



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & MAKHANDIA, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 242 OF 2012

BETWEEN

**ARTHUR MATHITU NDERITU AND**

**JOSEPH WACHIRA NDERITU**

(Suing as Personal Representative of the Estate of

**STANLEY NDERITU NGARI (DECEASED).....APPLICANT**

**AND**

**THE SETTLEMENT FUNDS TRUSTEES.....1ST RESPONDENT**

**AYUB WANG'ONDU KIBII.....2ND RESPONDENT**

**DISTRICT REGISTRAR NYANDARUA.....3RD RESPONDENT**

*(An Application for setting aside in total the Ruling and Order of the Court of Appeal at Nairobi (Warsame, Kiage & Murgor, JJ.A) on 30th January, 2019 in Civil Appeal No. 242 of 2012 in an appeal against the entire decision of the High Court of Kenya at Nairobi (Mwera, J.) dated 22nd March, 2012*

*in*

*HCCC NO. 2822 OF 1998)*

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**RULING OF THE COURT**

1. Evidently, the Notice of Motion dated 17th June, 2019 is premised on the wrong rules of the Court of Appeal Rules. **Rule 71(4)** cited by the applicant relates to criminal appeals and not civil appeals such as the subject matter before us. From the content of the motion, there is no doubt that learned counsel ought to have cited **Rule 102(1)** of the Rules of Court. We shall advert to that issue later.
2. **Stanley Nderitu Ngari**, (since deceased but substituted by **Arthur Mathitu Nderitu** and **Joseph Wachira Nderitu** the applicants herein), filed **Civil Case No. 2822 of 1998** against the respondent herein before the High Court of Kenya at Nairobi vide a plaint dated 11th December, 1998. The suit was nonetheless dismissed through a judgment delivered on 22nd March, 2012 by Mwera J (as he then was).
3. **Civil Appeal No. 242 of 2012** was proffered against the said judgment before this Court. The appeal was fixed for hearing on several occasions but it did not take off mainly on grounds of nonservice on the part of the counsel either for the appellant or the respondent.
4. Eventually, the appeal was fixed for hearing on 30th January, 2019 but when it was called out for hearing, there was no attendance by either party. In a brief order of the Court, the Court pronounced itself as follows:-

***“It would seem that none of the parties to this appeal, though served with the hearing notice, were in Court this morning when the appeal was called out. As such, the appeal is dismissed with no order as to costs.”***

The appeal was consequently dismissed pursuant to **Rule 102(1)** of the Court of Appeal Rules.

5. The appellant has now moved the Court for restoration of the appeal. As stated earlier, learned counsel seems oblivious of the law that allows him to move this Court to restore an appeal that has been dismissed for non-attendance. It is not about “*recalling, reviewing, or even setting aside*” the order dismissing the appeal as stated in the application. The proviso to **Rule 102(1)** allows an appellant to apply to the Court to “restore” the appeal if he can show that he was prevented by any sufficient cause from appearing when the appeal was called for hearing.

6. There is a supporting affidavit purportedly signed by one Stanley Nderitu Ngari. As noted earlier the said Stanley Nderitu Ngare is deceased, and was substituted by the applicant herein. Learned counsel for the respondent has raised an issue with the said affidavit as the same is said to have been sworn by a deceased person. We agree and common sense dictates that a dead person cannot swear an affidavit. The applicant has deposed that he, by mistake, put the deceased’s name in the affidavit instead of his own name. He has sworn the supplementary affidavit (undated) but filed in Court on 4th September, 2019 explaining the problem and also adopting the contents of the earlier affidavit. We had occasion to see the applicant who is elderly and apparently illiterate. He was failed by his advocate who drew the said affidavit and had it commissioned without counterchecking who the deponent was. In view of the nature of the appeal, we hold the view that we should not visit counsel’s shortcomings on the applicant, and we therefore hold that the supplementary affidavit has cured the defect in question.

7. From the grounds on the face of the application and the contents of the said affidavits, the applicant avers that his advocates then on record for him never informed him of the hearing date and that is why he was personally not in Court when his appeal was dismissed. He could also not explain why his advocates then on record had not appeared in Court to prosecute the appeal on 30th January, 2019. He deposed that he only discovered that the appeal had been dismissed on 7th June, 2019 after he instructed the advocates currently on record. This application was then filed with dispatch on 17th June, 2019 and so there was no undue delay. He urged us to allow him get his day in court and not to condemn him unheard.

