**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: NAMBUYE, KIAGE & MOHAMMED, JJA)**

**CIVIL APPEAL NO. 13 OF 2012**

**BETWEEN**

**JOHN MUGAMBI & 21 OTHERS.....APPELLANTS**

**AND**

**KENYA NATIONAL ASSURANCE COMPANY (2001) LIMITED...….RESPONDENT**

*(An Appeal from the ruling of the High Court of Kenya at Nyeri ( Sergon J.) dated 17th October, 2011)* **IN H.C.C.C. No. 21 OF 2008)**

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**RULING OF THE COURT**

By a Notice of Motion said to be brought *"**under Section 3A of the Appellate Jurisdiction Act, Rule 42, 45 (sic) of the Court of Appeal Rules and the inherent power of the Court of Appeal"***, the appellants pray that the orders of this Court made on 17th March 2014, (which dismissed the appellants appeal for non-attendance at the hearing), be set aside and the appeal be reinstated.

The grounds upon which the application is premised are set out on the face of the motion thus;

> **"1. That a hearing notice for the appeal herein was served on the firm of King'oo-Wanjau and Company Advocates but the clerk who received it inadvertently did not indicate the hearing date in the office dairy and place the said notice in the office file.**

2. **That the firm of King'oo-Wanjau and Company advocates did not deliberately fail to attend court for hearing of the Appeal herein.**

3. **That the firm of King'oo-Wanjau and Company is extremely apologetic for the embarrassment and inconvenience caused to this court by their absence in court to prosecute the Appeal.**

4. **That it is never too late to do justice.**

5. **That the applicants stand to suffer substantial loss unless this application is granted.**

6. **That it is in the interest of justice that this application be granted."**

The application's evidentiary basis is the affidavit of **Alice Mwikali King'oo-Wanjau,** advocate sworn on 20th May 2015. In it, **Mrs Wanjau** states that she first became aware of the dismissal of the appeal when, on 20th March 2015 she received a copy of the draft order for her approval. She first thought the dismissal occurred in 2015 but saw no hearing date for such date. She called one of her client, (she does not say whom) ***"to find out if they were aware of the said development and they too were in the dark".*** She asked the said unnamed client to peruse the court file in Nyeri Court of Appeal but the said unnamed client "***did not succeed"***. She speaks of having attended court on 24th February 2015, for hearing of Civil Application No. 249 of 2011 and ***"could not see why a hearing notice for this appeal for 17th March 2015 had not been served".*** She then swears at paragraph 5 that ***"time flew very fast "and*** **before [she] knew it**" **Mr. Mahinda** came to her chambers seeking approval of the order and that is when during discussions she discovered the appeal had been set down for hearing on 17th March 2014, not 2015. It was then she sent a clerk to this Court's Registry the next day (again not disclosed) who confirmed that a hearing notice had been served on her firm. She expresses surprise that their copy of the hearing notice was not in the file and the clerk (again, unnamed) who received it inadvertently failed to endorse it in the diary. The diary page is not however exhibited. The deponent then expresses extreme apologies for embarrassment and inconvenience but asks us to grant the application as the applicants are otherwise likely to suffer substantial loss. The nature of the loss is undisclosed.

The respondents opposed the application by way of a replying affidavit sworn on 4th December 2015 by its Principal Legal Officer and Company Secretary, **Tabitha Mwaniki.** She stated that no satisfactory reason had been given for the applicants' and their advocates' failure to attend court on 17th March 2014 and expressed surprise that they had made no provision for bringing up the file in preparation for hearing of the appeal. At any rate, she swore, it was evident that the applicants were not taking their appeal or this Court seriously, made no better by their inexcusable and culpable delay in bringing this reinstatement application a year and two months after the dismissal. She expressed the belief that the failure to attend court was intentional and calculated to delay pursuit of the appeal. She asserted that from the record, the appeal itself was devoid of substance.

Further, the applicants having regularly been evicted from the suit premises in execution of the decree of the High Court, the reinstatement of the appeal sought would be a purely academic exercise.

At the hearing of the application, learned counsel **Mr. Bizimaria** appeared for the applicants and essentially repeated the grounds and assertions in the replying affidavit. He beseeched us to grant this application.

For the respondent, learned counsel **Mr. Mahinda** questioned why the applicants did not file an affidavit by the clerk who allegedly failed to diarize the date and attach the relevant page of the diary. He submitted that the application before us is an afterthought, brought after two months after discovery of the dismissal for non-attendance. Moreover, he submitted, a reinstatement application can only be brought within 30 days of the dismissal of the appeal.

He urged us to dismiss the application with costs.

We have considered the record before us, perused the application and the affidavits for and against it, as well as reflected on counsel's rival submissions. It seems to us plain that this application must fail on the single basis that it is hopelessly out of time. **Rule 102(1)** of the **Court of Appeal Rules, 2010** deals with appearances at the hearing of appeals and the procedure of non-appearance. The rule permits the Court to dismiss an appeal if on the day fixed for the hearing the appellant does not appear.

Aware of the injustice and difficulty that could easily befall an appellant who due to mistake, inadvertence, accident or a myriad other causes and reasons in the nature of humanity fails to attend, the Rule provides a limited window time - and cause - wise, for restoration of an appeal so dismissed. The proviso to the sub-rule provides thus;

***"Provided that where an appeal has been so dismissed… the appellant may apply to the Court to***

***restore the appeal for hearing… if he can show that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing".***

The restoration of dismissed appeals is an exceptional relief, for cause, granted to an appellant who would otherwise have no recourse under the general tenet that there has to be an end to litigation. For precisely that reason, such appellant must move the court with expedition. He must move with speed and within a specified time set out in **Sub-rule 3;**

***"An application for restoration under the proviso to sub-rule(1) … shall be made within thirty days of the decision of the Court, or on 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."***

(Our emphasis)

That proviso is in mandatory terms and the time it sets out is peremptory. In the case before us, the applicant's advocates were served with a hearing notice. They therefore had only up to 17th April 2014 to file an application for restoration. They did not do so until 22nd May 2015 which was more than thirteen months out of time. That renders the application before us incompetent.

Even had the applicants been in the position of an appellant who was not served with a notice of hearing (but they were), that they made this application more than two months after learning of the dismissal of the appeal would also have rendered the application incompetent. That delay moreover provides further evidence that the applicants and their legal advisers approached the appeal and the aftermath of its dismissal in a casual, cavalier and leisurely manner. There was no serious attempt to place before the Court any material upon which the Court would have been minded to grant a restoration on the merits. There is displayed before us a lack of candour and a general apathy that seems to assume that the restoration of appeals is the done thing. It is not. It must be merited. On that consideration as well, the application would have failed.

The upshot is that this application is devoid of substance and is dismissed with costs to the respondents.

***DATED and DELIVERED at NYERI this 3rd day of March, 2016.***

**R. N. NAMBUYE**

**……..…….**

**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***