IN THE COURT OF APPEAL

AT ELDORET

(CORAM:WAKI, HANNAH OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 2 OF 2017

WILSON CHEBOI YEGO.....APPLICANT/APPELLANT

AND

SAMUEL KIPSANG CHEBOI.....RESPONDENT/RESPONDENT

(Being an application to restore the appeal dismissed on 4th December, 2018 for non-attendance).

in

ELDORET HCCC. No. 44 of 2002 OS)

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RULING OF THE COURT

BACKGROUND

[**1**] This appeal was listed for hearing on 4th December, 2018. When called out, neither the applicant nor his counsel was in Court, though served with the hearing notice. Upon the application of counsel for the respondent, the appeal was dismissed under **Rule 102(1)** of the **Court of Appeal Rules** (**the Court Rules**) for non-attendance. On 6th December, 2018, the appellant filed a notice of motion under the same Rule seeking the following orders: -

> **"a) ……..**
>
> **b) That the order made on 4th December, 2018 dismissing the appeal for non-attendance be set aside.**
>
> **b) That the appeal be restored for hearing.**
>
> **c) That costs of the application be provided for."**

[2] The grounds upon which the applicant relies on in support of his application are that on 4th December, 2018, **Civil Appeal No. 2 of 2017** was dismissed by this honourable Court (**Githinji, Hannah Okwengu and J. Mohammed, JJ.A**); that the non-attendance was occasioned by an error and mistake on the part of the applicant's advocate; that the non-attendance was not deliberate but was caused by mis-diarization of the hearing date by counsel for the applicant; that the mistake of the advocate ought not to be visited upon the client; and that the application has been made without undue delay.

[**3**] In response to the application, the respondent swore and filed a replying affidavit on 5th February, 2019 averring that the application is an afterthought, a waste of judicial time and an abuse of the court process; that litigation should come to an end, which end need not be the outcome preferred by the applicant; that the applicant and his counsel deliberately failed to turn up in Court on 4th December, 2018; that the applicant failed to tender any explanation as to his non-appearance resulting in the dismissal of the appeal; that the orders sought in the instant application cannot be entertained as the hearing notice served upon the parties by the Court was very clear regarding the date and time the appeal was listed for hearing; that no reasonable explanation has been tendered to warrant the Court to interfere with the decision to dismiss the appeal; that the allegation of mis-diarization does not hold water; that both parties were given a chance to ventilate their respective positions in the appeal but the applicant elected not to argue his appeal; and that the applicant is not deserving of any orders of reinstatement as the application has not satisfied the requirements set out under Rule 102 (1) of the Court Rules.

Submissions by Counsel

[**4**] At the hearing of the application, learned counsel **Mr Mogambi** appeared for the applicant. He submitted that the explanation for non-attendance of the hearing of the appeal on the scheduled day, 4th December, 2018 was that he was served with two(2) hearing notices, one dated 4th December, 2018 in respect of Civil Appeal No 2 of 2017 and the other dated 5th December, 2018 in respect of Civil Appeal No 93 of 2018; that he inadvertently diarized both appeals for hearing on 5th December, 2018; that the mistake was inadvertent; that Civil Appeal No 2 of 2017 relates to a land matter and should therefore be restored to avail the parties an opportunity to canvass their appeal; that the application to restore the appeal was filed on 6th December, 2018, a day after the appeal was dismissed, and was therefore filed expeditiously; that the expeditious filing of the application is evidence that the applicant is keen to have the appeal heard; that an affidavit sworn by the applicant is attached to the instant application confirming that the mistake resulting in the applicant's non-attendance at the hearing of the appeal on 4th December, 2018 was that of counsel. Counsel attached a copy of his letter to the applicant informing him that the hearing date of the appeal was 5th December, 2018; and that this was proof that the mix-up in the hearing dates was not deliberate. He urged us to allow the application.

[**5**] **Ms Odwa**, learned counsel for the respondent, opposed the application. Counsel submitted that the appeal was dismissed on the basis of the applicant's non-attendance and failure to file written submissions. She further urged that the applicant's written submissions were filed out of time; that litigation must come to an end as the respondent has waited for seventeen (17) years to enjoy the fruits of his judgment. Counsel urged us to dismiss the application.

Determination.

