Kenya Civil Aviation Authority & another v Micheni & 4 others (Suing on behalf of themselves and 63 other employees of the Directorate of Civil Aviation, a department within the Ministry of Transport and Communication) (Civil Application Sup 18 of 2014) [2024] KECA 13 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KECA 13 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION SUP 18 OF 2014

HA OMONDI, A ALI-ARONI & GWN MACHARIA, JJA

JANUARY 25, 2024

BETWEEN

KENYA CIVIL AVIATION AUTHORITY ..... 1ST APPLICANT

CA KUTO ..... 2ND APPLICANT

AND

RURIANI MICHENI ..... 1ST RESPONDENT

RUFUS NJUGUNA ..... 2ND RESPONDENT

DANSON KIMANI ..... 3RD RESPONDENT

ALLAN MUKINDA ..... 4TH RESPONDENT

NANCY OWITI ..... 5TH RESPONDENT

SUING ON BEHALF OF THEMSELVES AND 63 OTHER EMPLOYEES OF THE DIRECTORATE OF CIVIL AVIATION, A DEPARTMENT WITHIN THE MINISTRY OF TRANSPORT AND COMMUNICATION

(Being an application for reinstatement of the applicants' Notice of Motion dated 9th September 2014 dismissed on 28th February 2022)

RULING

1. The application before us for determination is dated February 8, 2023, brought pursuant to articles 48 and 50 of the *Constitution*, rules 58(1), 56(3) and 56(4) of the *Court of Appeal Rules* and sections 1A and 3A of the *Civil Procedure Act*, seeking reinstatement of the applicants' Notice of Motion dated September 9, 2014 which was dismissed on February 28, 2022.

2. The application is supported by the grounds on the face of it and an affidavit sworn by one Paul O Ogunde, the applicants' advocate. He deposes that in September 2014, the applicants sought certification to appeal to the Supreme Court pursuant to rule 42 of this *Court's Rules*, against the judgment that was delivered on April 4, 2014, arguing that a point of law of general public importance was involved. He contends that the application was listed for hearing on several occasions, but it was never heard on its merits; that on February 6, 2023 when they (the applicants' advocates) attempted to fix it for hearing, they established that it had been dismissed on February 28, 2022 on the ground of advocates' failure to attend the hearing; that the hearing notice was never served upon them as it was sent to an erroneous email, namelywalterkoxxx@walterkxxxx.com instead of walkerkxxxx@walkerkoxxx.com; that therefore, the failure to attend the hearing was not deliberate or intentional; that they are desirous of pursuing the application, having already filed their submissions; that no prejudice will be suffered by the respondents; and that it is in the interest of justice that the orders sought be granted lest the applicants be driven from the seat of justice in breach of their right to a fair trial.

3. The application is opposed by the 1st respondent *vide* a replying affidavit sworn on March 16, 2023. He avers that the application is vexatious, bad in law, frivolous and an abuse of the court process, as what the applicants are seeking is to unjustifiably deny him and the rest of the respondents from enjoying the fruits of the judgment; that the applicants have not proffered any reasonable explanation for the one year delay in seeking review of the orders dismissing the subject application; that applicants have further failed to show any reasonable steps they have taken to prosecute the instant application, which was filed as an afterthought; that the application ought to have been filed within 30 days after the dismissal; that furthermore, the applicants have failed to demonstrate how they learned that the application had been dismissed; and that it is in the interest of justice and fairness that the instant application be dismissed with costs for want of merit.

4. The application is also opposed by the 2nd to 68th respondents. On behalf of the 2nd to 66th respondents, the application is opposed vide a replying affidavit sworn by their advocate, learned counsel Dr John M Khaminwa on March 16, 2023. He avers that this is an old matter and litigation must come to an end; that the impugned application was dismissed on February 22, 2022, and that under rule 58(4) of the *Court of Appeal Rules*, a party seeking reinstatement of a dismissed application must apply within 30 days; that furthermore, the applicants have not provided any evidence that they only became aware of the dismissal of the impugned application on February 6, 2023; further, the hearing notice indicating the wrong email address should be disregarded as it falls out of the provisions of section 106B(2)(b) of the *Evidence Act*, as there is no proof that it was obtained from the computer of this Court. Finally, it is contended that the respondents will suffer prejudice if the application is allowed, as some of them have since died, and a further delay in the matter is tantamount to denying them their rightful justice.

5. The applicants' counsel filed a further affidavit sworn on July 13, 2023. He deposes that on February 6, 2023, he dispatched his process server, one Mr. Leonard Muendo to the Court registry to fix the dismissed application for hearing; that upon perusal of the Court file, he procured copies of the dismissal order together with the email forwarding the hearing notice, which forms part of the Court record; and that he then promptly made the application herein. It is his view therefore, that since the hearing notice as well as the dismissal order were procured from the court record, the provisions of section 106B (2) of the *Evidence Act* are inapplicable.