8. On his part, the 2nd respondent opposed the application vide the replying affidavit sworn on 13th September, 2019. He deposes that the appeal has been overtaken by events as the applicants have already been evicted from the suit premises. He disclosed that the appellants have been found in contempt of court and fined Ksh. 100,000.00 for moving back to the suit property after the said eviction. Being in contempt of court, they cannot have audience before this Court, posited learned counsel. The respondent urged us not to restore the appeal for hearing as non-attendance on the date in question has not been explained and no sufficient cause has therefore been shown as required under the relevant rules.

9. At the plenary hearing, the applicant was represented by learned counsel Mr. Kirimi. He reiterated that the applicants were unaware of the hearing date; and further that there was no evidence of service of the hearing notice on their former advocates. He entreated the Court to allow the applicants to have their day in Court saying they will endeavour to prosecute the appeal without further delay, and the respondents will not be prejudiced in any way if the appeal is restored.

10. On his part, Mr. Gitonga, learned counsel for the respondent urged for the dismissal of the application saying that the same was filed outside the 30 days allowed by the Rules of Court.

11. Mr. Menge, learned counsel for the 1st and 3rd respondents urged us to dismiss the application as the non-attendance had not been explained and that the application was an afterthought.

12. We have considered the application, the grounds on its body and the rival affidavits. We have also considered the oral submissions by counsel and the law. On the issue of form, we agree that the application was filed under the wrong rule but as we have stated earlier, the content leaves no doubt that it seeks the restoration of the appeal to allow for a merit hearing. The lack of form or citing the wrong rules in view of the subject matter of the appeal intended to be restored is curable under **Article 159(2)d of the Constitution** as read with **Sections 3A and 3B of the Appellate Jurisdiction Act**.

13. On the issue of the applicants being denied audience for being in contempt of court orders, we do not have before us sufficient material to deal with the contempt of court issue. That should not therefore be an issue before us, but the respondents will be at liberty to raise it before the Court hearing the appeal in the event the appeal is reinstated for hearing. Furthermore, this Court in **Rose Detho v-Ratilal Automobiles Limited & 6 others, C A. No. 304 of 2016** pronounced itself as follows;-

**“Thus, there is no absolute legal bar to hear a contemnor who has not purged the contempt ... and whether the court will hear the contemnor is a matter for the discretion of the court depending on the circumstances of each case.”**

The circumstances surrounding this case commend the exercise of our discretion in favour of the applicant.

14. The only issue for our determination is whether this application satisfies the requirements of the proviso to **Rule 102(1)** and **Rule 102(3)** of the Court of Appeal Rules. It is not denied that even the respondents and their counsel were not in Court on the date the appeal was supposed to be heard. No reasons have been given for their non-attendance. Could it be that the hearing notices for all the parties were not properly served?

We have gone through the record in a bid to confirm service of the hearing notices but are unable to find copies of the same in the record.

15. We appreciate that the bench that dismissed the appeal indicated that the parties were duly served with the hearing notices. We note however that there is no indication as to the mode of service, the date of service and exactly who in the said firm of advocates accepted service. In the absence of proper evidence of service, and given that the respondents were also not in Court on the material date, we are inclined to give the appellant the benefit of doubt. We are also alive to the fact that the dispute involves ownership of land which is

admittedly a very emotive issue which has been a source of friction and has even led to loss of lives in several cases.

16. On the question whether the application was filed out of time, the Rule allows the filing of the application within 30 days of the date the applicant discovered that the appeal had been dismissed. According to the applicants they only discovered the dismissal on 7th June, 2019 and filed the application 10 days later. There is no contestation of that fact by the respondents. The application was therefore filed within the time allowed by the rules of this Court.

17. Overall, we are persuaded that the appellants should not be dislodged from the seat of justice unheard. Let them have their day in Court so that they can prosecute their appeal for whatever it is worth. The Notice of Motion dated 17th June, 2019 is therefore allowed to the extent that **Civil Appeal No. 242 of 2012** is hereby restored. We direct that the same be set down for case management on priority basis. Costs of the application be in the appeal.

**Dated and delivered at Nairobi this 6th day of December, 2019.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**