



REPUBLIC OF KENYA



KENYA LAW
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**Owuoti & 4 others v Mohamed & another (Civil Appeal
151 of 2021) [2023] KEHC 1338 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1338 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL 151 OF 2021
TW CHERERE, J
FEBRUARY 23, 2023**

BETWEEN

**MIKE OCHIENG OWUOTI 1ST APPELLANT
PETER MWATHI 2ND APPELLANT
JAMES NGIGI MUTHAMI 3RD APPELLANT
SAMUEL KANYUA NJUN'GE 4TH APPELLANT
ERIC KIRIMI 5TH APPELLANT**

AND

**HASSAN KALLA MOHAMED 1ST RESPONDENT
ARID LANDS CONSTRUCTION CO. LTD 2ND RESPONDENT**

RULING

1. By notice of motion application dated January 25, 2023, the applicant has moved the court seeking for the following orders:
 - i. Spent.
 - ii. That this honourable court be pleased to set aside its orders made on January 24, 2023 dismissing the appellants appeal and reinstate the same for hearing.
 - iii. That costs of this application be in the cause.
2. The said application is premised on the following grounds that appellants appeal was dismissed on the January 24, 2023 for want of prosecution whereas it had been listed for hearing on January 26, 2023, that appellants have a strong and meritorious case against the respondents and the respondents shall suffer no prejudice if the appeal is reinstated for hearing and is supported by an affidavit sworn by Mike



Ochieng Owuoti (1st appellant) on the January 25, 2023 in which eh reiterates the grounds on the face of eth application.

3. The application is opposed vide a replying affidavit dated February 15, 2023 sworn by Hassan Kalla Mohamed (1st respondent) who states that the allegations by the 1st appellant/applicant that the non-attendance by his advocate was an inadvertent has no truth whatsoever because he does not dispute that his advocate or himself were not aware of the hearing date of this appeal on January 23, 2023.

Analysis and Determination

4. Indeed, both the dismissal of this appeal for want of prosecution and its reinstatement is an act of the exercise of this court's discretionary power. (See *Mbogo & Anor v Shah* (1968) EA 93).
5. This application was filed on January 25, 2023 just 2 days later after the dismissal order was thus filed without delay. Whereas the applicant's counsel has not denied that he was aware that the appeal was listed for hearing on January 23, 2023, it should be the court's last resort to deny a party a chance to be heard on merit.
6. In any case, the door of justice is not closed because a mistake has been made by a person of experience who ought to have known better as counsel in this case ought to have known (See *Belinda Murai & 2 others v Amos Wainaina* [1979]eKLR).
7. Consequently, I find that the interest of justice demands is in favour of reinstating the appeal for hearing. The notice of motion application dated January 25, 2023, is allowed and the order made on January 24, 2023 dismissing the appellants' appeal is set aside and the appeal is hereby reinstated for hearing.
8. The appeal shall be disposed off by way of written submissions with each party 14 days starting with the appellants
9. Mention on July 5, 2023 to confirm compliance with the abovementioned orders and for taking a judgment date. I make no order for costs

DATED AT MERU THIS 23RD DAY OF FEBRUARY 2023

T.W. CHERERE

JUDGE

Appearances

Court Assistant - Morris Kinoti

For Appellants - Mr. Muriira for Kiogora Mugambi & Co. Advocates

For Respondents - Mr. Nyamu for Nyamu Ngaga & Co. Advocates

