



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 70 OF 2016

BETWEEN

MIRIAM CHEMAIN.....APPELLANT

AND

ESTATE OF PHILOMENA CHEPEITUI

Represented by JOSEPH MARIACH.....RESPONDENT

(An Application for reinstatement of Civil (Appeal) Application No. 70 of 2016 dismissed on 26th July, 2017

RULING OF THE COURT

[1] This is an application under various provisions of the Constitution, **Section 3 A** and **B** of the Appellate Jurisdiction Act and **Rules 1(2), 42, 43** and **44** of the Court of Appeal Rules for orders that:

“(i) the order given on 26th July, 2017 dismissing the applicant’s application dated 21st April, 2017 be set aside.

(ii) the suit be reinstated and heard on merit.

[2] Surprisingly **Rule 56(1)** and **56(3)** of the Court of Appeal Rules has not been cited. Rule 56(1) aforesaid gives the Court power to dismiss an application if the applicant does not attend on the day fixed for hearing. **Rule 56(3)** provides in part that where an application is dismissed, the party in whose absence the application was dismissed:-

“May apply to the Court to restore the application for hearing or to re-hearing if he can show that he was prevented by any sufficient cause from appearing when the application was called for hearing.”

Rule 56(4) provides that an application to restore a dismissed application for hearing or re-hearing should be made within 30 days of the decision of the Court.

[3] By an application dated 23rd December, 2016, the applicant sought orders, *inter alia*, that the judgment of this Court in **Kisumu Civil Appeal No. 70 of 2016** be recalled, reviewed or set aside. By a further application dated 21st April, 2017, the applicant sought leave of the Court to amend the application dated 23rd December, 2016.

The application for leave to amend was fixed for hearing on 26th July, 2017. The applicant’s counsel did not attend the hearing although served with a hearing notice. The respondent who was in attendance applied for the application to be dismissed for non attendance. The Court duly dismissed the application under **Rule 56(1)** of the Court of Appeal Rules.

[4] The present application was lodged at the Court’s Eldoret Registry on 24th August, 2017 and received at the Court’s Kisumu Registry on 29th August, 2017. The application is supported by the grounds on the body of the application which are supplemented by the supporting affidavit of **Prof. Tom Ojienda, SC.**

Counsel deposes, amongst other things, that he was aware that the application was slated for hearing on 26th July, 2017; that he was unavailable as he had travelled abroad on official duties; that the hearing date was mistakenly diarized for 27th July, 2017; that he cut short his trip and travelled back on 26th July, 2017 purposely to attend the hearing and that failure to attend on 26th July, 2017 was solely due to mistake on his part that should not be visited on the applicant. He annexed a copy of his Passport showing that he arrived in Kenya on 26th July, 2017.

[5] The application is opposed on the grounds contained in the replying affidavit of **Joseph Mariach**. He stated, *inter alia*, that the person who made an entry in the diary is not disclosed; that the copy of the diary is not annexed; that applicant's counsel has not disclosed how he came to know that the application was heard on 26th July, 2017, or shown that he attended court on 27th July, 2017 and that the delay in this matter is extremely prejudicial to the respondent as the applicant is still occupying the 29 acres awarded to the respondent.

[6] The present application was filed within the 30 days stipulated by **Rule 56(4)** of the Court of Appeal Rules. The issue is whether the applicant's counsel has shown that he was prevented by a sufficient cause from attending the hearing of the application.

The documents annexed to the application show that the applicant's counsel was abroad and returned to the country on 26th July, 2017 – the very day that the application was scheduled for hearing. The fact that the counsel was abroad is sufficient cause even without proof of mistake in the entry in his diary. It would not be reasonable to have expected him to travel to Eldoret and prosecute the application on the very day that he arrived in Nairobi from abroad.

The dispute involves a relatively big piece of land and it would be unjust in the circumstances to deny the applicant an opportunity to be heard on the application.

An award of costs would be adequate compensation to the respondent in this case.

[7] Accordingly, the application is allowed. The order dated 26th July, 2017 dismissing the application is set aside and the application dated 21st April, 2017 is restored for hearing on priority basis. The applicant shall pay to the respondent the costs of this application which shall be taxed and paid forthwith.

Dated and Delivered at Eldoret this 17th day of May, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR