IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, KIAGE & GATEMBU JJ.A)

CIVIL APPEAL (APPLICATION) NO. 120 OF 2003

BETWEEN

K & K AMMAN LIMITED …… APPELLANT

AND

MOUNT KENYA GAME RACH LIMITED ……. 1ST RESPONDENT

THE ATTORNEY GENERAL ……..…… 2ND RESPONDENT

(on behalf of the Principal Registrar of Titles)

NDUNG'U NJOROGE & KWACH ADVOCATES..3RD RESPONDENT

KAPLAN & STRATTON ADVOCATES ……...… 4TH RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi Milimani Commercial Courts (Mr. Justice A.G. Ringera) dated and delivered on the 18th December, 2001

in

HIGH COURT CIVIL SUIT NO. 6076 OF 1993)

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RULING OF THE COURT

Following the judgment in the High Court where Ringera, J (as he then was) dismissed entirely the applicant's suit against the 1st, 3rd and 4th respondents and allowed partially the suit against the 2nd respondent, the applicant preferred this appeal by lodging a notice of appeal and subsequently the record of appeal on 10th June, 2003.

It is not clear why but the appeal was not listed for hearing until 14th July 2010, seven years later. When it did come up on that day, it emerged that although all counsel involved were duly served with the hearing notice and were in attendance, the firm of S. Musalia Mwenesi Advocates for the appellant was not represented. We note that they had received the hearing notice on 24th May 2010 under protest for the reason that they were no longer on record. A similar remark had been made earlier in response to a

letter from the Deputy Registrar inviting the firm to take the hearing date.

When the appeal was called out on 14th July 2010, all the advocates, save for Mr. Mwenesi were present. Ms. Kambuni, learned counsel for the 4th respondent informed the Court that she had spoken to Mr. Mwenesi who had reiterated that he was no longer on record for the applicant. The advocates present unanimously asked the Court (differently constituted) to dismiss the appeal under **Rule 99 (1)** of the repealed Court of Appeal Rules. After considering that prayer, the Court made the following order:-

> **"The record before us indicates that the advocates on record for the appellants are M/s S. Musalia Mwenesi Advocates. They were duly served with the hearing notice for today but they are not before us. The endorsement on the hearing notice by S. Musalia Mwenesi is that the notice was received *"under protest"* as they are no longer on record. All learned counsel for the respondents confirm that they also spoke to Mwenesi himself and he restated that his firm had no instructions on the matter and was not acting for the appellants. The Rules of this Court are plain about what an advocate ought to do when he ceases to act for a party. That is Rule 23 of the Court of Appeal Rules. We find nothing on record to show that the Rule was complied with. In the event, we hold that counsel for the appellant is absent without any reasonable cause and there is no one to urge the appeal before us. We order that it be and is hereby dismissed under Rule 99 (1) of the Rules of this Court. The appellants shall bear the costs of this appeal."**

Following that dismissal the applicants have returned with an application expressed to be brought under the provisions of **Section 3A** of the Civil Procedure Act (not applicable in this Court) and **Rules 23 (1)** and **102 (1)** of the Court of Appeal Rules 2010, for orders that this Court be pleased to reinstate the dismissed appeal. The applicant pleads that it be given another chance because when the appeal was dismissed, the firm of S. Musalia Mwenesi Advocates were no longer representing it, having ceased to do so in January 2010 and the applicant's files retrieved from the firm; that the applicant has not, since the appeal was filed, been served with a hearing notice; that upon withdrawing instructions from S. Musalia Mwenesi Advocates, the applicant instructed Murgor and Murgor Advocates; that Patrick Kiprop, an advocate in that firm informed the applicant that they were unable to take any steps in the file as it was unavailable; that he was only able to peruse the file on 8th December 2010 when he learnt of the dismissal of the appeal.

It is further deposed that subsequent to this the file once again disappeared forcing both Philip Murgor and Patrick Kiprop, advocates in the firm of Murgor and Murgor Advocates to seek audience with the Registrar of the Court, who informed them that there was no likelihood of the file being traced within a reasonable time as it had been removed from the registry for digitization. A digitized version of the record was availed to them on 1st March 2011; that todate the original file has not been traced.

It was after perusing the proceedings that the applicant was surprised to learn that its erstwhile advocates, although served with the hearing notice never informed it of that fact; that had the appellant been aware of these events it would have ensured attendance; that the applicant is desirous to prosecute the appeal and stands to suffer irreparable loss if the appeal is not reinstated.

The combined effect of the respondents' reply to the application is that the applicant has not offered a plausible justification for the reinstatement of the appeal; that having withdrawn instructions from S. Musalia Mwenesi Advocates in January 2010 the applicant ought to have made alternative arrangement for its representation; that no evidence of communication with the Court's Registrar has been presented; that there being no notice to act in person, the applicant's former advocate remained on record.

Rule 99 (1) of the repealed Court of Appeal Rules stipulated that:-

> **"99 (1) 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 re-hear the cross-appeal, <u>if he can show that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing."</u>** (Emphasis supplied).

The instant application has been brought under **Rule 102 (1)** of the 2010 Rules because, although the dismissal was before the repeal of the pre 2010 Rules, the application for reinstatement was brought after the coming into force of the 2010 Rules. The language in **Rule 99 (1)** has been repeated word for word in **Rule 102 (1)** aforesaid.

There is no doubt that the power to reinstate a dismissed appeal is discretionary. From the emphasized part of the proviso to **Rule 102 (1)** set out above, it is clear that the onus is on the applicant to satisfy the Court that:-

> **"he was prevented by any sufficient cause from appearing when the appeal was called on for hearing."**

See **<u>Philip Keipto Chemwolo & Mumias Sugar Co. Ltd v. Augustine Kubende</u>** (1982-88) 1KAR 1036. We stress, however, that each application must be decided on its peculiar circumstances. In this one, the applicant had all through engaged the services of S. Musalia Mwenesi advocates, who filed the appeal on 10th June 2003. It is alleged that in January 2010 the applicant withdrew those instructions and carted away the file from that firm. It is the case for the applicant that the firm was no longer on record, a view apparently shared by Mr. Mwenesi of S. Musalia Mwenesi Advocates, but which is clearly erroneous in light of **Rules 18** (providing for change of address of service), **22** (appearance either in person or by advocate and in the case of a corporation by advocate, director, manager or secretary) as well as **Rule 23 (1)** and **(2)** which states:-

> **"23. (1) Where a party to any application or appeal changes his advocate or, having been represented by an advocate, decides to act in person or, having acted in person, engages an advocate, he shall, as soon as practicable, lodge with the Registrar a notice of the change and shall serve a copy of such notice on the other party or on every other party appearing in person or separately represented, as the case may be.**
>
> **(2) An advocate who desires to cease acting for any party in a civil appeal or application, may apply by notice of motion before a single Judge for leave to so cease acting, and such advocate shall be deemed to have ceased to act for such party upon service on the party of a certified copy of the order of the judge."**

The presumption after the applicant expressed its intention to withdraw instructions from M/S. S. Musalia Mwenesi Advocates was that it (the applicant) or the firm of S. Musalia Mwenesi would file a notice in terms of the aforesaid **Rule 23 (1)** and **(2)**. Without that the firm of S. Musalia Mwenesi Advocates, having filed the appeal technically remained on record for the applicants until 13th April 2011 when M/S Murgor & Murgor Advocates filed a notice of change of advocates. The protest by S. Musalia Mwenesi Advocate upon being served with the hearing notice was to no avail in so far as the Court and other parties in the appeal were concerned.

Regarding the long story of non-availability of the court file, digitization and meeting with the court's Registrar, not an iota of evidence in the form of affidavits or letters was presented. A litigant who is keen in pursuing a matter such as the one before us would not fail to present the whole case to the court because that is what is required of such a party before the court can exercise its discretion in his/its favour.

It is instructive to note also that the application was not presented within **Rule 102 (3)** of the Court of Appeal Rules which requires that;-

"(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.

(4) For the purposes of this rule, a party who has lodged a statement under rule 100 shall be deemed to have appeared."

We entertain no doubt at all that the applicant's advocates on record at the time of the dismissal were duly served with the hearing notice. That apart, the applicant has averred that they first heard of the dismissal from Patrick Kiprop on 8th December 2010. It took them up to 13th April 2011, a period of four months and not 30 days as stipulated, to bring this application. That period is not only inordinate in the circumstances but also unexplained. The respondent will be prejudiced.

In the result, this application fails and is accordingly dismissed with costs.

Dated at Nairobi this 24th day of January 2014.

W. OUKO

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

/mgkm