



Route 3 Company Limited & another v Nairobi City County & another (Civil Appeal (Application) 188 of 2019) [2025] KECA 315 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KECA 315 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 188 OF 2019
K M'INOTI, F TUIYOTT & FA OCHIENG, JJA
FEBRUARY 21, 2025**

BETWEEN

ROUTE 3 COMPANY LIMITED 1ST APPLICANT

GOSPEL CELEBRATION CENTRE 2ND APPLICANT

AND

NAIROBI CITY COUNTY 1ST RESPONDENT

REUBEN NJUGUNA 2ND RESPONDENT

(Being an appeal from the Judgment of the Environment & Land Court at Nairobi (K. Bor, J.) delivered on 26th November 2018 in ELC Suit No. 546 of 2008)

RULING

1. Before us is a notice of motion dated 24th June 2024. The application is brought under the provisions of Rule 58(3) & (4) of the Court of Appeal Rules, and Articles 48, 50(c), & 159(2)(d) of the *Constitution*. The applicants pray for orders that:
 - a). Spent.
 - b. The court be pleased to vary or set aside its orders issued on 28th May 2024 dismissing the applicant's notice of motion dated 17th October 2019, for non-attendance.
 - c. The court be pleased to reinstate the application dated 17th October 2019.
 - d. Costs be in the cause."
2. The application is premised on the following grounds:



- a). The application herein has been filed within the parameters set by the applicable statute, and the applicants have demonstrated the reason for the delay.
 - b). Should the appeal proceed without the determination of the application dated 17th October 2019, the appeal will be rendered nugatory as the applicants will have no cause for deliberation before the court.
 - c). The court to exercise its discretion and apply Article 159(2) (d) of the Constitution, in favour of the applicants.
 - d). The court has the discretion to vary any order, and it should adhere to substantive justice.
 - e). The mistake of the advocate has caused the applicants to be dismissed from the seat of justice.
3. The application is further supported by the affidavit of John Swaka, advocate for the applicants, sworn on 24th June 2024, in which he reiterated the grounds on the face of the application and stated that:

- “ a) He had on several occasions, including the last two occasions, requested the registry to list the application dated 17th October 2019 for hearing.
- b. Immediately after realizing the mistake he had made, which adversely affected his clients, he promptly filed the present application for consideration by the court.
- c. The mistake occurred due to a technical hitch after his call dropped for three minutes, only to log back in and he was informed that the application had been dismissed.
- d. The registry has since directed parties to file submissions to the main appeal, which is detrimental to the applicants as the appeal will be heard without the dispensation of the application for additional evidence.
- e. The court to look at his previous conduct in the matter, showing that he has always attended court at all times and he has always been ready to proceed with the application.
- f. The mistake of the advocate should not be visited upon the client.”

4. In response, the respondent in his replying affidavit sworn on 18th July 2024, stated that:

- “ a) The application is incompetent and an abuse of the court process for reasons that; the application is filed by the firm of Swaka Advocates for the appellant yet the deponent in the affidavit in support thereof avers to be on record for the applicants, and although the firm of Swaka Advocates came on record for the applicants vide a notice of appointment dated 9th September 2021, the 2nd applicant is represented by the firm of D. K. Githinji & Co. Advocates, who filed the record of appeal dated 7th May 2019, and the application dated 17th October 2019.
- b. Mr. Swaka has never been ready to prosecute the application as his letter to the deputy registrar and his submissions dated 23rd July 2023 were in relation to the application dated 7th May 2019.



