



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MURGOR, J.A.)

CIVIL APPLICATION NO. 62 OF 2016

BETWEEN

**SAMUEL MAINA KABIRU**

**(suing as the legal administrator of the estate**

**of AMOS KABIRU KIMEMIA.....APPLICANT**

AND

**1. PATRICK MUTURA KAMAU.....1<sup>ST</sup> RESPONDENT**

**2. JOSEPH NDUNG'U.....2<sup>ND</sup> RESPONDENT**

**3. JAMES NJOROGE.....3<sup>RD</sup> RESPONDENT**

*(Application for reinstatement of a Notice of Motion dated 8<sup>th</sup> August 2016 for extension of time to serve a Notice of Appeal from the Judgment of the High Court at Kitale, Githinji, J. dated 24<sup>th</sup> March, 2016*

*in*

***Kitale HCCC No. 2 of 1998)***

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**RULING**

The applicant, **Samuel Maina Kabiru (suing as the legal administrator of the estate of Amos Kabiru Kimemia)** has applied to reinstate the Notice of Motion dated 8<sup>th</sup> August 2016 in which he applied for extension of time to file a Notice of Appeal out of time.

By way of a Notice of Motion dated 1<sup>st</sup> December 2016, brought under **rule 56 (3) and (4)** of the **Court of Appeal Rules 2010**, and supported by an affidavit of **Kihiga Watindi (the applicant's counsel)**, sworn on the same date, the applicant has sought to reinstate the application for extension of time dated 8<sup>th</sup> August 2016, that was dismissed by this Court for non attendance of the applicant on 22<sup>nd</sup> November 2016.

The grounds are that the application was coming up for hearing on 22<sup>nd</sup> November 2016 seeking to extend time to file a Notice of Appeal out of time; that the applicant's counsel who had conduct of the application was also scheduled to appear for a taxation in HCCC No. 2 of 1998 at Kitale; that owing to information counsel received that the Court would hear the application as from noon, counsel proceeded to Kitale to attend to the taxation; that when, counsel subsequently learnt that the Court had commenced its sitting before the scheduled time, he requested one Amos K. Songok, Advocate to hold his brief.

When Mr. Songok, Advocate appeared before this Court, he sought to have the application placed aside to allow the applicant's counsel to attend the hearing, this Court declined to place the application aside and proceeded to dismiss it for non-attendance; that the failure to attend court was inadvertent, and could be attributed to a miscommunication in the time scheduled for the Court to sit; and, that the mistake of the counsel should not be revisited on the applicant, as he will be denied an opportunity to prosecute his intended appeal.

In a replying affidavit sworn on 9<sup>th</sup> February 2017, by **Peter Kiarie Ndarwa**, it was deponed that they had not been served with the application dated 1<sup>st</sup> December 2016, but upon being served with the hearing notice, he had attended the registry to obtain copies of the application; that, neither the application for extension of time of 8<sup>th</sup> August 2016, nor the letter requesting for proceedings was served on them and there was no valid notice of appeal on record.

It was further deponed that no sufficient cause had been shown why the counsel failed to attend court on 22<sup>nd</sup> November 2016; that the annexed certified copy of the proceedings in Kitale of 22<sup>nd</sup> November 2016, showed that the applicant's counsel did not attend court, and furthermore, the certified order of this Court of 22<sup>nd</sup> November 2016, showed that contrary to the applicant's counsel's averments, the Court was sitting at 12 noon as scheduled. It was averred that, the suit over the disputed parcel of land had gone on for 19 years, and despite the trial court having ordered the applicant to vacate the land, he has refused to do so, to the detriment and extreme prejudice of the respondents.

Learned counsel **Mr. D. Gatonye**, holding brief for Kihiga Watindi for the applicant, largely reiterated the averments in the applicant's supporting affidavit, and added that the application was filed within the stipulated 30 days, and was merited. Counsel submitted that the annexed notice of taxation dated 13<sup>th</sup> October 2016 showed that counsel was to appear in the Kitale High Court for the Taxation of a Bill of Costs for HCCC No. 2 of 1998 on 22<sup>nd</sup> November 2016, which prevented him from appearing in this Court on the material day. This was confirmed by counsel for the 1<sup>st</sup> respondent with whom they were to appear in the same taxation.

Counsel posited that, by dismissing the application for extension, the applicant had been denied the right to prosecute his appeal. The dismissal was on account of a technicality, and not on the merits of the appeal. Furthermore, **section 3A and B** of the **Appellate Jurisdictions Act** enjoins this Court to take into account the fair, just, speedy and proportionate exercise of justice. That it would be unfair to dismiss the application due to a mistake on the part of counsel; that this Court should apply proportionate and substantive justice for both the applicant and the respondent; and that no prejudice would be occasioned by the respondents. Counsel cited **Mary Muthoni Njeru vs Duncan Mugo Ndata [2013] eKLR** and **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 6 others [2013] eKLR** in support of the proposition that this Court is required to pay allegiance to the overriding objectives irrespective of the rules of this Court.

**Mr. Ndamwa** learned counsel for the respondents opposed the application, and relied on the replying affidavit. Counsel begun by submitting that the application was made in bad faith as it comprised of material non-disclosures. Counsel's main contention was that, contrary to the applicant counsel's assertions, Mr. Kahiga did not attend court in Kitale on 22<sup>nd</sup> November 2016. Further, counsel stated that there was no miscommunication of the time when the Court was to sit, as the applicant's counsel was aware that this Court would sit at 12 noon, and indeed it commenced sitting as scheduled.

The jurisdiction of this Court to restore the application for extension of time to file an appeal is specified

under **rule 56 (3)** of this Court's Rules which provides;

***Where an application has been dismissed under sub-rule (1), or allowed under sub-rule (2), the party in whose absence the application was determined may apply to the Court to restore the application for hearing or to re-hear it, as the case may be, if he can show that he was prevented by any sufficient cause from appearing when the application was called for hearing.***

The question that I must address is whether the applicant has complied with the requirements of **rule 56 (3)** by showing that he was prevented by sufficient cause from appearing in Court when the application was called for hearing.

The averments and submissions of counsel for the applicant show that the applicant's counsel received information that "...the Honourable Court would be sitting as from noon...". Based on this information the applicant's counsel proceeded to the High Court at Kitale to conduct a taxation in HCCC No. 2 of 1998.

In opposition to this, the respondent's replying affidavit and submissions present a different scenario. According to the respondents, this Court was to hear the application for extension at noon as scheduled, and accordingly, the Order of 22<sup>nd</sup> November 2016, Gatembu, JA stated thus;

***"It is now 12.17 p.m. This matter has been called out for hearing but there is no appearance for the applicant or for the respondents."***

The incongruence in the applicant's counsel's application is further compounded by the fact that no mention was made in the learned judge's order, of the appearance of one, Amos K. Songok, Advocate who is alleged to have pleaded for the application to be placed aside to enable the applicant's counsel attend Court.

In addition, it was recorded in the proceedings in Kitale HCCC No. 2 of 1998 that were before Hon. D. Wangeci, Deputy Registrar, that the "...parties are absent, file referred back to the registry."

When the events as they are recorded to have occurred on the material date, are analysed in conjunction with the applicant's counsel's explanations, it becomes apparent that he has not been entirely truthful. I say this because, the applicant's counsel was aware that the hearing of the application was to take place at noon. Yet, when the Court sat at noon, there was no appearance by either the applicant's counsel, or by one Amos K. Songok, Advocate, as alleged.

Furthermore, though it was explained that he was in court in Kitale, the Kitale court proceedings show that he never appeared in that court.

In ***John Koyi Wakule vs Moses Masika Wetangula & 2 Others [2010] eKLR*** this Court considered the effect of untruthful explanations included in such affidavits and stated thus,

***"The issue of untruthful affidavit had been raised before the single judge but it appears that he never considered that point. We do not think the learned judge would have granted the application if he had considered the fact that the affidavit in support of the application which was intended to explain the delay was untruthful. An application seeking exercise of the court's discretion must be supported by an honest explanation. It is a serious matter to mislead the court by untruthful affidavits."***

***In Mzamil v. Ansari (supra) this Court said:-***

***"In view of the inconsistencies and contradictions in Asige's affidavit bristles, we do not think the application for extension of time can succeed. Sufficient reason cannot be established on the basis of an obviously incorrect affidavit."***

***“The application for extension was supported by what was obviously incorrect and untruthful affidavit. Whether we call it an error of principle or a misapprehension of a point of law or a plainly wrong approach, we agree with Mr. Shah that we ought to interfere with the exercise of the discretion of the learned single judge.”***

The applicant counsel’s explanations for his non-attendance are mistruths, and are not supported by the facts. I am unable to rely upon them as the reasons for his inability to attend this Court. The material before me shows that applicant’s counsel did not attend the taxation in the High Court at Kitale, and therefore, this was not what prevented him from attending the hearing in this Court. Without material to sufficiently demonstrate what prevented the applicant’s counsel from attending this Court, upon which I can rely, I find that the applicant has not shown sufficient cause for his absence, with the result that the prerequisite for restoring the application as set out in **rule 56 (3)** of this Court’s rules has not been fulfilled.

This leads me into the next issue of whether **section 3A** and **B** of the **Appellate Jurisdictions Act** and **Article 159** of the Constitution provide a sufficient basis upon which to disregard the requirements of **rule 56 (3)**? The applicant asserts that the Court is enjoined by **section 3A** and **B**, under the “**O<sub>2</sub> principle**” to take into account the fair, just, speedy and proportionate exercise of justice.

In the case of ***Hunter Trading Company Ltd vs. Elf Oil Kenya Limited***, **Civil Application No. NAI. 6 of 2010**, this Court also considered the applicability of the two sections in relation to the Court’s rules when it stated;

***“It seems to us that in the exercise of our powers under the “O<sub>2</sub> principle” what we need to guard against is any arbitrariness and uncertainty. For that reason, we must insist on full compliance with past rules and precedents which are “O<sub>2</sub>” compliant so as to maintain consistency and certainty. We think that the exercise of the power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of the power. If improperly invoked, the “O<sub>2</sub> principle” could easily become an unruly horse.”***

It will be appreciated that the, O<sub>2</sub> principles were never intended to operate in a vacuum, but were to be applied in tandem with existing rules of procedure. Therefore, for the O<sub>2</sub> principles to be invoked, in this case, compliance with the laid down preconditions of **rule 56 (3)** would also need to be demonstrated. Under this rule the applicant was required to proffer sufficient cause for non-attendance, and has been unable to do. Simply put, the explanation for absence turned out to be a falsehood, and therefore, no viable reason or material was placed before me to explain what prevented the applicant’s counsel from attending Court.

Without the fulfillment of the criteria set out in **rule 56 (3)**, application of the O<sub>2</sub> principles would be unjustifiable, as, the substratum to support its application would not be in existence. In this case, since no sufficient cause, has been advanced by the applicant, as stipulated by **rule 56 (3)**, no judicial basis was established to which the O<sub>2</sub> principles could be applied to reinstate the application.

That said, I decline to exercise my discretion to allow the application, and hereby order that the Notice of Motion dated 1<sup>st</sup> December 2016 be and is hereby dismissed with costs.

***It is so ordered.***

***Dated and Delivered at Eldoret this 24<sup>th</sup> day of March, 2017.***

**A.K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**