IN THE COURT OF APPEAL
AT KISUMU

(CORAM: ASIKE-MAKHANDIA, J.A. (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. EI53 OF 2024

BETWEEN

ELISHA OKOTH OTIENO.....1ST APPLICANT FANUEL ACHOLA OTIENO.....2ND APPLICANT ISAIAH OJOWI OTIENO .....3RD APPLICANT

AND

JARED OTIENO AOKO (Sued as the legal representative of the estate of the late **ELIZAFAN AOKO GUMBO.....RESPONDENT**

(Being an application for reinstatement of the impugned application)
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RULING

[1] Before the Court is the application dated **4th April, 2025**, seeking extension of time within which the applicants should file an application to set aside the order dated 19th February, 2025, dismissing their application dated the 18th June, 2024; and reinstate the same for *inter- partes* hearing on merit.

[2]The application is brought on the grounds that the application dated the 18th June, 2024, was dismissed for want of attendance when the same came up for hearing on the 19th February, 2025. That the non- appearance of counsel for the applicants on the day

of the hearing was purely occasioned by a mistake on the part of the counsel who was

served with the hearing notice, however, due to administrative lapses in the office, the said date was not diarized. That the ill-fated application was for stay of execution pending the hearing and determination of appeal. That the applicants reside on the suit property and are on the verge of being evicted which would render the appeal a nugatory.

[3] The respondent filed a replying affidavit dated the 14th April, 2025, in opposition to the application in which he pointed out that the application was incompetent, bad in law, the delay was in any event, inordinate and not sufficiently explained and that the appeal was filed out of time and without leave.

[4] Parties were directed to canvass the application by way of written submissions which directions were fully complied with. I have carefully read and considered the respective written submissions.

[5] In my view, the issue for determination is whether this application is merited. The application is premised on **Rule 58(3)** and (**4)** of the Court of Appeal Rules which provides i*nterlia*:

> **“Where an application has been dismissed or allowed under sub-rule (2), the party in whose absence the application was determined may apply to the Court to restore the application for hearing or to rehear it, as the case may be, if that party can show that he or she was prevented by any sufficient cause from appearing when the application was called on for hearing.**

4. An application made under sub-rule (3) shall be made within thirty days of the decision of the Court, or in the

case of a party who would have been served with notice for the hearing but was not so served, within thirty days after that party's first hearing of that decision."

[6] It is clear that this provision sets out two preconditions that should be met for the success of such an application viz: the application must be lodged within 30 days and that the applicant demonstrates sufficient reasons.

[7] Dealing with first prerequisite, it is conceded by the applicants that they lodged the instant application after the lapse of the requisite 30 days hence the necessity of having the same admitted out of time.

[8] In order to invoke the court's discretion to enlarge time, an applicant has to satisfy the requirements set out in **Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231,** which is the locus classicus thus:

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay, thirdly, (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted."

[9] I note that the delay on the part of the applicants in bringing the instant application is not ordinate being **18 days** after the 30 days

had lapsed. This is after the applicants' counsel learned of the said dismissal after an alert from the judiciary CTS.

[10] I am also satisfied that the respondent will not suffer prejudice in the event that the dismissed application is reinstated as he will still have occasion to ventilate his opposition to the application on merit. It is also not lost on me that the applicants reside on the suit property and face imminent eviction if this application is not allowed which will occasion them serous prejudice.

[11] I think that the assertion of the respondent that the appeal is bereft of merit as it was filed out of time is not for this forum to determine.

[12] Have the applicants demonstrated sufficient cause for the reinstatement of the dismissed application? The decision whether or not to reinstate the dismissed application for non-attendance is an exercise in discretion by this court. In this case the non-attendance of counsel is solely attributed to human error whereby the registry rightfully served the applicants' advocate with a hearing notice, however, the same was not diarized by the staff of the applicants' advocates office and as a result counsel failed to attend court on the material hearing date.

[13] This was purely a mistake on the counsel for the applicants which commends to inference of sufficient cause. There are countless authorities which stress that the mistake of counsel should not be

visited on the client. For instance, in **Belinda Murai & 6 others -vs-**

Amos Wainaina [1978] KLR, Madan JA stated as follow:

> **"A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate."**

[14] Further, in the case of **Philip Chemwolo & Another -vs-**

Augustine Kubede [1982] KLR 103 at 1040, Apalloo JA held that:

> **"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 heard on merit."**

[15] In this case, counsel for the applicants has owned up to his mistake.

[16] In view of the above, I am satisfied that the applicants have met the threshold to have the impugned application reinstated. Accordingly, I allow the application as prayed.

Dated and delivered at Kisumu this 9th day of March, 2026.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is
a true copy of the

original
Signed
DEPUTY REGISTRAR