6. When the matter came up for hearing before us, learned counsel Mr. Wafula appeared for the applicant. He wished to rely on submissions dated July 12, 2023. He also briefly submitted that the hearing notice was served through the wrong email address, and, as such, there was no hearing notice on which the Court can rely upon to conclude that the applicants knew that the impugned application had a hearing

date. He submitted further that, as a result, the failure on their part to attend Court was not deliberate. Suffice it to state that there was no appearance for learned counsel Mr Gitobu Imanyara for the 1st respondent and learned counsel Dr Khaminwa for the 2nd to 66th respondents. It was not clear who represented the 67th and 68th respondents, or whether they were acting in person. The number of the respondents is informed from the title of the application.

7. We have carefully considered the application, the respective responses and the applicants' submissions. We find that the only issue for determination is whether the application is merited; whether in the circumstances of this case, the Court ought to set aside the *ex-parte* order dismissing the applicants' application dated September 9, 2014.

8. The facts of this case are that the applicants filed an application dated September 9, 2014, seeking leave to appeal to the Supreme Court against a judgment delivered by this Court in Civil Appeal No 67 of 2010, on grounds, inter alia, that the judgment raised a point of law of general public importance; and that despite the application being set down for hearing, it was never heard. When finally, the application came up for hearing on February 28, 2022, the court dismissed it for lack of attendance of the applicants and their advocate, pursuant to rule 56 of this *Court Rules*. The applicants contend that the failure to attend court was not deliberate; it was on account that they were never made aware of the hearing date as the hearing notice was sent to the wrong email address of their advocates, being walterkoxxxx@walterkxxxx.com instead of walkerkxxxx@walkerkxxxx.com.

9. Rule 58(3) and (4) of the *Court of Appeal Rules* provide as follows:

    3. Where an application has been dismissed or allowed under subrule (2), the party in whose absence the application was determined may apply to the Court to restore the application for hearing or to re-hear 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.

    3. 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 of his first hearing of that decision.

10. Rule 59(2) donates power to the court to rescind or vary an order made by the Court upon application by the affected person. It reads:

    (2) 2) An order made on an application to the court may similarly be varied or rescinded by the court.

11. It is evident from the record that the applicants' advocates have exhibited a copy of the hearing notice allegedly served on them electronically by the Deputy Registrar of this Court on February 15, 2022, at 1:52pm bearing an email address attributed to them. We do note that their known email address is walkexxxxx@walkerxxxxx.com. We are therefore satisfied that the hearing notice sent out on February 15, 2022, at 1:52pm by Deputy Registrar of this Court was not sent to the applicants' advocates. It follows then that the reason proffered for lack of attendance for the hearing of the impugned application is both reasonable and satisfactory.

12. As to the respondents' contention that the application has not been made within the stipulated 30 days from learning of the decision dismissing the application, our finding is that the respondents have not placed anything before us to indicate the applicants could be dishonest. They have also not provided any proof that the applicants did not specifically learn of the Court's orders on February 6, 2023. What is evident is that the application is dated February 8, 2023 and was filed on March 8, 2023, which is well within the 30-day period envisaged under rule 58(4) of this *Court's Rules*.

13. Further, the right to be heard before an adverse decision is taken against a party is fundamental, and permeates our entire justice system. We are therefore called upon to ensure that the right to a fair hearing is not fettered on grounds of mere technicalities that cannot be attributed to the party on the receiving end. That is the clarion call to a truthful and judicious justice system. In a scenario such as in the present case, where a party was condemned without notice, the exercise of the Court's discretion is paramount for purposes of ensuring that the party is heard on a just platform.

14. In *Ridge v Baldin* (1964) AC (1963) 2 ALL ER 66 the court observed as follows:

> The principle of fairness has an important place in the administration of justice and is also a good ground upon which courts ordinarily exercise discretion to intervene and quash the decisions of a tribunal or subordinate court made in violations of right to a fair hearing and due process."

15. This Court in the case of *James Kanyiita Nderitu & another vs. Marius Phillotas Chikas & another* (2016) eKLR, summarized the criteria upon which the courts exercise discretionary jurisdiction as follows:

> " In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."

16. Having said the above, we find that the application is merited. We allow the same with orders that this court's orders of February 28, 2022 dismissing the application dated September 9, 2014 are hereby set aside. The application dated September 9, 2014 is hereby reinstated. The costs shall abide the outcome of the application.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2024.

H. A. OMONDI

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JUDGE OF APPEAL ALI-ARONI

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR