IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, G.B.M KARIUKI & SICHALE JJ.A)

CIVIL APPEAL (APPLICATION) NO. 282 OF 2007

BETWEEN

ADIEL MURIETHI PHILIP……..……APPLICANT

VERSUS

THOMAS MAINGI..…….…….……..…. RESPONDENT

(An application for restoration of Civil Appeal No.282 of 2007 to hearing on merit arising from the exparte orders of the Court of appeal given on 21st July 2014 which was dismissed for non-attendance on 2nd April, 2014

RULING OF THE COURT

[1] **ADIEL MURIETHI PHILIP** who is the applicant has moved this Court by way of a notice of motion dated 23rd July 2014 for orders to reinstate his appeal that had been dismissed by this Court on 21st July 2014, for non-attendance under **Rule 102 (1)** of the **Court of Appeal Rules**. The motion is brought under **Rules 1(3),** ***102 (1), (2) and (3)*** of the ***Rules of this Court*** and under **Articles 10, 19, 20 21** and **159** of the **Constitution**. The motion is supported by an affidavit sworn by **Peter. O. Ngoge** learned counsel for the applicant. In the supporting affidavit counsel explains that he did not attend court on 21st July 2014 because of his failure to diarize the hearing date; that the failure to diarize the hearing date was occasioned by massive disorder and disorganization of files in his office because of distress for rent levied on his law firm and eventual auctioning of his firm's tools of trade. **Thomas Maingi** who is the respondent in the motion did not file any reply to the motion.

[2] When the motion came up for hearing **Mr. Ngoge** appeared for the applicant and **Miss Omotto** appeared for the respondent. **Mr. Ngoge** urged the court to reinstate the appeal contending that it was not opposed, as there was no reply to the supporting affidavit. On her part, **Miss Omotto** submitted that although no replying affidavit had been filed the respondent was opposing the motion as the applicant has not demonstrated any good reason for the failure to attend court; that the distress was carried out in August 2011 and the appeal was dismissed three years later on 21st July 2014; that the distress was therefore not a good ground for the failure to attend court. **Mr. Ngoge** responded that although the distress was levied in 2011 it completely affected his operations; that his client was entitled to be heard. He cited the U.N. Basic Principles on the role of lawyers; **Articles 15-21** that bestow an obligation on the State to protect confidential documents. He urged the Court to protect the applicant by granting the motion

[3] The issue in this application is whether the applicant has given a satisfactory explanation for the

failure to attend court on 21st July 2014 that resulted in the dismissal of his appeal. We have considered the motion, the grounds cited in support thereof, the supporting affidavit and submissions by counsel. **Rule 102(1)** of the **Court Rules** that 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 sees 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"***

[4] The rationale behind the rule is the fact that sometimes, for reasons beyond the control of the parties or their counsel, a party may fail to attend court on the appointed day. The rule has two conditions that an applicant must satisfy before the court can exercise its discretion in his/her favour. First, the application for reinstatement should be made within 30 days of the dismissal. Secondly, the applicant must show that he was prevented by sufficient cause from attending the

hearing. In the instant case, the applicant lodged the application within 2 days and he therefore satisfied the first condition.

[5] As for the second condition, in our view, sufficient cause means no more than circumstances that give reasonable explanation or excuse for the applicant's default. In his supporting affidavit, **Mr. Ngoge,** counsel for the applicant, explained that he failed to attend court because of his mistake in not diarizing the hearing date.

In **CMC Holdings Ltd vs James Mumo Nzioka (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."***

[6] In **Philip Chemowolo & Another -vs- Augustine Kubede (1982- KAR 1036 at 1040**, Apaloo, JA as he then was observed that:

> ***"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 its merits.***
>
> ***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 the purpose of imposing discipline"***

[7] In **Belinda Murai & 9 Others -Vs- Amos Wainaina [1982] KLR 38** at **pg 47 C.B. Madan, JA** as he then was had the following to say regarding mistake by counsel:

> ***"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 may 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 lawyer of experience who***

ought to have known better. The court may not forgive or condone it but it ought to certainly do whatever is necessary to rectify it if the interests of justice so dictate. The 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 sometime overrule..”

[8] In his supporting affidavit **Mr. Ngoge** stated that he has consistently attended court for hearing of this appeal. We have examined the court record and find nothing on record to suggest that the applicant is trying or has previously tried to undermine or delay the expeditious and just determination of the appeal. To the contrary, the record shows that **Mr. Ngoge** was steadfast and consistent in attending court whenever the appeal came up for hearing. We are therefore satisfied that the reason advanced by the advocate for not attending court shows sufficient cause to justify excusing the absence.

[9] In the premises, considering that there was no delay in bringing this application and being satisfied with the explanation for non-attendance, we allow the notice of motion dated 26th July 2014, set aside the order dismissing the appeal and hereby reinstate the applicant’s appeal. We direct that the same be set down for hearing and determination without undue delay.

Dated and Delivered at Nairobi this 22nd day of July, 2016.

H.M. OKWENGU

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JUDGE OF APPEAL

G.B. M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR