



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NYERI**

**Civil Appeal 11 of 1994**

**MATHENGE NJOGO ..... DECEASED**

**AND**

**JOSEPH NJOGO MATHENGE ..... 1<sup>ST</sup> RESPONDENT**

**PETER MAINGI MATHENGE ..... 2<sup>ND</sup> RESPONDENT**

**BEATRICE WANJIKU MATHENGE ..... 3<sup>RD</sup> RESPONDENT**

*(Appeal from original Judgment of the High Court of Kenya at Nyeri in Civil Appeal No. 1 of 1985 dated 11<sup>th</sup> December 1987 by Torgbor – Judge)*

**R U L I N G**

Before me is an application dated 5<sup>th</sup> May 2008 expressed to be brought under Orders XLI rule 16 and L rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. It seeks:-

- 1. That this appeal be readmitted or reinstated for hearing.**
- 2. That the costs of the application be awarded to the respondents.**

The application is ground on the following facts:-

- (a) That the appellant and his counsel were prevented from attending court on 4<sup>th</sup> March 2008 by factors beyond their control.**
- (b) That the appellant has an interest of being heard in this appeal on merit.**
- (c) That the appellant is ready and willing to**

**pay the Respondents costs incurred on 4<sup>th</sup> March 2008 and for this application.**

**(d) That it is in the interest of justice and fair**

**play that the appeal be heard and determined on merits.**

It is further supported by the affidavit of **Charles Gakuhi Chege Esq.**, learned counsel for the applicant and **Charles Wahome Gikonyo Esq.** also learned counsel. Both affidavits are dated 5<sup>th</sup> May 2008. The main grounds or reasons advanced in support of the application are that the appeal was on 4<sup>th</sup> March 2008 dismissed with costs for want of attendance by the appellant and or his counsel. That the said non-attendance was not deliberate but was occasioned by circumstances beyond their control. That as the applicant and his counsel were on their way to court from Nyahururu in good time their vehicle suddenly broke down at Kiawara trading centre along Nyahururu-Nyeri road. The motor vehicle had to be repaired and by the time they got to court at about 10.30 a.m. their appeal had been called out and dismissed. In the meantime and as their vehicle was being attended to, counsel for the applicant contacted **Mr. Wahome Gikonyo Esq** and requested him to hold his brief and have the court file in respect of the appeal placed aside. When counsel for the applicant arrived in court and found that the appeal had been dismissed he contacted **Mr. Wahome** aforesaid who in turn informed him that the appeal had been called in his absence when he had rushed to mention Nyeri High Court Miscellaneous Civil application number 28 of 2008 before the Deputy Registrar. Mr. Wahome's affidavit was to that effect. That the appellant had all along been desirous to prosecute the appeal and it is in the interest of justice and fair play that the same be reinstated for hearing on merits.

The application was opposed. **Mr. Silvester Mwangi Muhia** swore an affidavit in response. In the main he deponed that the allegation that the applicant and his counsel had travelled to Nyeri arriving at 10.30 a.m. only to find the appeal dismissed were false. That he himself had arrived in court at 11 a.m. found the court in session and it was not until 1 p.m. that this appeal was called out and dismissed for want of prosecution as neither the applicant nor his counsel was present. That costs cannot adequately compensate the Respondents as the dispute has been dragging in courts since 6<sup>th</sup> April 1983; a period in excess of 25 years. That litigation must come to an end and finally that for a court to exercise its discretion in favour of the respondents, they must come to court with clean hands. To counsel, there can be no dirtier hands than when two advocates conspire to swear falsely.

In his oral submissions in support of the application, **Mr. Chege**, learned counsel at the application merely reiterated and expounded on the grounds in support of the application and also what had been deponed to in the two affidavits in support of the application. The only additions however being that the applicant was willing to pay costs which will be sufficient recompense the respondents, that the applicant had not been indolent, that the delay in instituting the instant application is not inordinate and finally that though he may have been negligent in the way he handled the matter, that omission should not be visited upon the applicant. In support of his submissions counsel relied on the following authorities which I have carefully read and considered.

