



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, G. B. M. KARIUKI & MWILU, JJ.A)

CIVIL APPEAL (APPLICATION) NO.1 OF 2004

BETWEEN

LA BELLE INTERNATIONAL LIMITED.....1ST APPELLANT

TEJINDER KAUR BIRDI.....2ND APPELLANT

AND

FIDELITY COMMERCIAL BANK LIMITED.....1ST RESPONDENT

ISMAIL M. H. MAWJI.....2ND RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nairobi (Nyamu, J.),

dated 17th July, 2003

in

H.C.C.C. No.786 OF 2002)

RULING OF THE COURT

The appellants/applicants have filed a notice of motion dated 5th February, 2015 invoking the powers donated by **Rules 4, 102(1)(3) of the Court of Appeal Rules** with the main prayer that this Court:

i. be pleased to restore the appeal herein for hearing, the same having been dismissed on 3rd February, 2015 for want of attendance.

The grounds on which the application was premised, together with the affidavit in support principally stated that M/s Ndege & Company Advocates, acting for the applicants were served with the hearing notice on 4th December, 2014 for hearing on 3rd February, 2015 but their Secretary by the name of **Christine Basil**, instead entered the hearing date in the 2014 diary on 3rd February, (2014). So for that reason, when the appeal came up for hearing, **Mr. Ndege** from the named firm, was not present in court and the appeal was dismissed for non-attendance, hence the prayer before us.

Mr. Ndege submitted that the error of the entry in his diary of 3rd February, 2014 instead of 3rd February, 2015 by his staff, was inadvertent and excusable. It should not he said, be held against his clients in their tussle with the respondents over house No.5 on LR 1870/1/535 Parklands, Nairobi. Further, that when his office learnt of the dismissal of the appeal on 3rd February, 2015, the same was confirmed on a visit to the registry on 4th February, 2015 followed with filing of this motion on 6th February 2015. There was no delay, he said, whatsoever. Counsel urged us to note that he had filed written submissions in readiness and anticipation to argue this appeal as long ago as 24th January, 2014, a copy of which he annexed to the supporting affidavit as well as the copy of his diary to show that the appeal herein was therein indicated to come on 3rd February, 2014.

Turning to the replying affidavit filed by the respondents, **Mr. Ndege** argued that contrary to the deposition that the suit in the High Court was since dismissed, the suit in which **Nyamu, J**, as he then was, denied the applicants an injunction, which denial gave rise to the subject appeal, we heard that **Ogola, J** had set aside that order of dismissal and reinstated the suit on 17th March, 2014. Thus the basis of the appeal still subsisted.

Mr. R. Hira, learned counsel for the respondents, began by pointing out that there was no affidavit filed by the secretary, **Christine Basil**, who allegedly made an entry in the diary that the appeal was due for hearing on 3rd February, 2014 rather than 3rd February, 2015. And further that **Mr. Ndege's** affidavit supporting the motion did not aver that the said secretary informed him about that entry and "he truly and verily believed" the same to be true.

Regarding the setting aside by **Ogola, J.** of **Khaminwa, J's** order of 25th February, 2011 dismissing the suit, **Mr. Hira** focused on the fact that the reinstatement of the suit by **Ogola, J** was conditional on the applicants, *inter alia*, providing security for the sum owed to the respondents within the next 30 days. That was not done and so the suit stood or remained dismissed.

Further, that the applicants had not given sufficient cause for this Court to reinstate the appeal.

Mr. Ndege, in response said that **Ogola J's** conditional order to reinstate the suit, contained another requirement that the parties agree on the exact sum due or they would return to court which would determine the same. The parties had not agreed on the sum owed and so the applicants had filed an application, still pending, as ordered. Only on agreement or determination of the sum owed could security for the same be provided. So in the circumstances, counsel argued, the condition to provide security had not come to pass.

The relevant part of **Rule 102 of the Court of Appeal Rules** under which this application falls provides thus:

"102. (3) 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, or in 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."

The *proviso* to sub-rule (1) states that a party whose appeal or cross-appeal has been dismissed for non-appearance may apply to the Court to restore the same for hearing or re-hearing as the case may be:

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

The application for restoration must be made within 30 days from the decision of this Court to dismiss an appeal. In the present case, this application was filed three days from the date of dismissal and there was no dispute about this. It was filed in time.

The next important issue to determine is whether the applicants have shown sufficient cause which

prevented their lawyer from appearing when the appeal was called out for hearing.

Having heard rival arguments on this aspect, we are satisfied that **Mr. Ndege**, acting for the applicants, was not able to appear before Court on 3rd February, 2015 because of the inadvertent error by his secretary who, though she received the hearing notice in time, nonetheless, entered in their diary the date of 3rd February, 2014 instead of 3rd February, 2015. To us that error constitutes sufficient cause in this matter, even as it appeared rather silly that a process served on 4th December, 2014, indicating the due date as 3rd February, 2015 was entered in a 2014 diary. Indeed, **Mr. Hira** observed that the secretary who made that entry had not sworn and filed an affidavit to depone to that aspect. And counsel could not hear of **Mr. Ndege's** plea on that issue that he had stated in his supporting affidavit as follows:

“11.That what is deponed hereof unless otherwise stated is true to the best of my knowledge, information and belief sources whereof have been disclosed.”

Much as **Mr. Ndege** would have done better by filing an affidavit from **Christine Basil** whose error caused all this, nonetheless, we were satisfied that his own affidavit which disclosed the source of information served as well in the circumstances. The error or mistake had been explained, and constituted sufficient cause as envisaged in Rule 102.

We are not well placed to determine the status of the suit in the High Court as to whether it is dismissed or is still subsisting and so we refrain from commenting on it here.

In the result, we grant the prayer stated in the motion by restoring the subject appeal. It shall be fixed for its hearing with a views to its disposal. Arguing it on its merits will leave none the worse for it. However, the applicants will pay the costs of this application to the respondents.

Dated and delivered at Nairobi this 12th day of June, 2015.

J. W. MWERA

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR