



**REPUBLIC OF KENYA**

**IN THE LAND AND ENVIRONMENT COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL CASE NO. 63 OF 1997**

**MNALA KOITA & ANOTHER.....APPLICANT/RESPONDENT**

**VERSUS**

**JUSTUS ABUKUSE .....RESPONDENT/APPLICANT**

**RULING**

This application is dated 10<sup>th</sup> January 2017 and is brought under sections 1A, 3A and 3 of the Civil Procedure Act, Order 12 Rule 7 and Order 51 Rule 1 seeking the following orders;

1. That the order of this honourable court given on the 25<sup>th</sup> day of October, 2016 dismissing the suit for lack of prosecution be and is hereby set aside.
2. That the said suit be reinstated and be allowed to proceed to hearing of the notice to show cause issued on the 30<sup>th</sup> day of July, 2010.
3. That if the orders sought in 1 and 2 above, the respondent be allowed to issue afresh notice to show cause with current computations and an early hearing date for the said notice.
4. That costs of this application be in the cause.

The application is supported by the grounds therein and the affidavit of **ISAAC SHIVACHI MUTOKA ADVOCATE** counsel for the applicant/respondent. That the respondent filed an application seeking orders for the execution of the decree of the court for costs in the above case. That parties canvassed and the honourable court issued directions for the extraction of the notice to show cause why the judgment debtor should not be committed to civil jail in execution of decree. That the notice to show case was issued on the 30<sup>th</sup> day of July, 2010 for interparte hearing on the 4<sup>th</sup> October, 2010. That the same was duly heard in the Magistrate's Court No. 2 on the 4<sup>th</sup> day of October, 2010. That immediately thereafter the file went missing and their efforts to trace the file at the registry have been fruitless and thus execution as execute has been frustrated. That they wrote complaint later dated the 1<sup>st</sup> April, 2015 to the Deputy Registrar High Court Kakamega to assist in the location of the said file or allow us reconstruct a skeleton file and to which no response has been received to date. That they received a notice of dismissal of the appeal dated the 18<sup>th</sup> day of August, 2016 on the 27<sup>th</sup> day of October, 2016. That by the time of receipt the matter had already been heard on the 25<sup>th</sup> day of October, 2016 and dismissed. That the notice reached their chambers long after the matter had been dismissed and without an opportunity for the applicant to be heard. That this was an error which was not occasioned by the applicant and therefore he should not be condemned unheard, hence the need for reinstatement of the suit and setting aside of the dismissal orders as issued on the 25<sup>th</sup> October, 2016. That the applicant/respondent filed this matter for the execution of a decree following the dismissal of the appeal by the appellant.

That the matter was canvassed before the honourable court and he was issued with an order to extract a notice to show cause why the judgment debtor should not be committed to civil jail in execution of the decree. A copy of the application and notice to show cause is attached and marked "ISM 1 a & b" respectively. That the matter was fixed to interparte hearing on the 4<sup>th</sup> day of October, 2010 and was duly heard in the Magistrate Court No. 2 at Kakamega. That since then, the file went missing and their efforts to trace it at the registry were fruitless.

That vide their letter dated the 15<sup>th</sup> April, 2015, addressed to the Deputy Registry, High Court Kakamega and they requested that they be assisted to trace the file or be allowed to do construction, and to date no response has been received. A copy of the letter is attached and marked "ISM II". THAT as we continued with the search, they on the 27<sup>th</sup> day of October, 2016, received a notice for the dismissal of the matter. The said Notice is attached and marked "ISM III". That in the said notice, it had been indicated that the matter was to be placed for the hearing of the dismissal on the 25<sup>th</sup> October, 2016, which was two days before we received the Notice. That the matter was therefore heard in their absence and order of dismissal issued without our participation. That it was an error as the applicant was condemned without getting an opportunity to be heard. That in the circumstances and in the best interest of justice, it's his humble request to this honourable court to set aside the order dismissing the suit and reinstate it for hearing. The respondent was served and failed to attend court and the matter proceeded exparte.

This court has considered the applicants submissions and annexures therein. It would appear that the applicant's received a notice of dismissal of the appeal dated the 18<sup>th</sup> day of August, 2016 on the 27<sup>th</sup> day of October, 2016. From the court records by the time of receipt the matter had already been heard on the 25<sup>th</sup> day of October, 2016 and dismissed. I find that this application has merit and I grant it as prayed. The applicant is to fix a hearing date of the matter within the next 30days.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20<sup>TH</sup> DAY OF JUNE 2017.**

**N. A. MATHEKA**

**JUDGE**