



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, GATEMBU & M'INOTI, JJA)

CIVIL APPEAL (APPLICATION) NO. 16 OF 2016

BETWEEN

GABRIEL OWINO.....1ST APPLICANT

MORRIS OUMA OMONDI.....2ND APPLICANT

AND

ODONGO ONDWAKO KHADUDU.....1ST RESPONDENT

ODUORI ONDWAKO KHADUDU Alias NYAGWESO.....2ND RESPONDENT

OWINO ODWAKO.....3RD RESPONDENT

(Being an application for restoration of appeal herein which was dismissed

by the Court on 30th June 2020)

RULING OF THE COURT

1. In their application dated 27th July 2020, the applicants, Gabriel Owino and Morris Ouma Omondi seek an order for the restoration of their appeal herein which was dismissed by the Court on 30th June 2020 for non-appearance.

2. The proviso to Rule 102(1) of the Court of Appeal Rules provides that where an appeal has been dismissed for non-appearance, the appellant may apply to the Court for restoration of the appeal for hearing if he was prevented by sufficient cause from appearing when the appeal was called for hearing. Rule 102(3) of the Rules requires that such application should be made within 30 days of the decision dismissing the appeal.

3. In his affidavit in support of the application, the advocate for the appellant Charles Duke Nyamweya has explained in detail that the hearing of the appeal on 30th June 2020 was virtual; that he received the link for purposes of joining the virtual hearing the day before at 4.30 p.m. and that on the hearing date, he had difficulties linking to the court despite his calls for help to the court registry. In his words:

“I tried to access the court through the link provided, the video was properly running I could see the honorable judges, Hon. Lady Justice Okwengu, Hon. Justice Kiage and Hon. Warsame. The Hon. Lady Justice Okwengu was addressing but I could not hear her address. Justice Warsame also tried addressing but still I could not get anything. I tried this severally until the Court dismissed the session.”

4. There is also evidence that counsel for the applicants promptly wrote to the Court on the very day explaining his challenges and subsequently filed, within the prescribed period, the application now before us for the restoration of the appeal.

5. We have not seen any opposition to the application and have also noted that the respondents were themselves absent during the aborted hearing on 30th June 2020.

6. In our view, the applicants have shown sufficient cause why the appeal should be restored for hearing. In exercise of the Courts discretion, we allow the application, set aside the orders of the Court made on 30th June 2020 and restore the appeal for hearing. Given that it is an old appeal, we direct that the same be fixed for hearing on basis of priority.

Costs of the application shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR