



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NUMBER 37 OF 2015**

**KENYA NUT LIMITED.....APPELLANT**

**VERSUS**

**SAMSON OGUTU RACHAR.....RESPONDENT**

**RULING**

By way of a Notice of Motion dated 6<sup>th</sup> May, 2015, the Appellant/Applicant herein has moved the court under Order 17 Rule 2(3) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

The same is premised on the grounds set out in the body of the Application. The Applicant/Appellant seeks the following orders.

1. That the Civil Appeal No. 37 of 2015 be reinstated.
2. That cost of the application be provided for.

The Application is premised on the grounds that the hearing of the Appeal herein was on 5<sup>th</sup> May, 2015, that the Appellants Advocates was not present in court as she was attending to another matter and that the Appellant stands to suffer irreparable loss if the orders sought are not granted.

The Application is supported by the Affidavit of Christine Atieno Otieno wherein she depones that the matter was due for the hearing of an Application dated 11<sup>th</sup> February, 2015 on 5<sup>th</sup> May, 2015 and on the said date the Application was dismissed for non-attendance of the Appellant's Advocate as the date had not been diarized. She has annexed the relevant page of her office diary for the aforesaid date.

She further avers that the court clerk who failed to diarize has since left the firm. The Appellant will suffer irreparable loss if the Application is not reinstated.

She depones that the Appellant has an arguable Appeal with overwhelming chances of success and she prays that the Application be reinstated. She further states that it was not her intension to have failed to attend court on 5<sup>th</sup> May, 2015 but it was an honest mistake.

She concluded by deponing that the mistake of an Advocate should not be visited upon an innocent client and that no prejudice shall be suffered by the Respondent.

The Application is opposed vide Grounds of Opposition filed on the 23<sup>rd</sup> September, 2015. The

Respondent opposes the Application on the grounds that the same is an abuse of the court process and its frivolous, vexatious and without any merit.

That the Appellant herein served the Respondent with a hearing notice dated 31<sup>st</sup> March, 2012 indicating that the Application dated 11<sup>th</sup> May, 2015 would be heard on the 5<sup>th</sup> May, 2015.

That on the 5<sup>th</sup> May, 2015, the Respondent's Advocate's attended court for hearing of the Application and only learnt of the Appellant's non-attendance when the matter was called out.

The alleged failure to diarize by the Appellants clerk is inexcusable as the Appellant's Advocates had fixed the matter for hearing themselves.

That the court's discretion to reinstate the Civil Appeal herein is not designed to assist a party who has deliberately sought to obstruct or delay the course of justice such as the Applicant.

That the Appellant has not demonstrated sufficient cause at all to warrant a grant of the orders sought.

I have considered the Application together with the Affidavit in support and the grounds of opposition.

First and foremost, the Application has been brought under the wrong provisions of the law in that Order 17 Rule 2 (3) is for dismissal of suits for want of prosecution.

Secondly, the Application is seeking to reinstate an Appeal. I have perused the court record and what was coming up for hearing on 5<sup>th</sup> May, 2015 is the Application dated 9<sup>th</sup> day of February, 2015 seeking leave to file an Appeal out of time and a stay of execution pending the hearing and determination of the said Application.

In her affidavit in support of the Application, the advocate for the Applicant depones in paragraph 2 that on the 5<sup>th</sup> May, 2015, the matter was due for hearing of an Application dated 11<sup>th</sup> February, 2015. According to the record, there isn't such an Application filed in this matter.

I have looked at the submissions filed by the Respondent. It is submitted that the date of 5<sup>th</sup> May, 2015 was taken by the counsel for the Appellant and she was in court when the date was given.

It was further submitted that conduct by the Appellant demonstrates disinterest in pursuing the Appeal.

I have considered the Application and the same has no merits as it seeks to reinstate an Appeal and not an Application. In the premises aforesaid, I have no option but to dismiss the same with costs to the Respondents.

Signed, Dated and Delivered at Nairobi this 17<sup>th</sup> day of December, 2015.

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**L. NJUGUNA**

**JUDGE**

***In the presence of***

..... ***for the Appellant.***

..... ***for the Respondent.***