



**M'kirigia v M'itonga (Civil Appeal (Application)
153 of 2018) [2024] KECA 775 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KECA 775 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) 153 OF 2018
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
JULY 5, 2024**

BETWEEN

M'NKUMBUKU M'KIRIGIA APPELLANT

AND

JOSEPH M'ITONGA RESPONDENT

*(Being an application to restore the appeal dismissed on 15th
March 2023 for non-attendance in E.L.C No. 54 of 2018)*

RULING

1. On March 16, 2023 the appeal that had been filed by M'Nkumbuku M'Kirigia, the appellant, against the respondent, Joseph M'Itonga, was dismissed for the non-attendance by learned counsel, Ms. Kaume for the appellant.
2. The appeal followed a claim by the respondent that the appellant had been registered to hold half of land parcel Nyaki/Thuura/1144 in trust for him. He asked for the subdivision of the land so that he could get his share and for a permanent injunction against the appellant. The appellant denied the claim and sought a permanent injunction against the respondent. The Environment and Land Court at Meru heard the dispute following which it allowed the respondent's claim and dismissed the appellant's counterclaim. This is what caused the appellant to appeal before this Court.
3. Learned counsel Ms. Kaume has deponed that at 8.30am on March 15, 2023 her office informed her that notice had been received for the hearing of the appeal on the following day. She had travelled to Isiolo where she had another hearing. Come March 16, 2023, she was not able to get a link on time and that by 9.15 am when she had got a link she found that the appeal had been dismissed for non-attendance. She states that this was a 2018 appeal which she had been anxiously waiting to prosecute. Secondly, that her client, the appellant, is over 90 years' old and has been waiting to have his appeal



heard. Further, that she has herself not been well and it took long to get to her client to be able to bring this application to have the appeal restored. She was not able to bring it earlier.

4. Ms. Betty Mwari Kiyuki, learned counsel, filed a replying affidavit to oppose the application. According to her, the explanation for non-attendance by the appellant's counsel was not satisfactory, and that if the application is granted her client would be prejudiced. It was deponed that, following the pre-trial directions, parties were asked to file written submissions on the appeal. She had filed hers but that the appellant's counsel had not by the time of hearing; that the appellant's counsel had been casual in the handling of the appeal.
5. We consider that the averment by the respondent's counsel, that the appellant's counsel had not prepared for the hearing by filing submissions, was not controverted. The claim that learned counsel had been casual in her handling of the appeal cannot be said to be without basis.
6. Under Rule 105(1) of the [Court of Appeal Rules, 2022](#) this Court has jurisdiction to exercise its discretion to reinstate an appeal that has been dismissed for non-attendance. Before such a discretion is exercised, the appellant has to show that his application for reinstatement was brought within 30 days of the dismissal of the appeal and that he was prevented by sufficient cause from attending the hearing.
7. Learned counsel M/s Kaume became aware on March 16, 2023 that the appellant's appeal had been dismissed for non-attendance. The present application was filed on May 19, 2023. This was well beyond the 30 days that the law allows. We consider that the appellant did not take advantage of Rule 4 of the [Court of Appeal Rules](#) to have time extended for him.
8. Even if the Court were to accept that counsel's non-attendance on March 16, 2023 was because of sufficient cause, we find that the application is not competent for the reason that it was made outside the 30 days required by the Rules.
9. Consequently, we dismiss the application with costs.

DATED AND DELIVERED AT NYERI THIS 5TH DAY OF JULY 2024

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