**1. Trust Bank Ltd v/s Amalo Co. Ltd (2002) 2 KLR 627**

**2. Mariam Nyawira v/s Philis Muringi Noirangu & Another NKR HCCC No. 24 of 1993 (unreported)**

**3. Municipal Council of Meru v/s National Housing Corporation & Another NYR C.A. No. 161 of 2000 (unreported)**

On his part **Mr. Muhia**, learned counsel having reiterated and expounded on what he deponed to in his affidavit in opposition to the application, added that the application was not brought with clean conscience. That the two affidavits contained untruths. Lying to court for purposes of reopening a matter was not the way to go. That costs would not adequately compensate the respondent as he has been unable to develop the suit premises. Finally counsel submitted that it is high time that this matter was brought to an end.

I have carefully considered the application, the respective supporting and replying affidavits, rival oral submissions and the law. I note that the application is expressed to be brought under Order XLI rule 16 and L rule 1. Order XLI rule 16 of the Civil Procedure rules deals with remand of cases. The application before me does not seek such orders. Order L rule 1 of the Civil Procedure rules cannot come to the aid of the applicant either. It is a mere procedural rule as to the hearing of applications. I would have been minded to disallow the application on that basis but for the rubric “..... **and all other enabling provisions of the law** .....

I am aware that I enjoy an unlimited and unfettered discretion to set aside an order dismissing a suit or as in this case an appeal for want of prosecution and or attendance. However such discretion must be exercised on sound judicial principles and not capriciously. In exercising such discretion regard must be had to the conduct of the parties to the appeal, the circumstances that led to the dismissal of the appeal, whether the application for the reinstatement has been filed timeously and whether an award of costs would be an adequate recompense to the respondent.

A person invoking the court’s discretion must be candid and must come to court with clean hands. In the circumstances of this case I am unable to say that the applicant has come to court as aforesaid. The applicant says that his failure to attend court on the material day was because of circumstances beyond his control. The circumstances beyond his control are that as he was driving to court with his counsel, **Mr. Chege**, their vehicle developed a mechanical problem along the way at Kiawara trading centre along Nyahururu–Nyeri road. They had to fix the mechanical problem before proceeding on with their journey. The problem was duly fixed and they proceeded to court where they reached at about 10.30 a.m. only to find that the appeal had been dismissed. First and foremost there is no convincing evidence that indeed the applicant’s advocate’s motor vehicle broke down. One would have expected as correctly pointed out by **Mr. Muhia** that the applicant will cause the mechanic who fixed the problem bedevilling **Mr. Chege’s** motor vehicle to swear an affidavit to that effect. Indeed there is nothing at all to show that the motor vehicle was ever fixed. For instance where is any document showing payments made to the mechanic and or the garage in which the vehicle was repaired for the work done. Secondly where is the documentary proof that spare parts of any kind were bought for purposes of fixing the said motor vehicle. Even the alleged mechanical problem is not indicated. Besides, the applicant himself has not even sworn an affidavit to buttress **Mr. Chege’s** averments. No doubt, **Mr. Chege** is well aware that courts transact business from 9 a.m. If indeed by 8.30 a.m. his vehicle had broken down, why couldn’t he have despatched the applicant to rush to court as he tried to fix the problem with his motor vehicle. I would imagine that, that is what a prudent counsel would do. I am sure had the applicant been in court on that day and indicated that his counsel’s motor vehicle had developed a mechanical problem on the way and prayed that the file be placed aside pending appearance of his counsel, the court would not have been averse to the idea. Instead and according to **Mr. Chege** he conducted **Mr. Wahome Gikonyo** on phone and requested him to intercede with the court on his behalf. However according to **Mr. Wahome**, he preferred to deal with his own matters before the Deputy Registrar on that day and by the time he came to this court he found the appeal had been dismissed. It is instructive that **Mr. Wahome** does not mention what time he arrived in this court only to find the appeal already dismissed. In any event etiquette demands that this being a superior court, it takes precedence over courts below. Ideally therefore, **Mr. Wahome**, if he is genuine ought to have come to this court first before proceeding to Deputy Registrar’s court. It is also significant to note that **Mr. Wahome** is silent on what he did immediately he noticed that the appeal had been dismissed.

