



REPUBLIC OF KENYA

High Court at Meru

Civil Appeal 112 of 2007

**STEPHEN MURANGIRI M'NKABU.....1ST
APPELLANT/APPLICANT**

DAVID KIRIMI NDUBI.....2ND APPELLANT/APPLICANT

VERSUS

ANTONY NGARI MWANGI.....RESPONDENT

R U L I N G

The appellants/applicants filed this appeal on 17th October, 2007 against the ruling of the SRM Tigania, Law Courts in his civil Case No.93 of 2006 against his refusal to set aside the ex-parte judgment on appellant's allegation that they had not been served with the summons to enter appearance. The appeal was admitted to hearing on 29th October, 2008. On 3rd November, 2009, the appeal was set down for hearing on 4th February, 2009 by the respondent in absence of Counsel for the appellant. On 4th February, 2010 none of the parties Counsel attended and court found that as the date had been taken by Counsel for the respondent and the same was duly served, the court proceeded thereupon to dismiss the appeal for non-attendance.

The applicants/Appellants filed notice of motion pursuant to Order 42 rule 21 of Civil Procedure Rules and 3 and Section 3A of Civil Procedure Act seeking to be granted orders to set aside the dismissal of the appeal and reinstating of the appeal for hearing on merits.

The grounds in support of the application are stated on the face of the application. The application is supported by annexed supporting affidavit of the applicants deposed upon by Stephen Murangiri. The application is opposed. The respondent swore a replying affidavit in opposition to the application.

When the application came up for hearing, this court heard oral submissions by Mr. Kijaru, learned Counsel for the applicants and Miss Mutinda learned Counsel for the respondent. This court has carefully considered the said submissions. It has also heard the pleadings filed by the parties herein in support of their respective opposing positions.

The issue for determination is whether by this court is whether the applicants have laid sufficient basis for this court to grant orders for setting the dismissal of the appeal and reinstating of the appeal for hearing.

Order 42 Rule 21 of Civil Procedure Rules provides:-

“21. Where an appeal is dismissed under rule 20, the appellant may apply to the court to which such appeal is preferred for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.”

In the instant application the applicants deponed that the appeal was dismissed without their knowledge or notice. The trial court in its judgment referred to a letter dated 27th January, 2010 by the Counsel for the Respondent as a basis of refusing to adjourn the matter. The court failed to satisfy itself that the appellants and their Counsel had been served. The court record has no affidavit of service on record, the hearing date having been taken ex-parte. I find the appellants were correct in their averment that the appeal was dismissed without their knowledge. The court should always be careful from locking out any litigant by summary procedure or on a technicality.

Parties in any matter should be given an opportunity to put forward their case however weak it may seem to be.

Our Constitution is very clear on fair hearing of the parties in any dispute.

Article 50(1) of the Constitution of Kenya, 2010 provides:-

“50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

In the case of Savings and Loan Kenya Ltd – V- Odongo(1987) KLR 294. The Court of Appeal held:-

“The very foundation upon which any judicial system rests is that a party who comes to court shall be heard fairly and fully. The court is duty bound to hear all parties to a case and failure to do so is an error.”

In the circumstances of this case I find that the applicants have demonstrated that they were not served with hearing notice and have proved that they were prevented by a sufficient cause from appearing when the appeal was called on for hearing. The applicants were denied a fair hearing and as the court has duty to hear all parties to a case I find the court acted unfairly by dismissing the appellants/applicant’s appeal when they had not been served.

The upshot is that the application dated 2nd February, 2012 is allowed. The dismissal of the appeal herein is set aside and appeal re-admitted to hearing and determination on merits.

The costs of this application shall be in cause.

DATED, SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF OCTOBER, 2012.

J. A. MAKAU
JUDGE

Delivered in Open Court in presence of:

1. Mrs. Ntarangwi h/b for Mr. Kijaru for appellant
2. Miss Mutinda for the respondent

J. A. MAKAU
JUDGE