



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APEAL NO. 547 OF 2009**

**JACKSON MWILU.....APPELLANT/APPLICANT**

**VERSUS**

**MARY MUKETHE (suing as the legal representative of the Estate of**

**PATRICK NDAMBI (DECEASED).....RESPONDENT**

**RULING**

1. The Respondent herein filed an application dated 29<sup>th</sup> May, 2012 seeking for this appeal be dismissed for want of prosecution. Mr. Kamau Mbugua, learned counsel for the Appellant admitted to inadvertently filing the matter away without fixing a date for bring ups in his office. In my ruling of 12<sup>th</sup> May 2015, I considered the said application and found that the mistake was a genuine one and that the Appellant had no knowledge of the delay to expedite the conclusion of the matter, consequently I dismissed the application and made the following orders that:-
  - i. ***The Appellant to prepare, file and serve the record of appeal within 30 days from date hereof.***
  - ii. ***The appeal to be mentioned before this court on 9/6/2015 for directions and admission.***
  - iii. ***The summons dated 29.05.2012 is dismissed with costs assessed at ksh. 10,000/= payable to the respondent within 30 days.***
2. When this matter was mentioned on 9<sup>th</sup> June, 2015 for directions and admission, there was no appearance on the part of Appellant. By that day, the Record of Appeal had not been filed. The matter was then stood over to 7<sup>th</sup> July, 2015. Again on 7<sup>th</sup> July, 2015, the Appellant and his counsel did not appear in court. It is on that date that Mr. Rono, learned counsel holding brief for Mr. Naikuni for the Respondent made an oral application seeking the dismissal of the appeal.
3. I have read the affidavit of service sworn by Dominic Ngoka on 28<sup>th</sup> May, 2015 The same shows that the process server served the appellant's advocates, M/s Mbugua, Atudo and Macharia & Company Advocates with this courts' order dated 12<sup>th</sup> May, 2015 emanating from the ruling of 12<sup>th</sup> May, 2015. Annexed to the said affidavit of service is a copy of the court order. The copy of the order bears a receiving stamp of the firm of the appellant's advocates which reveal that the order was received by them on 28<sup>th</sup> May, 2015. Further, there is an affidavit of service of Dominic Ngoka sworn on 6<sup>th</sup> Jul, 2015. Annexed to the said affidavit of service is a mention notice dated 9<sup>th</sup> June, 2015 which reveal that the Appellant's advocates were informed of the mention date of 7<sup>th</sup> July 2015. Despite having knowledge of the mention date of 9<sup>th</sup> June, 2015 and 7<sup>th</sup> July 2015, the Appellants advocates failed to file the record of appeal as ordered and also failed to attend court to explain the reasons for the said failure.
4. Since the filing of the application dated 29<sup>th</sup> May, 2012, the Appellant has not been diligent enough to make a follow up on the matter. I say so because his advocate's have not since been apt in handling his appeal. It must be noted that although the Appellant engaged his advocates and perhaps expects them to keep track of the mater, it is his primary duty as the party that dragged the

Respondent to court to take steps to progress his case. It is not prudent to file a matter in court and fail to attend to it.

- 5. From the circumstances stated above, I find that there is unexplained failure to attend to this matter. A fair order to make is to order which I hereby do for the appeal to be dismissed with costs to the Respondent.

Dated, Signed and Delivered in Open Court this 10<sup>th</sup> day of July, 2015.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

.....for the Respondent