From the way I conduct my court, there is no way that the said appeal would have been dismissed earlier than 1 o’clock. Dismissals normally come as the last item in the cause list. So that when **Mr. Muhia** depones that on the material day he sat in court from 11 a.m. until sometimes before 1 p.m. when the appeal was called out and dismissed as neither **Mr. Chege** nor the applicant were present to prosecute it, it must be true. I have no basis to disbelieve this averment as from my own experience this is what happens in my court. For the applicant to claim that he arrived in court at 10.30 a.m. only to find his appeal dismissed is not being candid with the court. Suddenly Mr. Muhia would have been able to see them. That singular lack of candour should disentitle the applicant to the remedy sought in the application.

Yes, litigation belongs to the parties and that advocates who appear in court are mere agents of those parties and litigants should not be blamed for their woes. Yes, blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on merits. Yes, the administration of justice should normally require that the substance of all disputes should be investigated and decided on merit and that errors should not necessarily deter a litigant from pursuits of his right and that the spirit of the law is that as far as possible in the exercise of judicial discretion, the court ought to hear and consider the case of both parties in any dispute in the absence of any good reasons for it not do so. (See generally **Trust Bank Ltd, Municipal Council of Meru, Mariam Nyawira all supra**).

These are indeed noble ideals and good principles of law to guide courts in their daily judicial discourse. However they must be counter balanced with the desire that litigation must come to an end, that justice cuts both way as well as the need to adhere to and enforce the rules of engagement as enshrined in our civil procedure Act and the rules made thereunder. Those rules were not promulgated for Child play. I am however unwilling to accept that a party at fault should be economical with the truth with the hope of reopening a matter by calling to his aid the aforesaid principles. I must repeat here again that a party seeking the exercise of a court's discretion in his favour must come to

court with candour and clean hands. The applicant and his counsel cannot claim that they have behaved that way in this application. I also believe that the sins of counsel should never be visited on a litigant. However there may be occasions when such sins may be born by the litigant more so as in the instant case where the applicant has conspired with his counsel to mislead the court. They ought to have owned up to what exactly transpired that led to their non-appearance in court on that day and sought the court's hand in remedying the situation.

From the record, this matter has been dragging in this court corridors for the last 25 or so years. It is in the interest of the public that litigation whether be land should at some point come to an end. Land may be a sensitive issue in this part of the world. However land based litigation

is just like any other litigation not deserving any special treatment.

From the record, this appeal was filed on 17<sup>th</sup> February 1994 and admitted to hearing on 12<sup>th</sup> September 1994. It was not until 14<sup>th</sup> April 2003 that the appeal was for the first time set down for hearing. On 18<sup>th</sup> November 2003 when the appeal came up for hearing, it could not proceed as apparently the appellant had died. It is noteworthy that the appellant had died on 14<sup>th</sup> November 2001 yet no efforts had been made timeously to substitute him. The application for such substitution was belatedly filed on 9<sup>th</sup> December 2003 but was not prosecuted until 26<sup>th</sup> October 2007 when it was allowed. Almost a month later is when the applicant fixed the case for hearing. From what has been outlined above there is no comfort to the claim by the applicant that he has all along been desirous to prosecute the appeal. If anything, he has been indolent. A court of law does not assist the indolent.

The applicant knew on the very same day that his appeal had been dismissed. One would have expected therefore that he would immediately file the instant application. Instead what does the applicant do? He files it on 4<sup>th</sup> June 2008, a whole 3 months after the event. No explanation is given for this inordinate delay. If this cannot be described as indolence, I do not know what else is.

The respondents have been kept away from the fruits for their judgment since 20<sup>th</sup> January 1994. They have been unable to develop the suit premises. In the circumstances I do nor think that an award of costs would act as adequate recompense for the respondents.

It must be obvious from what has fallen from my lips so far that I find no merit in this application and is accordingly dismissed with costs to the respondents.

***Dated and delivered at Nyeri this 29<sup>th</sup> day of September 2008***

**M. S. A. MAKHANDIA**

**JUDGE**