IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KOOME & G.B.M KARIUKI, , JJ.A)

CIVIL APPLICATION NO. NAI. 159 OF 2011

BETWEEN

REPUBLIC…………………………………………………......APPLICANT

AND

THE COMMISSIONER OF POLICE…………….……. 1ST APPLICANT

THE COMMISSIONER OF LANDS..…………..…...….. 2ND APPLICANT

THE HON. ATTORNEY GENERAL...……………....…. 3RD APPLICANT

VERSUS

JOSEPH MBURU GITAU AND 635 OTHERS…………..RESPONDENTS

(*Being an application for review and setting aside the ruling of (Okwengu, Mwera & J. Mohammed, JJ.A.) delivered on 20th July, 2015 striking out the Notice of Appeal dated 24th June, 2008 and filed in Court on 1st July, 2009*

in

HCC MISC. CIVIL APPL. NO. 673 OF 2005)

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RULING OF THE COURT

[1] This is an application, principally brought under ***Rule 56*** of the ***Court of Appeal Rules*** which deals with procedures for non attendance in Court for hearing of applications. The Attorney General, representing the Commissioner of Police and the Commissioner of Lands, the applicants herein did not attend Court during the hearing of the motion dated 8th June 2011 when it came up for hearing on the 20th July, 2015. As a consequence of their counsel's failure to attend court, the said motion was allowed with the result that the Notice of Appeal by the applicants was struck out.

[2] The applicants now seek to set aside the ex parte orders made by this Court on 20th July, 2015, and reinstate the motion dated 8th June, 2011. In the said motion, Joseph Mburu Gitau and 673 other persons applied to strike out the Notice of Appeal dated 24th June ,2008, on the grounds that the said Notice of Appeal had never been served upon them as the respondents. The said motion came up for hearing on 20th July 2015, before Okwengu, Mwera & J. Mohammed JJ.A., who made the following order;-

" **Order of the Court**

> ***The application dated 8th June, 2011 for striking out the Notice of Appeal filled by the respondent was coming up for hearing today. Service of the hearing notice was effected upon the***
>
> ***AG's office through one Vincent who is a clerk in the said office. The said Vincent is present in Court but he has no right of audience and there is no counsel holding brief for the A.G. In the circumstances, we allow the application dated 8th June, 2011 and strike out the Notice of Appeal dated 24th June, 2008 filed in this Court on 1st July, 2009 under Rule 84 of the Court of Appeal Rules. We award costs to the applicant".***

[3] The instant application is based on the grounds that failure to attend court by counsel for the applicants was not intentional, but the hearing notice in regard to the foresaid motion that sought to strike out the applicant's Notice of Appeal was not brought to the attention of Mr. Motari Matunda, the litigation counsel who had the conduct of this matter. Failure to attend court was attributed to the clerk, one Vincent Oichoe Oseko who was served with a hearing notice. The mistake by counsel and his clerk should, therefore, not be visited upon the applicants who are likely to suffer substantial injustice unless their appeal is heard as they have invested a whopping 5 billion shillings on the suit land where they have developed 595 houses which are fully occupied by the security personnel. Further grounds state that the firm of E. K Mutua and Co. Advocates who prosecuted the motion were not even on record as the respondents were represented by the firm of Onyancha and Associates.

[4] The aforesaid grounds were elaborated in greater detail by the matters deposed to in the supporting affidavit sworn by Jeremiah Motari Matunda, a state counsel in the Attorney General's Chambers. Counsel contends that on the 20th July 2015, he was attending another mater before the High Court at Milimani, when he received a telephone call from a clerk in their offices by the name *Vincent* who informed him that he had noticed the said matter (which was in the docket of Mr. Matunda) was in the cause list for the day, and that he had inadvertently forgotten to bring it to his attention. Nor the efforts of Mr. Matunda on that day to get counsel to hold his brief or his frantic attempt to make his way to the Court of Appeal yielded any success because by the time he arrived in Court, the matter had been determined.

This application was argued before us by Mr. Waigi Kamau, learned counsel for the applicants. He hinged his arguments on the inherent jurisdiction vested in this Court under ***Section 3A*** and ***3B*** of the ***Appellate jurisdiction Act***. By the said provisions, the Court is enjoined to overlook matters of procedural technicalities and aim for an outcome that renders substantive justice that is expeditious, proportionate and affordable. According Mr. Waigi, the applicant offered cogent and credible explanation why counsel failed to turn up in court during the hearing due to a mistake by a clerk in their offices; that disciplinary action was taken against the said clerk as a notice to show cause why disciplinary action should not be taken against him for failing to bring the hearing notice to the attention of Mr. Matunda (who had the conduct of the matter) was already issued to the clerk. Counsel for the applicant implored us to allow the application and to set aside the order striking out the Notice of Appeal and reinstate the motion for hearing as failure to do so, the applicants would suffer substantial injustice whereas the respondent will not suffer any prejudice.

[5] Mr. Eric Mutua, learned counsel for the respondents, left the matter on whether or not to reinstate the Notice of Appeal to the Court to determine, as it is within the Court's discretion. He, nonetheless, cautioned us to address the issue of whether reinstating the appeal would cure the fact that the Notice of Appeal was not served upon the respondents as required by the Rules of the Court. He also urged us to

note that the Notice of Appeal seeks to appeal from another decision but not the one by Nyamu, J, (as he then was).

[6] We have considered the application and the respective submissions. ***Rule 56*** of the ***Court of Appeal Rules*** provides the procedure where a party fails to appear in court on the day fixed for hearing of an application; the Court may dismiss the application or in the absence of the respondent may proceed to hear the applicant. The applicant failed to attend Court on the date set for hearing of the application that sought to strike out their Notice of Appeal. The motion was allowed and the result was an order dismissing the Notice of Appeal; thus the applicant filed the instant application under ***sub- rule (3)*** of ***Rule 56*** which provides:-

> ***"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".***

[7] The issue we have to address in this application is whether the applicants have demonstrated that their counsel was prevented by sufficient cause from attending Court for the hearing. It was not contested by the respondent that counsel for the applicant failed to attend court due to inadvertent mistake that was caused by counsels' clerk. There are sufficient authorities of this Court that have recognized that mistakes by counsel and/or their clerks would not in themselves deprive an otherwise deserving litigant of a favourable exercise of the Court's discretion.

Depending on the circumstances of each case, this Court, while not condoning those mistakes, often excuses them in the interest of justice.

In ***KIARIE VS. NJOROGE, [1986] K.L.R. 402, Gachuhi Ag. J.A.,*** (as he then was), took the view that under ***rule 4*** the court had an unfettered discretion to grant extension of time where it was satisfied that the cause of the delay did not lie with the applicant but with his advocate. The learned Judge stated that an applicant should not be penalized for the mistakes of his agent. And the best elucidation of them all on this point was by *Madan, J.A.* in ***MURAI VS. WAINAINA, (NO.4) [1982] K.L.R. 38*** at page 47 paragraph 40 where that erudite Judge let fall from his lips that:-

> "***"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might 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 person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictates. It is known that courts of justice themselves make mistakes which is politely referred to as erring, in their interpretation of law and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so required. It is all done in the interest of Justice".***

[8] And in ***GRINDLAYS BANK INTERNATIONAL (K) LTD & ANOTHER VS.GEORGEBARBOOR (CIVIL APPLICATION NO. NAI.257 OF 1995)*** (unreported), *Lakha, J.A.* indicated that a mistake could be as a result of inadvertence or negligence.

[9] We have considered this application against the above background of the provisions of the ***Rules*** of this ***Court***, the overriding objectives in the administration of justice as stipulated ***under Sections, 3A*** and ***3B*** of the ***Appellate Jurisdiction Act***, and also the established precedent. As aforementioned, it is not denied that counsel failed to attend court due to inadvertent mistake or call it negligence on the part of counsel's clerk. Indeed, counsel for the respondent left this issue for determination by Court; there was no replying affidavit; save that counsel raised the issue of non service of the Notice of Appeal as stipulated in the Rules and the fact that the said Notice of Appeal that was struck out seeks to appeal against another

decree and not the one issued by Nyamu, J., on 2nd May 2008 ***in H.C Misc. Civil Application No. 673 of 2005***.

[10] We agree with Mr. Waigi, that the issues of whether the Notice of Appeal was served or not or whether the appeal is against the decree by Nyamu, J., in the aforementioned case cannot appropriately be addressed in this application. Here we are concerned with whether the applicant has shown sufficient cause to warrant the exercise of this court's discretion to set aside the orders as prayed. We are satisfied that failure by the applicant to attend Court was not intentional, and in the event the application to reinstate the motion is not granted, the applicants would suffer substantial injustice as property that is worth billions of shillings would be ***in*** jeopardy. On the other hand, the respondent has not at all demonstrated that reinstating the motion would cause them any prejudice.

[11] In view of the forgoing reasons we are inclined to exercise our discretion in favour of the applicants with the result that the order of 20th July, 2015, is set aside and the motion dated 8th June ,2011, is reinstated. Costs of this application be and hereby granted to the respondents. This being an old matter, we direct the said motion to be given a priority date for hearing.

Dated and delivered at Nairobi this 18th day of December, 2015.

E.M. GITHINJI

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR