REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 31 of 2003

SIMON MURAGU KAIGI & ANOTHER ..... APPELLANTS

VERSUS

KAMAU KAIGI ..... RESPONDENT

(Appeal from the award dated 14th November 2001 of the Provincial Land Disputes Appeals Committee Central Province in APP. Kiambu 7 of 2002)

R U L I N G

By a notice of motion dated 30th November 2007 and filed in this court on 6th December 2007 expressed to be brought under Order XLI Rules 14 and 16 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, The applicant sought the following prayers:-

1. **That the appeal herein be re-admitted and re-instated.**

2. **That a fresh hearing date be granted.**

3. **That the costs be provided for.**

The application was premised on the grounds that the date given in court for the hearing of the appeal was 14th November 2007. However counsel for the appellant misapprehended and erroneously noted the same in his diary as 15th November 2007.

That the misapprehension arose as counsel for the appellant was to appear for a hearing and judgment in this court in other matters on 15th November, 2007. That the non-appearance of counsel was due to inadvertent error which should not be visited on the litigant.

The application was further supported by the affidavit of **Mr. Ng'ang'a Munene**, learned counsel. The supporting affidavit merely buttresses the grounds in support of the application already referred to hereinabove. The only new issue raised was that as a result of the confusion, counsel had served the Respondent with the hearing notice for 15th November 2007 and that could explain too why the respondent was not in court when the appeal was called out for hearing and dismissed for want of attendance. Finally counsel depones that this inadvertent error will cause hardship to the appellant even

though no prejudice would result to the respondent.

In response to the application, the respondent filed a replying affidavit. It is a lengthy affidavit giving a synopsis of the entire proceedings. The respondent does not agree with the applicant's counsel that it was inadvertent error to have misdiarised his diary. Rather he equates it to professional misconduct. That by bringing up other cases that were scheduled for hearing before this court on 15th November 2007, as the basis for the wrong entry in his diary of the date for the hearing of the appeal the applicant was merely seeking the sympathy of this court. Finally the respondent maintains that if the application is allowed he would suffer prejudice.

In his oral submissions in support of the application, **Mr. Mwangi,** Counsel for the applicant submitted that the appeal was dismissed on 14th November 2007 for non-attendance. Failure by counsel to attend court was because counsel misdiarised the date of the hearing of appeal. Instead of him indicating that the appeal was to be heard on 14th November 2007 he instead indicated erroneously that it would be heard on 15th November 2007. It was counsel's mistake that should not be visited upon the appellant. As to whether the negligence of counsel for the applicant amounted to professional misconduct, counsel maintained that if it was then it was forgivable.

As for the Respondent, he submitted that the matter has been pending in court for 9 years. That litigation must come to an end. Finally, he pointed that he had no more money to expend on the appeal.

I have carefully considered the application, the supporting and replying affidavits and respective oral submissions of the parties herein.

From the record this matter first came before me for hearing on 20th September, 2007. Though counsel for the applicant was present, counsel for the Respondent was absent. Counsel for the applicant then indicated to the court the difficulties he was encountering in serving the Respondent and or his counsel with the hearing notice. Counsel asked me to stand over the matter generally as he contemplated what to do next. The appeal being an old one, I declined the invitation and instead directed that the appeal be heard on 14th November, 2007 and the Respondent be served personally with the hearing notice by counsel for the applicant.

Come on 14th November 2007 and neither the applicant nor Respondent were in court. The appeal having been called out severally for hearing without any response, I ordered the dismissal of the same for want of attendance. It is this order that I am being asked to vacate and simultaneously reinstate the appeal for hearing on the ground of inadvertent error on the part of counsel for the applicant.

Under order XLI rule 16 of the Civil Procedure Rules, this court has a wide discretion to readmit and or reinstate an appeal which has been dismissed for sufficient cause. It provides "**..... where an appeal is dismissed under rule 14, the appellant may apply to he court to which such appeal is preferred for 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.....**"

According to the applicant, his counsel was prevented from appearing for the hearing of the appeal on account of him having misdiarised the date of the hearing of the appeal. I have no reasons to doubt what counsel has deponed on oath. I can think of no reason that would have stopped the appellant and or his counsel from attending the hearing of the appeal if he had got right the date for the hearing of the appeal. I also note that in the hearing notice served on the respondent by the applicant it is indicated therein that the appeal was scheduled to be heard on 15th November 2007 and not 14th November 2007 as directed by court. I do not think that counsel for the applicant would have set out to deliberately mislead the respondent by serving him with a hearing notice with a wrong date inserted therein. I think the mistake committed by counsel for the applicant was genuine and inadvertent. It should not be held against counsel. Entering wrong dates in a diary is not a strange phenomena. It happens all the time and it is not limited to lawyers alone. It is therefore excusable. Yes such action on the part of lawyers may border on

professional negligence. However and as correctly pointed out by counsel for the applicant, it is a forgivable misconduct.

The matter is old and I am aware that litigation must at some point come to an end. It is an important general principle of high public importance that there ought and must be an end to litigation. The law aims at providing the best and safest solution compatible with human fallibility and having reached the solution, it closes the case. Though sometimes fresh material may be found which might lead to a different decision, it is normally in the interest of peace, certainity and security that once a case has been finalised it should not be reopened. This principle must also be counter balanced by yet another important principle which is that justice must be done and be seen to have been done in each case that comes before the courts for determination. The principle is also based on public policy – that the public must have confidence in the courts and their decisions i.e. the public must have confidence in the judicial system itself. See generally **Jasbir Singh Rai & 3 others v/s Tarlochan Singh Rai & 4 others (2007) e KLR**.

In the circumstances of this case, if the application is denied, essentially the appellant would have been condemned unheard due to an inadvertent error on the part of his counsel. Justice will not have been done or seen to be done to the parties. It has been stated over the years that the sins of counsel should never be visited upon litigants. I think that this is one of those cases where counsel has owned up as to his error. His client should therefore not be condemned.

It is also not lost on me that the application to readmit the appeal has been made without undue and inordinate delay. Finally it is also not lost on me that the Respondent was not present on the two occasions that the matter came up for hearing. He cannot therefore escape censure as well. Neither can he claim prejudice if the appeal is readmitted.

In the end I have come to the conclusion that counsel for the appellant was prevented from appearing when the appeal was called out for hearing for sufficient reason. He entered a wrong date in his diary. Accordingly I will allow the application in its entirety. However I make no order as to costs as the respondent did not appear on the two occasions when the appeal was scheduled for hearing.

Dated and delivered at Nyeri this 14th day of April 2008

M. S. A. MAKHANDIA

JUDGE