



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, OKWENGU & KANTAI,**

**JJ.A.) CIVIL APPLICATION NO. NAI 15 OF 2015**

**BETWEEN**

**OKIYA OMTATA OKOITI .....1<sup>ST</sup> APPLICANT**

**WYCLIFE GISEBE AKINA ..... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL .....1<sup>ST</sup> RESPONDENT**

**KENYA RAILWAYS CORPORATION ..... 2<sup>ND</sup> RESPONDENT**

**THE PUBLIC PROCUREMENT**

**OVERSIGHT AUTHORITY .....3<sup>RD</sup> RESPONDENT**

**CHINA ROAD AND BRIDGE CORPORATION ..... 4<sup>TH</sup> RESPONDENT**

**LAW SOCIETY OF KENYA ..... 5<sup>TH</sup> RESPONDENT**

*(An application for stay of the reinstatement of an application for stay of the ongoing construction of the standard gauge railway from Mombasa to Nairobi, pending the lodging, hearing and determination of an intended appeal from the judgment, directions, orders and decree of the High Court of Kenya at Nairobi (Lenaola, J.) delivered on 21<sup>st</sup> November, 2014*

in

**Petition No. 28 of 2014)**

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**RULING OF THE COURT**

The applicants **Okiyo Omtata Okoiti** and **Wyclife Gisebe Akina** had filed a Notice of Motion seeking various orders. That Motion was called for hearing on 19<sup>th</sup> January, 2016 but the applicants were absent. It was dismissed for non-attendance under **rule 56(1)** of this **Court’s Rules**.

On 23<sup>rd</sup> January, 2016 the applicants filed a Notice of Motion dated 19<sup>th</sup> January, 2016 where it is prayed in the main, that, the said motion which was dismissed be reinstated to hearing. The applicants say in the grounds in support of the motion that they arrived in court late because they were held up in traffic and that they are sorry for attending court late. The affidavit in support sworn on 19<sup>th</sup> January, 2016 by the 1<sup>st</sup> applicant reiterates the said grounds stating in addition, *inter alia*, that the applicants arrived in court just as ruling dismissing their motion was being delivered and that the said motion was the first item on the cause list that day.

The respondents filed respective replying affidavits in opposition to the application for reinstatement. The theme appears to be that since an appeal pending in this Court is ready for hearing interlocutory applications should be dispensed with and allow the appeal to be heard. That theme also formed the basis of the submissions by all the learned counsel for the respondents when the motion came for hearing before us on 17<sup>th</sup> May, 2016.

It is not necessary to repeat all those arguments or submissions here.

**Rule 56(3)** of this **Court's Rules** allows a party in whose absence an application has been determined to apply to the court to restore it if that party can show that he was prevented by any sufficient cause from appearing when the application was called for hearing. **Rule 4** of the said rule imposes a duty on such a party to present the application within 30 days of the decision of the court or in case of a party who should have been served with a hearing notice but was not served, within 30 days of the date when that party knows about the decision.

So there are two conditions to be satisfied for a party to succeed in an application to restore a dismissed application to hearing – that there is sufficient cause why that party did not appear and secondly that the application is made within 30 days.

In the instant application the applicants' say that they were held up in traffic but they arrived in Court as the order dismissing their motion was being read out. They say that they are sorry for attending court late. Those facts are not seriously contested by the respondents.

The application was filed three days after the dismissal order. What is sufficient cause?

In **The Hon. Attorney General vs the Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of 2011 (ur)** Musinga, JA saw

sufficient cause to be:

***“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, 9<sup>th</sup> 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.”***

The Court of Appeal in Tanzania had this to say on “sufficient cause” in **The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others Civil Appeal No. 147 of 2006** in discussing what constitutes *sufficient cause*:

***“It is difficult to attempt to define the meaning of the words ‘sufficient cause’. It is generally accepted however, that the words should receive a liberal construction in order***

*to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant” (Emphasis added)”*

And the Supreme Court of India on the same issue in the case of **Parimal v Veena** [2011] 3 SCC 545 observed that:

*"sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously."*

We are satisfied on the averments of the applicants that they were prevented by the traffic of Nairobi from being in court when their matter was called. They arrived soon thereafter and they filed this application immediately. The applicants have satisfied the requirements required in an application such as this one and we therefore allow the same. The Motion dismissed on 19<sup>th</sup> January, 2016 is hereby restored and shall be heard on priority basis. Costs of this Motion shall be in the restored motion.

*Dated and Delivered at Nairobi this 17<sup>th</sup> day of June, 2016.*

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**H.M. OKWENGU**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**