[**6**] We have considered the application, the affidavits on record, list of authorities, submissions by counsel and the law. **Rule 102 (1**) of the Rules gives this Court discretion to reinstate an appeal that has been dismissed for non-appearance and stipulates as follows:

> ***"102 (1) If on any day fixed for the hearing of an appeal the appellant does not appear, the appeal may be dismissed and any cross-appeal may proceed, unless the Court sees fit to adjourn the hearing:***
>
> ***Provided that where an appeal has been so dismissed or any cross-appeal so heard has been allowed, the appellant may apply to the Court to restore the appeal for hearing or to re-hear the cross-appeal, if he can show that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing."***

Rule 102 (2) –

> ***"Rule 102 (3) An application for restoration under the proviso to sub-rule (1) or the proviso to sub-rule (2) shall be made within thirty days of the decision of the Court, or in the case of a party who should have been served with notice of the hearing but was not so served, within thirty days of his first hearing of that decision"***. (Emphasis supplied).

[**7**] Under **Rule 102**, an applicant must satisfy two (2) conditions before the Court can exercise its discretion in his/her favour; the application for reinstatement should be made within thirty (30) days of the dismissal and the applicant must show that he or she was prevented by sufficient cause from attending the hearing.

[**8**] In the instant case, the application was lodged on 6th December, 2018 which was within the thirty (30) days from the date of dismissal of the appeal and the applicant has therefore satisfied the first condition. The proviso to **Rule 102 (3)** is in mandatory terms.

[**9**] The second condition requires that 'sufficient cause' be shown by the applicant. But what is 'sufficient cause'?. It is a question of fact and the court has to exercise its discretion in the varied and special circumstances of each case. The same question was posed by this Court in the case of **Okiya Omtata Okoiti & another v Okiya Omtata Okoiti & 4 others [2016] eKLR** and was answered as follows:

"In **The Hon. Attorney General vs the Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of 2011 (ur)** Musinga, JA saw sufficient cause to be:

> ***"Sufficient cause" or "good cause" in law means:***
>
> ***"….the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused". See BLACK'S LAW***
>
> ***DICTIONARY, 9th Edition, page 251.***
>
> ***Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."***

The Court of Appeal in Tanzania had this to say on **"sufficient cause"** in **The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others Civil Appeal No. 147 of 2006** in discussing what constitutes *sufficient cause:*

> ***"It is difficult to attempt to define the meaning of the words* 'sufficient cause'. *It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona***

fides, is imputed to the appellant" (Emphasis added)"

And the Supreme Court of India on the same issue in the case of **Parimal v Veena [2011] 3 SCC 545** observed that:

> ***"sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or"remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously."***

[**10**] The applicant in his affidavit explained that he received two (2) hearing notices, one for hearing on 4th December, 2018 in respect of **Civil Appeal No 2 of 2017** which was dismissed and in respect of which this application has been filed; and another hearing notice for 5th December, 2018 in respect of **Civil Appeal No 93 of 2018 – Richard Nafwiki Makanda v Job Wekesa**. It was counsel's submission that he was under the mistaken impression that both appeals were scheduled for hearing on 5th December, 2018 and that he took immediate steps to rectify the mistake by filing the instant application. We have no reason to doubt the candid and forthright manner in which that explanation was given. Did it amount to an excusable mistake? We think it did. In the case of **Belinda Murai & Others vs Amos Wainaina, [1979] eKLR, *Madan, J.A.*,** (as he then was) stated:

> ***"A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule..."***

[**11**] In the present case it is clear that failure to attend court was a mistake of the applicant's counsel who swore an affidavit averring the circumstances surrounding his failure to attend court. Although counsel for the applicant has not annexed a copy of the Court's cause list proving that **Eldoret, Court of Appeal Civil Application No 93 of 2018** was listed for hearing on ***5th December, 2018***, it is notable that the instant application was lodged a day after the dismissal of the appeal. We are guided by the dicta in the case of **Philip Chemwolo & Another vs Augustine Kubende, [1986] eKLR where *Apaloo, J.A.*** (as he then was) stated:

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline".***

[**12**] Having considered the submissions by the applicant and the respondent, we find that in the circumstances of this application, sufficient reason has been given for the applicant's counsel's non-attendance on 4th December, 2018. The applicant has therefore complied with the requirements for the grant of an order reinstating his appeal. Further, the appeal relates to a land dispute and the applicant will therefore be granted an opportunity to ventilate his case in the appeal.

[**13**] In view of the foregoing, we find that this application has merit. The ruling and order dated ***4th December, 2018*** is set aside. In lieu thereof, we allow the applicant's notice of motion dated ***6th December, 2018*** with the consequence that the applicant's appeal, Civil Appeal No 2 of 2017 is hereby restored for hearing. Costs of the application are awarded to the respondent in any event.

It is so ordered.

Dated and delivered at Eldoret this 6th day of June, 2019.

P. N. WAKI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR