REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 73 OF 2013

PHILIPH MURURI NDARUGA……APPELLANT/APPLICANT

VERSUS

GATEMU HOUSING SOCIETY LIMITED……...…….RESPONDENT

RULING

Before me for determination is a notice of motion dated 24th July 2015, filed by the appellant (hereinafter referred to as the applicant) seeking orders that:-"*That this court be pleased to reinstate this appeal which was dismissed for non-attendance on 26th June 2015."*

The applicant has not cited the rules or provisions of the law upon which the application is premised nor has he shown on the face of the application the grounds upon which the application is premised. However, I am alive to the provisions of Order **51** Rule **10 (1) & (2)** of the Civil Procedure Rules 2010 which provides that:-

1. *Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.*

2. *No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.*

Thus, the application cannot be defeated on account of the said omission. Annexed to the application in the affidavit of the applicant sworn on 24th July 2015 in which the applicant *inter alia* avers that:-

i. *This appeal was dismissed on 26th June 2015 for non-attendance.*
ii. *He did not attend court because he was not aware of the hearing date.*
iii. *The address used in the notice was box 286, Nyeri which is not his correct address which is 236 Nyeri, hence he did not receive the notice to attend court.*
iv. *He came to learn about the dismissal on 14.7.2015 when on a mission to peruse the court file in a bid to fix the matter for hearing.*
v. *That he pleads with the court to be granted the opportunity to be heard.*

The respondent filed grounds of objection on 28.7.2015 and asserted that the application is misconceived and incompetent, that the same in bad in law and a gross abuse of the court hence untenable, that the application is fatally and incurably defective, that the same is frivolous, vexatious and has no merits and

sought for its dismissal with costs.

At the hearing of the application, the applicant adopted his written submissions filed on 9th September 2015 and reiterated essentially the contents of his earlier cited affidavit and made a passionate plea to the court for the appeal to be heard on merits. On his part the respondents' counsel vehemently opposed the application and urged the court to dismiss it. Learned counsel for the defence argued inter alia that under the above rule, once an appeal has been dismissed the door is closed and the court has no power to reinstate it because there is no provision under the rules for reinstituting an appeal dismissed under Rule 35 (2). In his submission, this court can only act where it has jurisdiction. Counsel further added that even though the constitution provides that courts are to act without undue regard to technicalities, there is still room for technicalities because in his view the CPR do not provided for reinstate of an appeal and added that the justice of the case demands that the application be dismissed and supported this point by enumerating the long history of this case which in his submission must be brought to an end.

The law concerning dismissal of an appeal for want of prosecution is contained in Order **42** Rule **35 (1) & (2)** which provides as follows:-

1.Unless within three months after the giving of directions under rule 13 the appeal shall be set down for hearing, the Respondent shall be at liberty to either set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

2.If, within one year after service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.

The applicants appeal was dismissed under sub- rule **(2)** cited above after the applicant failed to attend court on 26th June 2015 to show because why the appeal should be dismissed. On the question of whether this court has jurisdiction to reinstate an appeal dismissed under the above provision, my answer is in the affirmative and I am reinforced in this view by the provisions of article **165 (3) (a)** which provides *inter alia* that the High Court has *"unlimited original jurisdiction in criminal and civil matters."* A relevant Section **3A** of the Civil Procedure Act[1] which provides that *'Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'*

The notice send to the applicant by the court was posted to post office box number 286, Nyeri. However, the applicant maintains that he never received the said notice and that his correct postal address is P. O. Box 236, Nyeri. Hence, the notice issued by the court was mailed to the wrong address, and that he never received it and that explains why he never attended court to show cause why the appeal ought not to have been dismissed. In other words he never got the opportunity to show cause why the appeal ought not to have been dismissed.

I note from the court file that quite a number of documents in this file filed at different times from as early as 2001 including affidavits, hearing notices addressed to the applicant and other correspondences all bear Postal address 236, Nyeri and this confirms the applicants' assertion that the notice complained of was sent to the wrong address. That being the position, it's clear that the mode of service adopted was not proper and or effective and on that basis I find that the applicant has offered sufficient explanation as to why he was not able to attend court as required on 26th June 2015. To allow the orders dismissing his appeal on the basis of such improper service would in my view be wrong and would amount to miscarriage of justice.

I find that the reason given by the applicant for failing to attend court is candid and excusable and that this is a proper case for the court to exercise its discretion in favour of the applicant. In this regard, I find useful guidance in the court of appeal decision in the case of **Richard Nchapai Leiyangu vs IEBC & 2 others** [2] where the court expressed itself as follows:-

"We agree with the noble principles which go further to establish that the courts' discretion to set aside

ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice"

The question that follows is whether failure by the applicant to attend court 26th June 2015 constituted an excusable mistake or was it meant to obstruct or delay the course of justice. As explained above it is evident the notice that required him to attend court was mailed to the wrong address, and upon realising that the appeal was dismissed he filed the present application on 24th July 2015, slightly under one month from the date the appeal was dismissed. I find the reason offered to be reasonable and excusable.

I hold the view that it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard the opportunity of prosecuting is case. The court in the above cited case of **Richard Nchapai Leiyangu vs IEBC & 2 others** proceeded to state as follows:-

*"The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality"**[3]***

The above case was cited with approval by the Court of Appeal in **Harrison Wanjohi Wambugu vs Felista Wairimu Chege[4]** where by the court reinstated an appeal that had been dismissed for non-attendance. A similar position was held by the court of appeal in the case of **Cecilia Wanja Waweru vs Jackson Wainaina Muiruri[5]** where the court allowed an application to reinstate an appeal that had been dismissed for want of prosecution under Order **XL1** Rule **31 (2)** of the former Civil Procedure Rules **(Order 42 Rule 35 (2)** of the current Civil Procedure Rules. The facts of the said case do compare favourably with the application now before me, the subject of this ruling, and confirms my earlier finding that indeed the High court has jurisdiction to reinstate an appeal dismissed under the above cited rule.

Similarly, I stand guided and persuaded by the decision of the court of appeal in **CMC Holdings Ltd vs James Mumo Nzioka[6]** where it was held *inter alia*:-

"The discretion that a court of law has, in deciding whether or not to set aside ex-parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error"

I also find help in the position held by the court of appeal in the case of **Wenendeya vs Gaboi[7]** where the court in reinstating an appeal that had earlier been dismissed for non-attendance stated that disputes ought to be determined on merits and that lapses ought not necessarily debar a litigant from pursuing his rights. In **Katsuri Ltd vs Nyeri Wholesalers Ltd,**[8] a dismissed appeal was restored the mistake involved having been the omission of counsel to enter a date of the hearing in his diary.

In conclusion I find that this is a proper case for this court to exercise its discretion in favour of the applicant. Accordingly I hereby set aside the orders made on 26th day of June 2015 dismissing this appeal and reinstate the appeal and direct that the same proceeds for hearing and be determined on its merits. In view of my earlier finding that the notice to attend court was not properly served I find it unfair to condemn the applicant to pay costs and accordingly I order that each party shall bear his/its costs. Orders accordingly

Right of appeal 28 days

Dated at Nyeri this 23rd day of September 2015

John M. Mativo

Judge

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[1] Cap 21, Laws of Kenya

[2] Civil Appeal No. 18 of 2013

[3] Supra

[4] Civil Appeal No. 295 of 2009, Visram, Koome, Otieno-Odek , JJA, Nyeri Court of appeal

[5] Civil Appeal no. 49n of 2013, Nyeri Court of appeal,

[6] {2004}KLR 173

[7] {2002}2EA 662

[8] CA App No. 248 nof 2012, Nyeri