the notice. He further avers that the notice is not proper as it was drawn under the wrong provisions of the law and therefore, misleading.

I have considered the application, the affidavit and the submissions made by the counsel for the appellants. When the application came up for hearing on 3rd May, 2017, the respondents did not attend court and they had also not filed a response to the same. In the premises, it proceeded ex parte.

The appeal herein was dismissed on 3rd February, 2017 for want of prosecution. Counsel has argued that the notice to show cause that was served upon his client is misleading as it was brought under the wrong provisions of the law. I have perused the said notice and the same is expressed to have been issued **Order 35 Rule 2 of the CPR**. While I concur with the counsel for the appellants that the notice was issued under the wrong provisions of the law, I am not persuaded by his argument that the same was misleading. This is because the parties to the suit and the case number are correct and there is no dispute about that. To me, what is important are the contents of the notice and not the provisions under which it was brought.

This court, however, has taken into account the fact that the notice was served upon the appellants and not their advocate on record which is unprocedural as the same ought to have been served upon their advocate. The appellants have also submitted that they received the notice late, just a day before the matter was listed for hearing of the notice to show cause. Though there is no evidence placed before the court to prove that assertion, this court will give the benefit of doubt to the appellants and reinstate the appeal on the basis of the late service of the notice.

In the circumstances aforesaid, I hold and find that the application dated 1st March, 2017 has merits and the same is granted as prayed. The orders made on 3rd February, 2017 dismissing the appeal are set aside

and the appeal is reinstated for hearing.

Costs of the application shall abide the outcome of the appeal. The court notes that it is a very old appeal that ought to be disposed off expeditiously. To that end, I make a further order that it be prosecuted within 90 days failing which it shall stand dismissed.

Dated, signed and delivered at Nairobi this 5th day of May, 2017.

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L. NJUGUNA

JUDGE