



REPUBLIC OF KENYA



KENYA LAW
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**Nagda v Morjaria (Civil Application 010 of 2022)
[2023] KECA 132 (KLR) (10 February 2023) (Ruling)**

Neutral citation: [2023] KECA 132 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION 010 OF 2022
F SICHALE, LA ACHODE & WK KORIR, JJA
FEBRUARY 10, 2023**

BETWEEN

NARENDRA CHANDULAL NAGDA APPELLANT

AND

MANSUKHLAL JAMNADAS MORJARIA RESPONDENT

(An application to reinstate appellant/ applicant’s Notice of Motion dated 4th March, 2022 dismissed in a Ruling (Sichale, Ochieng & Korrir, JJ. A) dated 9th November, 2022)

RULING

1. This application was brought to this court under Rule 5 and 55(3) of *Court of Appeal Rules* vide a notice of motion dated November 9, 2022. Narendra Chandulal Nagda (the applicant) sought for orders: -
 - a. Spent
 - b. spent
 - c. that the honourable court be pleased to restore the application dated March 4, 2022 for hearing
 - d. that any other or further orders may be made that this honourable court deem fit to meet the ends of justice.”Mansukhlal Jamnadas Morjaria is the respondent.
2. The application is premised on the grounds on its face and the supporting affidavit of Frankline Bossire Ochweri.
3. The said grounds are that the applicant’s application dated March 4, 2022 was dismissed on the November 9, 2022 with costs. It was stated that on the November 9, 2022 the applicant’s advocate



- was on-line but due to technical problems in the internet system, he did not hear when the matter was called out. Further, that this application has been brought without inordinate delay.
4. Mr Frankline Bossire Ochweri deposed that he logged in to the link provided by the Court of Appeal but while waiting a message from the Court of Appeal appeared on the screen and disappeared as he tried to enlarge it. He contacted the Court of Appeal registry staff who in turn, sent him another link via email. That he joined the court with this link but as he waited for the file to be called a message from the link indicated that he had been released from the session.
 5. He further deposed that he sent their clerk to court to find out what transpired, only to be told that the application dated March 4, 2022 was dismissed for non-attendance.
 6. It was averred that the applicant stands to suffer irreparable loss and damage if the orders sought are not granted. That the respondent will not be prejudiced by the orders sought and can easily be compensated by damages, if any.
 7. The backdrop of the instant application is an application dated March 4, 2022 filed by the applicant in this court. The said application sought orders for stay of the Ruling of JM Mutungi J delivered on February 3, 2022 in Nakuru ELC No 135 of 2019, pending appeal in this court. On the November 9, 2022 when the matter came up for hearing, the applicant and/or his representative were not present in the virtual court. Consequently, the court dismissed the application for non-attendance.
 8. In response to the application, the respondent filed a replying affidavit sworn by Shaylesskumar Maganlal Panchmatia on January 24, 2023. It was deposed that the applicant had a tendency of not attending court, and thereafter filing urgent applications after judgment had been delivered. He gave an illustration of October 5, 2022 when the applicant's application seeking the stay application was scheduled for hearing before this court. The advocate sought adjournment on the grounds that they were awaiting instructions from the applicant and were unable to track him.
 9. It was averred that on the October 28, 2022, all the parties concerned were notified of the hearing date listed for November 9, 2022. Further, in the afternoon of November 8, 2022, the Court of Appeal Digital Administration circulated an invitation to all parties concerned, duly notifying them of the hearing the following morning, Wednesday November 9, 2022.
 10. The deponent added that the matter was called for the first time at about 9.03 am and Mr Sarvia for the respondent was present. There being no representation on the side of the applicant, the matter was placed aside and was called out again at 10:10 am That after the court confirmed that the applicant was served with the hearing date, the application was dismissed for non-attendance. He further averred that Mr Frankiline Bossire Ochweri exhibited a screen shot indicating that he joined the session at 9:52 am He therefore, did not understand why Mr Bossire did not address the court, since the matter was yet to be called out the second time.
 11. When the application came up for hearing, the applicant's advocates M/S Naomi Murithi & Co Advocates had filed written submission dated December 16, 2022 and supplementary written submissions dated November 8, 2022. Learned Counsel highlighted the submissions orally in the virtual court. On the other hand, the firm of M/s Mongeri Kinyanjui & Co Advocates, representing the respondent, had not filed their written submissions, but that notwithstanding, learned counsel, Mr Sarvia orally submitted in the virtual court.
 12. It was the applicant's submission that on the November 9, 2022 when the application dated March 4, 2022 was coming up for hearing, Mr Bossire was holding brief for Naomi Murithii & Co Advocates. That Mr Bossire logged into the Court of Appeal link on the November 9, 2022 at 9.00 am but while



- waiting, he received a message from the Court of Appeal which message unfortunately while he was trying to enlarge it as he was using a mobile phone, the message disappeared.
13. As a result, counsel contended that Mr Bossire called the Court Registry who in turn sent him another link through email at 9.52 am. That due to challenging technical issues on the internet system, Mr Bossire did not hear the matter being called out as he waited in the lobby, until a message was relayed on the link, informing him that he had been released from the session.
 14. In opposition, counsel for the applicant submitted that, the applicant's application is brought under an incorrect provision of this Court's Rules and that the proper Rule should be Rule 58 of the [*Court of Appeal Rules, 2022*](#).
 15. He reiterated what was averred in the respondent's replying affidavit, and urged this court to dismiss the applicant's application.
 16. It is true that the applicant relied on an incorrect Rule of this Court's Rules in his application. However, the substance of his application is the reinstatement of his application dated March 4, 2022. We note that the same should have been brought under Rule 58 (3) and (4) of the [*Court of Appeal Rules 2022*](#). As such, we shall consider his application under the supra Rule.
 17. We have considered the application, the replying affidavit and the rival submissions herein. Rule 58(3) and (4) of the [*Court of appeal Rules, 2010*](#) donates power to this court to intervene and grant reprieve to a party affected by an order of dismissal of an application for non-attendance. The Rule provides that:
 - “(3) Where an application has been dismissed under sub-rule (1) 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 re-hear it, as the case may be, if he can show that he 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 served with notice of the hearing but was not so served, within thirty days of his first hearing of that decision.”
 18. In order to succeed in this application, firstly, the applicant has to comply with the timeline set out in Rule 58(4) stated above. The application must be filed within thirty days of the impugned order. From the record it is clear that the application sought to be reinstated was dismissed on the November 9, 2022 and the applicant filed this application the same day. Therefore, Rule 58(4) of this [*Court's Rules, 2022*](#) was complied with.
 19. Secondly, the applicant must show that he was prevented by sufficient cause from appearing in court as stated in Rule 58
 - (3) above. The applicant's advocate argued that on the hearing date he logged into the virtual court through his phone at 9 am. That his phone failed him, and he reached out to the Court Registry staff who sent him a link to join in again at about 9.52 am. However, he did not hear the matter called out, and instead, the next thing he saw on his screen was that he had been released from the session.
 20. In rebuttal, the respondent was adamant that the applicant and his advocate were not in court on the day of the hearing. They contended that if they were indeed in court, they would



have heard their matter being called out as it was dismissed at 10:10 am. That at the very least, they would have spoken out, or raised their hand up to get the court's attention.

21. In *Ngugi v Thogo* (Civil Application 372 of 2018) [2021] KECA 88 (KLR) (22 October 2021) (Ruling) this Court laid down the guidelines that apply in Rule 58 (3) of the [Court of Appeal Rules 2022](#) as follows:

“It is however my view that the underlying principles would apply for an application also dismissed for non-attendance. I therefore find it prudent to distill and rephrase these as follows:

- i. It is more just if litigation is brought to an end after all parties have been heard on merit and substantive justice administered.
- ii. The very Rules of the court that provide for timelines for the performance of an act under the said Rules are the same Rules of the court that allow the court to exercise its discretion and extend time within which to comply in the event of any noncompliance with any of those Rules.
- iii. Article 159 of the [Constitution of Kenya, 2010](#) enjoins the court to administer substantive justice.
- iv. Sections 3A and 3B of the [Appellate Jurisdiction Act](#) through the overriding objective principle mandate the court to act justly and fairly.
- v. The overriding objective principle is not aimed at giving justice to one party at the expense of another but for ends of justice to be met to all the parties involved or stand to be affected by the matter.
- vi. In seeking the court's intervention upon default and or noncompliance with a procedural step in litigation before the court, demonstration of existence of a reasonable explanation for delay in the supporting documents is sufficient basis for the exercise of the court's discretion in favour of a deserving party.
- vii. Consideration of the nature of the substratum of the litigation is also of paramount consideration in an application for extension of time within which to comply with the Rules.
- viii. Article 50 coupled with Article 159 of the [Constitution](#) on the right to be heard and the need for a court of law to frown upon procedural technicalities in favour of substantive justice are meant to ensure substantive justice to all parties.
- ix. In an application for reinstatement of a court process, there is need to balance the requirement as to whether reasonable grounds have been proffered for reinstatement and the prejudice to be suffered by the opposite party if such an order for reinstatement were to issue bearing in mind at the same time that dismissal is a draconian order that drives parties away from the seat of justice and should therefore be employed sparingly.

22. We have applied the above threshold to the rival positions herein. The applicant exhibited a copy of a screen shot of the email sent by the Court Registry at 9:52 am on November 9, 2022. This is the email through which Mr Bossire deposed to have received another link from the Court Registry



after his phone failed him. This evidence being uncontroverted, we are satisfied that the applicant has demonstrated both a reasonable and plausible reason for non-attendance, when the application sought to be reinstated, came before this court for hearing, was called out and dismissed for non-attendance.

23. From the foregoing therefore, we find that the applicant has sufficiently demonstrated there is a basis for acceding to his prayer for reinstatement of his application. We also find that no prejudice will be suffered by the respondent if the applicant is granted the relief sought as none has been pointed out in the replying affidavit, or oral submissions by the respondents.
24. We therefore allow the application dated November 9, 2018. Costs shall abide the outcome of the main application.

DATED AND DELIVERED AT NAKURU THIS 10TH DAY OF FEBRUARY, 2023

F. SICHALE

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original

Signed

DEPUTY REGISTRAR

