



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NYERI**  
**(CORAM: VISRAM, KOOME & ODEK, J.J.A.)**  
**CIVIL APPEAL NO. 16 OF 2014**  
**BETWEEN**  
**JOSPHAT KAMAU GATIMU..... APPELLANT**  
**AND**  
**PETER GATIMU KANYONYO..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Kerugoya*

*(Olao, J.) dated 7<sup>th</sup> November, 2013*

*in*

*J. R. Appl. No. 24 of 2013)*

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**RULING OF THE COURT**

The Notice of Motion dated 21<sup>st</sup> July, 2014, is taken out by Josphat Kamau Gatimu the appellant in ***Civil Appeal No. 16 of 2014***. That appeal was dismissed for non-attendance on 2<sup>nd</sup> July, 2014. The applicant now seeks to review or set aside the order dismissing the appeal and has cited the following grounds:-

- (a) That the appellant has a sustainable and meritorious case with a great possibility of success against the respondents herein.***
- (b) That the non-attendance was occasioned by the appellant's inability to raise professional fees for his advocate.***
- (c) That substantial loss will result to the appellant unless the orders sought are granted.***
- (d) That the inadvertent and regrettable mistake of the Advocates should not be visited upon the applicant.***

**(e) That this application has been made without unreasonable delay.**

**(f) That is only mete and just to have the Honourable Court grant the orders sought.**

**(g) That no prejudice will be occasioned upon the Respondents which cannot be compensated with an award for costs should the application be allowed.**

The application is supported by the applicant's affidavit sworn on the 21<sup>st</sup> July, 2014, which expounds the above grounds. The applicant was basically disappointed by his counsel who did not turn up in court during the hearing on the grounds that his legal fees were not settled. The applicant was nonetheless present in court but he could not argue the appeal for reasons that he had a counsel on record. After the appeal was dismissed he contacted Kituo Cha Sheria that offers legal aid to the indigent who appointed Mr. Gori to represent the applicant on *probono* basis. Mr. Gori urged us to allow the application and reinstate the appeal which has great possibility of success. Moreover, the applicant will suffer irreparable damage if the mistakes of his counsel are visited upon him. On the other hand, the respondent will not suffer any prejudice as the applicant is willing to pay the thrown away costs to cover for the inconvenience caused to the applicant as a result of the present application.

This application was opposed; Mr. Omenya, learned counsel for the respondent relying on the affidavit of Peter Gatimu Kanyonyo sworn on the 8<sup>th</sup> December, 2014. The gist of the matters deposed therein is that this application was filed as an afterthought; the applicant should bear the consequences brought about by the choice of his counsel that should also not be visited upon the respondent; the application is overtaken by events as the respondent states he subdivided **Land Parcel No. Mutira/ Kiaga / 76** which was the subject matter of the appeal and he dis posed of the same. Counsel urged us to dismiss it with costs.

We have considered the issues raised in this application with anxious minds for reasons that when this appeal came up for hearing, the applicant was present but because he was represented by counsel, he did not urge the appeal. Secondly, the appeal is about a land dispute, and it is imperative that parties are given an opportunity to ventilate their issues substantively. In addition, we should add coming into effect the provisions of **Article 159 (2)** of the **Constitution** and **Sections 3A** and **3B** of the **Appellate Jurisdiction Act**, the Court is statutorily required when exercising its powers either under the **Act** or the rules made pursuant to the **Act** or in interpreting the provisions of the **Act** or the rules to give effect to the overriding objective. Whose principle is to achieve or attain justice, and fairness in the circumstances of each case; reduce cost and delay; deal with each matter in ways which are proportionate; and ensuring that the parties are on an equal footing and finally, allotting to each case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases. See the case of;- **DORCAS NDOMBI WASIKE v BENSON WAMALWA KHISA & 2 OTHERS ELD C.APPEAL NO. 87 of 2004** where this Court differently constituted held *inter alia*:-

***“The overriding objective principle has been introduced into our law by a statute and it is, inherently a principle of substantive law. We agree as submitted by Mr Amolo that, where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of this Court) the statute must prevail. A conflict is however unlikely to arise because section 3A(1) of the Act not only enacts the overriding objective principle but also expressly superimposes the overriding objective to the application of the existing rules with the result that the Court is enjoined to apply the overriding objective principle in both the substantive and procedural matters. That is to say that, the rule should also be construed in a manner which facilitates the just, expeditious proportionate and affordable resolution of the appeals”.***

We have carefully considered in relation to the present application, the principles governing the exercise of the court's discretion to set side orders made *ex parte* against the grounds urged by the applicant. Needless to emphasize the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. See **Shah v Mbogo & Another, 1967 1 EA 116 HCK**. The mistake was attributed to counsel for the appellant who failed to attend court, and as the applicant was present, we think this is a plausible explanation. Moreover,

the inconvenience that may be suffered by the respondent in terms of costs incurred in defending this application can be compensated with costs which we are inclined to award the respondent.

In the result we allow the Notice of Motion dated 21<sup>st</sup> July, 2014, the orders made on 2<sup>nd</sup> July, 2014, dismissing the appeal for non-attendance are hereby set aside. The appeal is reinstated for hearing. The respondent shall have the costs of this application

***Dated and delivered at Nyeri this 21<sup>st</sup> day of January, 2015.***

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***MARTHA KOOME***

.....

***JUDGE OF APPEAL***

***J. OTIENO- ODEK***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**