Pere v Osoi (Civil Appeal (Application) 008 of 2019)
[2025] KECA 1417 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KECA 1417 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL (APPLICATION) 008 OF 2019

PO KIAGE, JA

JULY 31, 2025

BETWEEN

ISAAC PERE ..... APPELLANT

AND

TIMINA LEKENI OSOI ..... RESPONDENT

(An application for enlargement of time for bringing an application for reinstatement of an appeal, and reinstatement of an appeal under Rule 105 of the Court of Appeal Rules, 2022)

RULING

1. On 5th February 2025, this Court (Warsame, Mativo & Gachoka, JJ.A) dismissed the appeal herein as neither party thereto appeared despite service of the hearing notice having been effected on 22nd January 2025.

2. Nearly two months later, on 1st April 2025, the appellant moved this Court for the following orders;

   "2. The honourable court be pleased to enlarge time to allow the appellant/applicant to file the application herein seeking reinstatement of the time out of time.

   3. Consequent to the grant of prayer 2, this honourable court be pleased to review, vary and/or set aside its order of 5th February, 2025 dismissing the appeal, and reinstate the appellant/applicant's appeal on such terms as it may deem fit and just."

3. The grounds founding the application were stated on its face as follows;

   "4. That the appellant only learned of the dismissal of his appeal on 23rd March, 2025 when he called learned counsel Mr. Geoffrey Otieno who was on record in the appeal to find out the status of the appeal.

5. That counsel was non-responsive and he therefore elected to visit his offices on the morning of 24th March, 2025 to enquire on what has transpired during the hearing on 5th February, 2025.

5. That it is only after visiting the advocate's chambers that he came to learn that the appeal had been dismissed for non-attendance."

4. Those grounds are repeated nearly verbatim in the supporting affidavit of the applicant, Isaac Pere sworn on the said 1st April 2025.

5. The motion is strenuously opposed by the respondent vide a replying affidavit sworn on 9th May 2025. The respondent/deponent dismisses the application as a non starter and an abuse of process based on a misrepresentation of the law by the applicant. It is also "incompetent, bad in law and fatally defective for being filed way beyond the mandatory requisite time from of thirty days after the decision of the court despite the appellant/applicant being aware of the hearing date as per his own sworn statement." He goes on to swear that under rule 105, the applicant was under a duty to bring a restoration application within 30 days of learning of the decision since his advocate had been served with the notice of hearing. The application is, therefore, time-barred, incompetent and incurably defective and a mere allegation of inadvertence or mistake by counsel does not suffice. The respondent opines that the applicant is guilty of inexcusable indolence and is not deserving of this Court's favorable discretion, and that the application should be dismissed.

6. Counsel for the respondent also filed written submissions together with a list and bundle of authorities in support of the positon he has taken herein.

7. Having carefully considered the motion and the rival urgings of the parties, I have come to the conclusion that the decision is easy to arrive at as a matter of law. It is not in dispute that notice of hearing of the appeal was issued to the applicant's advocates. It is also clear that the appellant was aware that the appeal was coming

8. up for hearing on 5th February 2025. There was no appearance by or for him. Nor had submissions been filed. The Court, upon being satisfied of service of the notice of and appeal proceeded to dismiss the appeal under rule 105.

9. That Rule has an express mechanism for restoration of a dismissed appeal for an appellant's non-appearance or he-hearing of an appeal that proceeded to hearing in a respondent's absence. The text of the rule is plain enough;

105.

(1) If, on any day fixed for the hearing of an appeal, the appellant does not appear, the appeal may be dismissed and any cross appeal may proceed, unless the Court deems fit to adjourn the hearing and, in such instance, may order the appellant to pay court adjournment fees and costs to the other parties present: Provided that where an appeal has been so dismissed or any cross-appeal so heard has been allowed, the appellant may apply to the Court to restore the appeal for hearing or to re-hear the cross- appeal, if he or she can show that he or she was prevented by any sufficient cause from appearing when the appeal was called on for hearing.

2. If the appellant appears and the respondent fails to appear, the appeal shall proceed in the absence of the respondent and any cross- appeal may be dismissed, unless the Court deems fit to adjourn the hearing and, in such instance, may order the respondent to pay court adjournment fees in accordance with the Third Schedule and costs to the

other parties present: Provided that where an appeal has been allowed or cross-appeal dismissed in the absence of the respondent, the respondent may apply to the Court to re-hear the appeal or to restore the cross-appeal for hearing, if he or she can show that he or she was prevented by any sufficient cause from appearing when the appeal was called on for hearing.

3. An application for restoration under the proviso to sub-rule (1) or the proviso to sub-rule (2) shall be made within thirty days after the decision of the Court or, in the case of a party who should have been served with notice of the hearing but was not so served, within thirty days after his or her first hearing of that decision.

4. For the purposes of this rule, a party who has lodged a statement under rule 100 shall be deemed to have appeared."

10. To my mind, appellate practice is predicated upon parties appearing, mainly through their appointed counsel, to urge their respective cases through advocacy in which they address the Court in an effort of persuade it to decide the matter in their favour. Advocacy at the bar ought to not to be lightly disregarded. Nor should advocates let die the hallowed tradition of appearing to plead their client's cases. It is for this reason that even though parties are required to file submissions and lists and bundles of authorities within set timeliness, hearings proceed by way of attendance and oral highlights of submissions. I am at times, alas too many times, baffled and disappointed to see advocates passing up the opportunity to persuade, content to rely on submissions they sometimes mischaracterize as "comprehensive and exhaustive" when that may well be an overstatement.

11. So, the rule expects appearance. It is at the heart of the right to be heard, the clearest signature of fair trial. To give effect to that right, there is a requirement that parties be given notice of hearing so that they can prepare and attend. If, despite service of such notice, an appellant fails to appear for the hearing of the appeal, his appeal should, by logical implication and the command of our Rules, be dismissed and any cross-appeal may proceed for hearing. It may be spared that fate only by the court choosing to adjourn the hearing, a rare occurrence under those circumstances. If the party defaulting of appearance is the respondent, the court once satisfied as to service of the notice of hearing, proceeds with the hearing and will decide the appeal, such absence notwithstanding. The respondent's cross-appeal, if any, would be dismissed.

12. Thus, dismissal of an appeal or cross appeal or a decision on the basis of the appellant's or cross-appellant's urgings would be the normal consequence of failure to appear, and was the case for a long time. Recent changes to the Rules of Court have adopted a more sympathetic view, cognizant of human frailties and infirmities, knowing that humans, even learned humans, do err. Hence the opportunity afforded by the twin provisos in sub rules (1) and (2) for the restoration of a dismissed appeal or cross appeal, or the re- hearing of any such as may have been heard in the absence of a respondent to the appeal, or cross-appeal, as the case may be.

13. Such intervention, itself a qualification to the principle of finality and the need for litigation to come to an end, is exceptional and not grantable arbitrarily at a whim. The person seeking indulgence must show that he was prevented by some sufficient cause from appearing when the appeal was called on for hearing. It is a discretion exercisable on principle, and based on evidence.

14. But that is not all. In appreciation that such intervention has the effect of re-opening an otherwise properly closed litigation, and has the potential to prejudice, and does certainly inconvenience, the opposite party who is not all fault and honoured the court's notice to appear at the hearing, the Rules impose a strict cut-off regarding the time within which such intervention is to be sought. In the case of a person who was aware of the hearing, having been served with notice thereof, he must make the

application for restoration on re- hearing within thirty (30) days of the dismissal or ex-parte hearing of the appeal. For a party who was not served, such application must be made within 30 days of first hearing of the dismissal or hearing in his absence.

15. My own view is that the 30-day window is eminently reasonable, and a party of reasonable diligence who has even average interest in his appeal, ought to be able to make the necessary application within that period without any difficulty or handicap.

16. In the matter before me, the appellant/applicant, on his own showing, was aware of the hearing date, and the Court duly confirmed service of the hearing notice before dismissing the appeal on 5th February 2025. That being the case, the appellant should have filed the restoration application by 7th March 2025 or thereabouts, at the latest. He did not do so until 1st April 2025, hopelessly out of time. Recognizing how belated he was, the appellant brought this motion in which he first prays that time for bringing the restoration application be extended under Rule (4) of the Rules of Court.

17. The firm view I take is that it cannot have been the intention of the Rules Committee that a party who fails to appear at the hearing of an appeal and the fails to apply to restore the duly dismissed appeal within the stipulated time can then resort to Rule 4 to seek extension of time. My view is that the 30 days period is an exceptional indulgence that is strictly limited and not amenable to extension.

18. I need say no more as the consequence of my holding is that the prayer of extension for time is untenable and I disallow it. The same is dismissed with costs.

DATED AND DELIVERED AT NAKURU THIS 31ST DAY OF JULY, 2025.

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR