IN THE COURT OF APPEAL

AT NAKURU

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

CIVIL APPEAL (APPLICATION) NO. 320 OF 2010

BETWEEN

CHEGE MURAYA.....APPELLANT/APPLICANT

AND

REHEMA NOOR.....1ST RESPONDENT

ABDI MOHAMMED NOOR.....2ND RESPONDENT

(Being an application for reinstatement of the Appeal dismissed

on 11th April, 2016 for non appearance of the Appellant)

in

Civil Appeal No 320 OF 2010)

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RULING OF THE COURT

Background

1) This is an application by way of Notice of Motion dated 27th May, 2016 brought pursuant to Rules 102, 1(2) and 42 of the Court of Appeal Rules (the Rules) and Sections 3A & 3B of the Appellate Jurisdictions Act, Chapter 9 of Laws of Kenya and Article 159 of the Constitution of Kenya, 2010. The applicant seeks the following orders:-

> ***'' 1. ….....***
>
> *2.* ***That this Honourable Court be pleased to set-aside and or vacate the orders it issued on 11th April, 2016, dismissing this appeal for non-appearance by the Appellant.***
>
> *3.* ***That this Honourable Court be pleased to restore this appeal for hearing on such terms and conditions as it may deem fit, just and equitable.***
>
> *4.* ***That the costs of this application be provided for".***

2) The grounds upon which the applicant relies in support of his application include that on 11th April, 2016, Civil Appeal No. 320 of 2010, was dismissed by this honourable Court *(P. N. Waki, R.N. Nambuye & P. O. Kiage, JJ.A.)*; that the hearing notice was sent to the applicant's previous advocates, M/s Mirugi Kariuki & Co Advocates on 23rd March, 2016 but the said advocates did not attend court nor inform the appellant of the hearing date; that the failure to attend court on 11th April, 2016, was wholly inadvertent and excusable as the applicant was not duly informed and/or notified by his previous advocates; that the error and or oversight of the applicant's previous advocates should not be visited upon the applicant; that the applicant's motion is brought in good faith as he is desirous of prosecuting his appeal; that the appeal raises substantial issues for determination; and that it is in the interest of justice that the appeal is heard and determined on merit.

3) In response to the application, the respondents filed a replying affidavit sworn by the 1st respondent on 21st July, 2016. The 1st respondent on her own behalf and duly authorized by the 2nd respondent averred that the application is misconceived, frivolous, oppressive, lacks merits and a serious abuse of the court process and should be dismissed with costs; that the applicant did not instruct his previous advocates in good time; that whereas the respondents stand to be prejudiced by the reinstatement of the Appeal, the applicant will not be so prejudiced; that the application has been preferred after inordinate delay without any reason or justification and does not meet the threshold for grant of such orders and ought, therefore, to be dismissed.

4) The background of this application is that the applicant's appeal, Civil Appeal No. 320 of 2010 (the Appeal), came up for hearing on 11th April, 2016, and was dismissed for non-attendance under Rule 102 (1) of the Rules. The record indicates that when the appeal was called out, counsel for the respondents was present and ready to proceed with the hearing, but there was no appearance for or by the applicant. The Court was satisfied that the advocate then on record for the applicant M/s Mirugi Kariuki & Company were served with the hearing notice on 23rd March, 2016, but despite the service, they were not before the Court.

Submissions

5) At the hearing of the application, learned counsel Mr. Waiganjo Mwangi, appeared for the applicant. He submitted that the applicant alluded that he was not aware of the hearing date; that his previous counsel did not inform him that the appeal had been listed for hearing and did not also attend court; that the applicant is elderly and sick and evidence has been adduced of the applicant's ill health at the time of the appeal; that the applicant is not to blame for the non-attendance in court resulting in dismissal of the appeal. Counsel urged us to allow the application.

6) Learned counsel, Mr. Orege, appeared for the respondents and opposed the application. Counsel submitted that there is no evidence that the applicant followed up the matter with his previous advocates or that he was hospitalized; that the applicant has not been candid and has not produced evidence to enable the Court to exercise its discretion in his favour.

Determination

7) We have considered the application, the affidavit on record, list of authorities and submissions by counsel and the law. *Rule 102 (1)* of the Rules which gives this Court discretion to reinstate an appeal that has been dismissed for want of appearance states 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 see into 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 <u>within thirty days of the decision of the Court</u>, 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 added)

8) The rationale behind the Rule is that for reasons beyond the control of the parties or their counsel, a party may fail to attend court on the appointed day. Under the Rule, an applicant must satisfy two conditions before the Court can exercise its discretion in his/her favour; the application for reinstatement should be made within 30 days of the dismissal and the applicant must show that he was prevented by sufficient cause from attending the hearing.

9) In the instant case, the application was lodged on 27th May, 2016, which was outside the prescribed 30 days from the date of dismissal of the appeal and the applicant has, therefore, not satisfied the first condition. The proviso to Rule 102 (3) is in mandatory terms and the timelines set therein are peremptory.

10) As regards the second condition, though we need not consider it, given our finding on the first, sufficient cause means that the circumstances give reasonable explanation for the applicant's non-appearance in Court. The applicant in his affidavit explained that he was incapacitated by ill health and adduced supporting documentary evidence in support of his claim.

11) The question then is whether failure to attend court on 11th April, 2016, constituted an excusable mistake, or an error by a counsel's mistake for failing to attend court for hearing.

In the case of ***<u>Belinda Murai & Others vs Amos Wainaina</u>, [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..."

12) In ***<u>CMC Holdings Ltd vs James Mumo Nzioki</u> (2004) KLR 173*** this Court stated as follows regarding mistakes in the context of applications to set aside ex parte orders:

"[T]he discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error".

13) In the case of ***<u>Philip Chemwolo & Another vs Augustine Kubende</u>, [1986] eKLR 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".

14) In the present case, the applicant has explained the reason for non-attendance to be entirely the mistake of his previous lawyers who failed to inform him that his appeal had been listed for hearing and also failed to attend court. The applicant has not, however, furnished this Court with an affidavit from his previous counsel on record confirming that the mistake was entirely his. We note that the applicant has appointed another counsel to represent him.

15) ***Musinga, J.A.***, in ***The Hon. Attorney General-vs-The Law Society of Kenya & Another Civil Appeal (Application) No. 133 of 2011***, considered the meaning of sufficient cause as follows:

> ***"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".***

We think, with respect, that the applicant did not show sufficient cause and the application would accordingly fail on the merits as well.

16) On the whole, this application is devoid of merit and is dismissed with costs to the respondents.

Dated and delivered at Nakuru this 27th day of April, 2017.

H. M. OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR