



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: VISRAM, KOOME & ODEK, JJ.A)
CIVIL APPEAL (APPLICATION) NO. 247 OF 2010

BETWEEN

CHARLES ALEXANDER KIAI APPLICANT

AND

FRASIA WANGUI GICHERU 1ST RESPONDENT

LAND REGISTRAR NYERI 2ND RESPONDENT

THE CHAIRMAN L.D.T OTHAYA 3RD RESPONDENT

CHAIRMAN PROVINCIAL APPEALS

COMMITTEE CENTRAL PROVINCE 4TH RESPONDENT

THE CHIEF MAGISTRATE NYERI 5TH RESPONDENT

(An application for reinstatement of the appeal from the ruling of the High Court

of Kenya at Nyeri (Sergon, J.) dated 26th February, 2010

in

H.C Judicial Review No. 13 of 2010)

RULING OF THE COURT

1. The appeal herein was dismissed on 12th June, 2013 for non-appearance pursuant to **Rule 102** of the **Court of Appeal Rules** (the Rules). Subsequently, the applicant herein filed the application before us under **Rules 71(4) & 102(1)(3)** of the Rules seeking *inter alia* an order setting aside the dismissal order and restoration of the appeal for hearing.
2. The genesis of this application is that when the appeal came up for hearing before this Court on

12th June, 2013 none of the parties were present despite being served with the hearing notice. The appeal was dismissed and the applicant filed the current application on 5th August, 2013. The application is supported by the affidavits sworn by the applicant and his former advocate, Messers Ombongi O. Douglas. Mr. Ombongi deposed that he had misplaced his office diary hence his office assistant was unable to diarize the hearing date of the said appeal. Consequently, he inadvertently failed to attend the hearing of the appeal; his mistake as counsel ought not to be visited upon the applicant. He further deposed that the respondents would not suffer any prejudice if the appeal was restored to be heard on merit. The applicant on the other hand, deposed that he would suffer irreparable damage if the appeal was not restored because the 1st respondent would take over his parcel of land.

3. In opposing the application, the first respondent swore an affidavit while Mr. Makori Okello, a state counsel, swore an affidavit on behalf of the 2nd, 3rd, 4th and 5th respondents. The respondents deposed that the application contravened the mandatory provisions of **Rule 102(3)** of the Rules which stipulates that an application for restoration of an appeal ought to be brought within 30 days of the dismissal of the appeal. Therefore, the application was incurably defective. Mr. Makori Okello further deposed that the applicant had not disclosed any reasonable explanation for the delay in filing the said application.
4. During the *interpartes* hearing of the application, the applicant appeared in person while Mr. Nderitu appeared for the 1st respondent and Mr. Makori appeared for the 2nd, 3rd, 4th and 5th respondents.
5. The appeal herein was dismissed under **Rule 102(1)** of the Rules which provides:-

“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 fit to 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 rehear 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.”

From the foregoing, it is clear that this Court has discretionary power to reinstate a dismissed appeal. Koome, J.A while considering the exercise of discretionary power by the Court in *Nyahururu D.E.B. Primary School –vs- Catherine Wangui Kariuki- Civil Application No. Nai. 254 of 2014* expressed herself as herein under:-

“However, where the court has to exercise its discretion, there must be some reasonable basis of fact or law to warrant the orders being made. In other words, judicial discretion cannot be exercised whimsically or capriciously.”

6. **Rule 102(3)** of the Rules provides:-

“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....”Emphasis added.

Therefore, an application for restoration of an appeal dismissed under **Rule 102(1)** for non-attendance ought to be filed within 30 days of the dismissal. In this case the appeal was dismissed on 12th June, 2013 hence the application for restoration ought to have been filed on or before 12th July, 2013. From the record the current application was filed on 5th August, 2013. What is the consequence of the said application being filed out of time?

7. We are of the considered view that **Rule 102(3)** connotes that this Court can only exercise its discretionary power in an application for restoration of an appeal if the same is filed within the requisite time frame. We take note that the applicant neither offered any reasonable explanation

for the delay in filing the current application nor did he make an application for extension of time within which to file the said application. Therefore, we find that the application before us is defective.

8. The upshot of the foregoing is that we dismiss the applicant's application with costs to the respondents.

Dated and delivered at Nyeri this 20th day of January, 2015.

ALNASHIR VISRAM

.....

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