



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: GATEMBU, J.A. (IN CHAMBERS))**

**CIVIL APPLICATION NO. NAI 327 OF 2014**

**UR 249/2014**

**BETWEEN**

**WILLIAM KIPROP CHEBII.....APPLICANT**

**AND**

**FLORENCE CHEPKURUI CHEPKWONY.....RESPONDENT**

*(An application to review and rescind dismissal orders for none appearance on the part of the Applicant by Honourable G. Kairu J.A on an application which was scheduled for hearing for enlargement of time arising from the Judgment of (Hon. Justice Munyao Sila,J.) dated 12<sup>th</sup> June, 2013*

**in**

**ELD. E&L COURT CASE NO. 1014 OF 2012)**

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**RULING**

1. On 26<sup>th</sup> November 2014, the applicant William Kiprop Chebii filed a Motion dated 20/11/2014 under Rule 4 of the Rules of the Court seeking extension of time to serve his Notice of Appeal and to file and serve his Record of Appeal from a decision of the Environment and Land Court delivered on 12<sup>th</sup> June, 2013.

a. That Motion was fixed for hearing before me at Eldoret on 22<sup>nd</sup> June 2015. When it was called out for hearing, there was no appearance for the applicant although notice of hearing of the Motion had been duly served. Miss. T. Tum, learned counsel, who appeared for the respondent successfully applied to have the Motion dismissed for non-appearance by the applicant under Rule 56(1) of the Rules of this Court.

2. By a Motion dated 23<sup>rd</sup> June 2015 filed on 25<sup>th</sup> June 2015, the applicant has moved the Court under Rule 56(3) of the Rules of the Court to restore the application dated 20/11/2014 for hearing. The present application is supported by an affidavit sworn by the applicant on 23<sup>rd</sup> June 2015 and another affidavit

sworn by his advocate Henry Koros on the same date.

3. In his affidavit, the applicant deposes that on 22<sup>nd</sup> June 2015 when his Motion for extension of time was scheduled for hearing, he arrived in the court precincts as early as 8.00 am and was directed to the open court room where he waited for his matter to be called. He later learnt his matter had been dealt with in chambers by a Judge.

4. The applicant's advocate Mr. Henry Koros on his part deposes in his affidavit that he got to the court precincts about 9.00 a.m. on 22<sup>nd</sup> June 2015 but could not get parking for his vehicle within the court premises; that he was constrained to hurriedly look for parking alongside the road, where he left his vehicle; that his vehicle was subsequently clamped for non- payment of parking fee as he hurriedly parked and proceeded to court; that he then went to court where his client had been waiting since 8.00 am only to learn that the matter was being dealt with in chambers; that on getting to chambers he established that the matter had already been dealt with in his absence and the applicant's application dismissed.

5. In opposition to the application, the respondent swore a replying affidavit on 24<sup>th</sup> September 2015 and filed grounds of opposition bearing the same date. In her replying affidavit, the respondent says that the contents of the affidavits sworn by the applicant and by his advocate are contradictory; that the applicants vehicle could not have been clamped at 9.00 am and neither could the clamping have anything to do with the dismissal of the applicant's application; that the applicant has not been candid as to why there was no appearance in court on 22<sup>nd</sup> June 2015; that in any event execution of the Judgment intended to be appealed against was long carried out; that in contempt of court the applicant has since returned to the subject property. In her grounds of opposition the respondent reiterates that the application is overtaken by event as execution was carried out on 4<sup>th</sup> October 2014 and the applicant evicted from the suit property; that the failure by the applicant to attend court on 22<sup>nd</sup> June 2015 is not excusable and that the applicant has approached the court with dirty hands.

6. During the hearing of the application before me, learned counsel for the applicant Mr. H. Koros referred to the affidavits in support of the application, to which I have already referred, and stated that his omission to attend the hearing of the application in chambers on 22<sup>nd</sup> June 2015 when the application dated 20<sup>th</sup> November 2014 was to be heard has been explained and that the present application was filed without delay.

7. On her part, learned counsel for the respondent Ms. T. Tum strenuously opposed the application and referred me to the replying affidavit and grounds of opposition, to which I have also referred, urging that no useful purpose will be served by allowing the application as the intended appeal has been overtaken by events on account of the applicant having been evicted from the suit property way back on 4<sup>th</sup> October 2014.

8. I have considered the application, the affidavits in support and in opposition to the application and the submissions by learned counsel. The applicant's application for extension of time that was scheduled for hearing on 22<sup>nd</sup> June 2015 was dismissed under rule 56(1) of the Rules of the Court for non- appearance. Rule 56(3) of those Rules provides that:

**“(3) Where an application has been dismissed under sub-rule (1) or allowed under sub - rule (2), the party in whose absence the application was determined may apply to the Court to restore the application for hearing or to re-hear it, as the case may be, if he can show that he was prevented by any sufficient cause from appearing when the application was called on for hearing.**

**(4) An application made under sub-rule (3) shall be made within thirty days of the decision of the Court, or in the case of a party who would have been served with notice of the hearing but was not so served, within thirty days of his first hearing of that decision.”**

9. Having regard to the explanation tendered by the applicant and his advocate in the affidavits supporting

the application as set out above, I am satisfied that on a balance of probabilities, the applicant has demonstrated that he was prevented, by sufficient cause from appearing before me when the matter was called for hearing on 22nd June 2015. There is nothing to suggest that the applicant is being less than candid when he deposes that he was sitting in open court as early as 8.00 am on 22<sup>nd</sup> June 2015 expecting that the matter would be dealt with in open court. The applicant's counsel Mr. Koros has also explained that he had challenges getting parking within the court premises and was constrained to park his vehicle alongside the road. He exhibited a document titled "*Caution*" issued by Uasin Gishu County Government (Eldoret) on 22<sup>nd</sup> June 2015 cautioning that his vehicle "*has been clamped*" for non-payment of parking fees and a receipt issued by the same authority on the same date for "*declamping*". I also recall that in the course of the morning of 22<sup>nd</sup> June, 2015, after I had already disposed the applicant's application, counsel for the applicant sought, unsuccessfully, to have the matter mentioned before me in chambers in the absence of counsel for the respondent.

10. The present application was filed without delay and within the period limited under Rule 56(4) of the Rules.

11. For those reasons, I allow the applicant's Notice of Motion dated 23<sup>rd</sup> June 2015 in terms of prayer (b) thereof with the result that the applicant's application dated 20/11/2014 and filed on 26<sup>th</sup> November 2014 is hereby restored. I direct that the same be fixed for hearing in the registry on priority basis. The applicant shall however bear the costs of the present application and of the court attendance on 22<sup>nd</sup> June, 2015.

Dated and delivered at Eldoret this 29th day of October, 2015.

**S. GATEMBU KAIRU,**

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**JUDGE OF APPEAL**

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

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**DEPUTY REGISTRAR**