



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU JA (IN CHAMBERS))

CIVIL APPLICATION NO. 270 OF 2018

BETWEEN

ATTORNEY GENERAL.....APPLICANT

AND

DAVID GITAU NJAU.....1ST RESPONDENT

SHABAN DOSHO MWADOSHO.....2ND RESPONDENT

JOHANA KIPTARUS KISORIO.....3RD RESPONDENT

HASSAN MOHAMMED HASSAN.....4TH RESPONDENT

DANIEL WILLIAM KOI.....5TH RESPONDENT

KHAMISI ALI MWAMGUTE.....6TH RESPONDENT

PETER MUTUNE MUNGAI.....7TH RESPONDENT

JACOB MWALIKO WANGAI.....8TH RESPONDENT

ALFRED KAHINDHI MWATHETHE.....9TH RESPONDENT

GRAHAM WAMBAA NJAU.....10TH RESPONDENT

(An application for reinstatement of application dated 19th September 2018

seeking extension of time to serve a notice of appeal out of time against the

Judgment of the High Court of Kenya (Isaac Lenaola, J)

delivered on 1st November 2013

in

Petition No. 340 of 2012)

RULING

1. On 24th July, 2019 a notice of motion dated 19th September, 2018, seeking leave to file a notice of appeal out of time in regard to a judgment which was delivered by **Lenaola, J** (as he then was) on 1st November 2013 came before me for hearing. I dismissed the notice of motion under **Rule 56(1)** of the Court of Appeal Rules as the applicant was not in Court.

2. The applicant has now filed a motion under **Rule 56(3)** of the Court of Appeal Rules and **Article 159 (2)(d)** of the Constitution of Kenya seeking to have the orders made on 24th July, 2019 set aside and the motion dated 19th September, 2018 reinstated. The application is anchored on the grounds that the applicant's failure to attend Court was not deliberate and that the applicant is desirous of pursuing the application which was dismissed.

3. In an affidavit sworn on 8th August, 2019, **Mr. Henry Mugiira** an advocate practicing as a special State Counsel has sworn that he received conflicting information concerning the hearing of the notice of motion as the matter was fixed for hearing on Wednesday 24th July 2018 and afterwards the hearing was on Wednesday 24th July 2019, and that on 24th July 2019, he was advised by a litigation clerk that the matter was listed for hearing on 25th July, 2019 hence his failure to attend Court. The applicant maintains that they have a good appeal with overwhelming chances of success and therefore urges that the application be allowed.

4. In a replying affidavit sworn on 10th January 2020, **David Gitau Njau** who is the 1st respondent, swears that the notice of motion was fixed for hearing on Wednesday 24th July, 2019 and that an amended notice of hearing dated 4th July, 2019 was duly served on their advocates on 10th July, 2019. The 1st respondent maintains that it would be unfair to allow the application as there is no appeal before the Court and the respondents stand to suffer great prejudice due to the continued delay in accessing the fruits of the judgment delivered in their favour more than six years ago.

5. Under **Rule 56(3)** of the Court of Appeal Rules, the Court has the discretion to restore an application that has been dismissed for non-attendance under **Rule 56(1)** of the Rules, if the applicant can

“show that he was prevented by any sufficient cause from appearing when the application was called out for hearing”.

However, Rule 56(4) requires such an application for reinstatement to be made within 30 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 30 days of his first hearing of that decision”.***

6. The applicant's advocate has explained that he was unable to attend Court because of confusion over the hearing dates. He explains that on the morning of 24th July, 2019, he was on his way to Court when he was advised by the chief litigation clerk that the matter was cause listed for the next day, i.e. 25th July, 2019. This explanation is not reasonable as it is evident that the parties were served with an amended notice of hearing showing that the matter was coming up for hearing on Wednesday 24th July, 2019. The motion dated 19th September, 2018 could not have been listed for 24th July 2018. Secondly, if the counsel was on his way on 24th July, 2019 when the chief litigation clerk informed him of 25th July, 2019, it is apparent that he must have been served with the hearing notice for 24th July, 2019. Moreover, he has not revealed the name of the chief litigation clerk, nor is there an affidavit from that clerk to reveal the source of his information that the matter was coming up on 25th July, 2019.

7. For these reasons, I am not persuaded that the applicant had a sufficient reason for failing to attend Court on 24th July, 2019. The application dated 8th August, 2019, filed on 13th August, 2019 is therefore dismissed.

Dated at delivered at Nairobi this 6th day of March, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR