



IN THE COURT OF APPEAL

AT NAKURU

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

CIVIL APPEAL (APPLICATION) NO. 39 OF 2011

BETWEEN

ELIUD MUYA KARIUKI1ST APPELLANT/APPLICANT

AVTAR SINGH CHAUHAN2ND APPELLANT/APPLICANT

GURCHARAN SINGH KAUR3RD APPELLANT/APPLICANT

AND

WILSON KABIRU NGANGA1ST RESPONDENT

KINYANJUI RUHIU2ND RESPONDENT

MARY WANJIRU NJENGA3RD RESPONDENT

KUBAI CHEGE4TH RESPONDENT

MARGARET WANJIRU MAINA5TH RESPONDENT

WARIGI GATHURI6TH RESPONDENT

PAUL MANGANGA MUTERO7TH RESPONDENT

(An application for reinstatement of the appeal from the judgment of the Court of Appeal at Nakuru (Waki, Nambuye & Kiage, JJ.A.) delivered on 12th April, 2016

in

CIVIL APPEAL NO. 39 OF 2011)

RULING OF THE COURT

Introduction

1. By a Notice of Motion dated 26th April, 2016, the applicants are seeking orders to reinstate their appeal that was dismissed for non-attendance on 12th April, 2016. The application is brought under **Rules 102, 1 (2) and 42 of the Court of appeal Rules, 2010, Sections 3A and 3B of the Appellate Jurisdiction Act and Article 159 of the Constitution of Kenya, 2010**. A period of 14 days elapsed between delivery of the ruling dismissing the appeal for non-attendance and the filing of the current application. The applicants further pray that the interim orders that existed immediately before dismissal of the appeal on 12th April, 2016 be reinstated.

2. The issue in this application is whether the applicant has given a satisfactory explanation for non-attendance on 12th April, 2014. The affidavit in support of the motion is sworn by the former counsel for the applicants Mr. Samuel Kinyanjui. Counsel averred in his affidavit of 26th April, 2016, that the reason for non attendance was that he received the hearing notice dated 23rd March, 2016 on 19th April, 2016 upon his routine collection of mail from his Post Office box; that he was not aware that the matter was coming up for hearing on 12th April, 2016 and it was only on 19th April, 2016 when he received the hearing notice that he learnt that the hearing of the appeal had come up on 12th April, 2016 and that the inadvertence and/or error relating to service of the notice for hearing and subsequent non-attendance of the Appellant's advocates should not be visited on the applicants.

3. The respondents through the 6th respondent filed a replying affidavit sworn on 13th June, 2016 and averred that it was the duty of the applicants to appear in court and argue their appeal; that the application is supported by a stranger or an advocate who is no longer on record and the same should be struck out; that there is no evidence that the advocate received the hearing notice on 19th April 2016 as alleged; that the applicants' counsel deliberately refused to attend court with knowledge that the appeal was coming up for hearing on 12th April 2016; that the error on the part of the applicants' advocates is a matter between the applicants and their former advocates; that the applicants have not been keen on prosecuting the appeal and the order of dismissal should remain in force. On the issue of the interim orders the 6th respondent deposed that the same were consent orders and they can, therefore, only be reinstated by consent.

Submissions by counsel

4. When the matter came up for hearing, learned counsel Mr. Naeku appeared for the applicants while learned counsel Mr. Waiganjo appeared for the respondents.

5. Mr. Naeku submitted that when the matter was called out in court both counsel were not in court and that there was no evidence that the respondents were present; that the erstwhile advocates for the appellants were served by registered post whereas counsel for the respondents was personally served; that the main ground for opposing the application is that it was the duty of the appellant to attend court. Counsel submitted that no specific evidence was adduced by the respondents to prove that appellants have caused delay in finalization of this appeal; that the appellants should not be penalized for an error attributable to previous counsel. Counsel urged us to reinstate the appeal to be heard and determined on merits.

6. Mr. Waiganjo relied on the Replying Affidavit sworn by the 6th Respondent. He submitted that the applicants' former advocates were guilty of misleading the court and this should weigh against the attempt to reinstate the appeal; that the court dismissed the appeal on account of non-attendance by the applicants and the applicants have not adduced any evidence by way of an affidavit to support their application.

Determination

7. We have considered the application and the Supporting Affidavit, the Replying Affidavit the respective submissions by learned counsel, authorities and the law.

8. **Rule 102** of the **Court Rules** provides for reinstatement of an appeal which has been dismissed for non-

attendance 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 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".

The Rule gives two conditions that must be fulfilled for one to succeed with such an application. First the application must be made within 30 days and secondly the applicant must show that he was prevented from appearing by a sufficient cause.

9. The application to restore the appeal was made within 14 days of the Ruling and the first condition has therefore been satisfied. Regarding the second condition, the applicants stated that the failure to appear in court when the matter came up for hearing was due to the fact that their advocates received the hearing notice on 19th April, 2016 by which date the appeal had already been dismissed on 12th April, 2016. They argue that the mistake or oversight if that it was, of their former advocate should not be visited upon them.

10. The respondents on their part argue that there is no evidence that the former advocates received the hearing notice on 19th April, 2016 as alleged. They further argue that the error admitted by the applicant's former advocates is a matter between the applicants and their former advocates and should not adversely impact on the respondents.

In ***CMC HOLDINGS LTD V JAMES MUMO NZIOKI, (2004) KLR 173*** this Court stated as follows regarding mistakes in an application 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."

11. In ***PHILIP CHEMWOLO & ANOTHER V AUGUSTINE KUBENDE, [1986] eKLR, Apaloo, J.A.*** (as he then was) stated as follows regarding blunders:

"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 heard on 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 parties and not the purpose of imposing discipline."

12. ***Article 159 of the Constitution*** requires courts to administer justice without undue regard to procedural technicalities whilst ***Section 3A and 3B of the Appellate Jurisdiction Act*** demands the just, expeditious, proportionate and affordable resolution of appeals.

13. Considering that there was no delay in bringing this application and being satisfied with the explanation for the applicants' or their counsel's non attendance as deposed to in the supporting affidavit, we allow the notice of motion dated 26th April, 2016, and hereby restore Civil Appeal No. 39 of 2011 to be heard on merit. The interim orders that existed immediately before the dismissal of the suit are also reinstated. The registry is hereby directed to list the appeal for hearing on priority basis. Costs of this application shall be borne by the applicant in any event.

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

H. M. OKWENGU

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