- c. The failure by the applicants' counsel to attend court to prosecute the application is not excusable as the applicants' intention has been to convolute the proceedings and delay the determination of the appeal.
 - d. The applicants' counsel's allegation that his call dropped is unbelievable as he was able to address the court on the same day, he did not require 24 days to file a pertinent application or adhere to the directions on the appeal dated 3rd June 2024.
 - e. The application lacks merit and should be dismissed with costs.”
5. When the application came up for hearing on 2nd October 2024, Ms. Njoki, learned counsel holding brief for Mr. Swaka, appeared for the applicants. The 1st respondent was represented by Mr. Nyakoe, learned counsel and the 2nd respondent was represented by Mr. Ochieng, learned counsel. Counsel relied on their respective written submissions, save for Mr. Ochieng, who briefly highlighted his submissions. Mr. Nyakoe did not file submissions and left the matter for determination by the Court.
 6. The applicants submitted that when their application dated 17th October 2019 came up for hearing on 28th May 2024, it was dismissed for want of appearance by their counsel. This prompted the applicants' counsel to file the present application.
 7. They refuted the 2nd respondent's claims on representation and pointed out that the notice of appointment dated 9th September 2019 shows that the firm of Swaka Advocates is properly on record, acting together with the firm of D. K. Githinji & Co. Advocates.
 8. The applicants submitted that while the matter was called out at 9:00 a.m. and counsel was not present, at 9:03 a.m. he was able to log in only to be informed that the matter had been dismissed. They invited the Court to apply Article 159 of the *Constitution* and consider the reason advanced by the applicants as sufficient.
 9. The applicants called upon the Court to look at their conduct, where their counsel had on several occasions made requests to have the application dated 17th October 2019 listed for hearing.
 10. Mr. Ochieng submitted that Rule 58(3) & (4) as relied upon by the applicants requires two preconditions; the application be lodged within 30 days and the applicants demonstrate sufficient reasons. However, the applicants have failed to meet the second precondition as counsel came on record for the 2nd applicant yet he refers to the both applicants in the application.
 11. Counsel reiterated that the application the applicants' counsel was ready to prosecute was the application dated 7th May 2019, which was not before the Court, and not the application dated 17th October 2019. Counsel cited the case of Wilson Cheboi Yego v Samuel Kipsang Cheboi [2019] eKLR and submitted that the explanation offered should not leave unexplained gaps.
 12. Counsel refuted the claim that Mr. Swaka's call dropped as he was of the view that he was just not ready to prosecute the application that was before the court. However, when asked by the Court whether the applicants' counsel's call might have dropped, the counsel conceded that it was a possibility.
 13. We have carefully perused the application, the rival affidavits by the parties, submissions by counsel, the authorities cited, and the law. The issue for determination is whether the application herein is merited.
 14. An application for reinstatement of a dismissed application is governed by rule 58(3) and (4) of the Court of Appeal Rules, which provides that:



3. 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 out 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 of the hearing but was not so served, within thirty days after that party's first hearing of that decision."
15. The two conditions for the reinstatement of an application dismissed or allowed for non-attendance are: whether a sufficient cause has been shown and whether the application is made within 30 days of the decision or 30 days after a party who ought to have been served but was not served first hears of the decision.
16. It is common ground that the application herein was filed within 30 days. The issue for determination is whether a sufficient cause has been shown.
17. In the case of Peter Nyamu Kabeu v Eliud Karani, Civil Application No. Nai. 293 of 2000, this Court noted that in an application seeking to reinstate an earlier application which was dismissed for want of prosecution, the Court must keep in mind the fact that it is not dealing with the merits or demerits of the application which is sought to be reinstated lest it trespasses upon the territory of another judge should that dismissed application ever come up for hearing.
18. The applicants stated that the reason for non-attendance was that their counsel's call dropped and by the time counsel logged back in, their application was already dismissed. This is evidenced by the record which shows that indeed, when the applicants' counsel logged into the court session on 28th May 2024, he was informed that his matter had already been dismissed. This was also conceded to by the 2nd respondent's counsel.
19. The applicants' counsel submitted that his mistake as counsel should not be visited upon his clients. In the case of Belinda Murai & 9 Others v Amos Wainaina [1982] KLR 38, Madan, JA as he then was, held that:

"A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court may 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 have known better. The court may not forgive or condone it but it ought to certainly do whatever is necessary to rectify it if the interests of justice so dictate. The courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule..."
20. Similarly, Apaloo, JA as he then was, in the case of Philip Chemowolo & Another v Augustine Kubede (1982) KAR 1036 at 1040, observed 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 its merits. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment



of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline”

21. It is trite that the decision whether or not to reinstate an application for non-attendance is discretionary. In the case of *CMC Holdings Ltd v James Mumo Nzioka* [2004] KLR 173 this Court stated that:

“ [T]he 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.”

22. In the premises, considering that there was no delay in bringing this application and being satisfied with the explanation for non-attendance, we allow the application and hereby reinstate the applicants’ application dated October 17, 2019.

23. As directions on the main appeal have already been issued, we direct that the said application be set down for hearing and determination without undue delay.

24. Costs of this application shall be in the cause.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2025.

K. M’INOTI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

