



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NUMBER 138 OF 2006

NDIRANGU WANJENJI.....APPELLANT

VERSUS

KENNETH MOKUA.....RESPONDENT

(Appeal from the Judgments/Decree of Honourable R.K. Kirui Senior Resident Magistrate delivered on 15th August, 2006 in Molo Senior Resident Magistrate Court Civil Case No. 48 of 2005)

RULING

Ndirangu Wanyenji the Appellant hereof, by his application dated 23rd May 2013 and filed on even date, sought orders that:

1. Spent
2. That this Honourable court be pleased to set its order dated 24th February 2012 dismissing the appeal for want of prosecution and re-instate and admit the appeal for hearing.

The appeal subject of the application was filed on the 11th September 2006 against the judgment of the lower court delivered on the 15th August 2006.

On the 21st January 2015, the appellant was granted leave by the court to effect service of the application by registered post to the last known address of the Respondent as his Advocate in the appeal, Mr. Motende of Motende & Company Advocates passed on and there has been no advocate on record for the respondent.

The application under review was duly served upon the advocates and a replying affidavit sworn by the Respondent was filed on the 4th June 2013.

On the 7th July 2015, the appellants Advocates sent by a registered post a hearing notice dated 7th July 2015 to the respondent and an affidavit of service was duly filed.

Having satisfied myself that the Respondent was duly served and failed to attend court on the 23rd July 2015 when it came up for hearing, I now proceed to consider the said application.

Mr. Murimi Advocate for the appellant submitted, relying on the affidavit in support, that soon after filing of the appeal and an application for stay of execution on the 26th September 2006, the court file went

missing and all efforts to have it traced and placed before the court were futile, hence the reason for not preparing the Record of Appeal as no proceedings had been typed.

He submitted that they did not receive a Notice to Show Cause issued by the court to show cause why the appeal should not be dismissed for want of prosecution for hearing on the 24th February 2012. There being no attendance by the appellant or his advocates, the appeal was dismissed.

It is stated that the appellant came to learn of the dismissal of the appeal in February 2013 when some people visited the suit land enquiring about the sale of the land. It is then that the appellant proceeded to the court and found that the court file had resurfaced and the appeal was dismissed without notice to him.

It is his prayer that the order dismissing the appeal be set aside and the appeal be reinstated for hearing.

I have considered the Replying affidavit sworn by the Respondent in which he claims that at all times the court file was available at the court registry.

However, since the respondent has failed to avail himself to argue his objection to the application, the court will not give any attention to the same.

I have considered the application and the arguments before me.

I am satisfied that the Notice to Show Cause was not served upon the Appellant. I have not seen any evidence of service in the court file. The appeal was dismissed without the appellant being given an opportunity to be heard.

In the interest of justice and fairness, I shall allow the application.

The order dated 24th February 2012 dismissing the appeal is set aside and the appeal is reinstated.

The appellant shall however prepare, file and serve the Record of Appeal within 90 days from the date of this ruling failing which the appeal shall stand automatically dismissed.

There shall be no orders as to costs.

Dated, signed and delivered in open court this 3rd day of December 2015

JANET MULWA

JUDGE