



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G. B. M. KARIUKI, J.A.(In Chambers))

CIVIL APPLICATION NO.245 OF 2013

BETWEEN

M A.....APPLICANT

AND

M A.....RESPONDENT

(Application for Restoration of the Applicant's Notice of Motion 114 of 2010 dismissed by (M. Koome, J.A.) on 12th July, 2013

in

H. C. D. C. NO. 73 OF 1985)

RULING OF THE COURT

The applicant, M A, lodged in this court on 16.9.2013 an application by way of a notice of motion prepared by her without aid of counsel premised on Sections 3, 3A and 3B (1)(a) of the Appellate Jurisdiction Act and Rule 56 (3) of the Rules of this Court seeking the following 4 orders:

- 1. That this Honourable Court be pleased to restore the applicant's application 114 of 2010 for extension of time to withdraw defected copies of memorandum of records of appeal dismissed on 12th day of July 2013 (M. K. Koome, J.A.) contrary to the previous order of which this Hon. Court granted on 20th day of September 2010 in a misconceive way copies herein attached marked M1, M2.***
- 2. That the said application 114 of 2010 for extension of time to withdraw defected copies of memorandum and records of appeal be listed for hearing on priority basis.***
- 3. That this Hon. Court may grant an order to withdraw the forge record of appeal dated 2.10.1986 as registry of this Hon. Court wants to replace the forced copies together with the original which was filed on 2nd day of May 2009 within 75 days. (According to order of the Court) herein attached marked MA3 copy of the Court order an a letter from Ministry of Justice shows this fact that the record of appeal 2/10/86 is not the original by many reasons copy of the letter from Ministry of Justice herein marked MA4.***

4. ***That, Hon. Court may grant and order that the Registry of the Hon. Court should comply with the Rules of Laws and issue hearing notice according. The ground of appeal as it is applied for. A copy of objective hearing notice by the applicant and a copy of hearing notice issued by Registry of Court of Appeal herein attached marked MA5 and MA6.***

The application was supported by an affidavit sworn on 27.1.2014 by the applicant.

The Respondent, though served with the application, did not file a replying affidavit.

The application came up for hearing before me on 28.1.2014. Before the hearing in the morning on that day, the applicant filed another affidavit in the application titled;

“Affidavit of chaos anarchy and conflict in Judiciary of the Court of appeal”

In the affidavit, the applicant expressed her grievances about the court processes. Attached to the affidavit was a ruling in **Civil Appeal No.133 of 1986 (M A v. M A)** dated 8.5.1991 and court orders dated 19.10.2006, 10.3.2009, 31.5.2010, 20.9.2010 and 12.7.2012 issued in the appeal.

The application is in a state of obfuscation but I shall endeavour to unravel the substance. Ostensibly, the applicant was a party, *qua* spouse, in Divorce Cause No.73 of 1985 in the High Court at Nairobi. It seems the judgment in the divorce cause was not in her favour and was delivered in her absence. By the time she learned of its delivery, the period for lodging appeal had lapsed. For that reason, she filed several applications for extension of time within which to file the record of appeal. This is evidenced by the ruling dated 8.5.1991 (by J. R. O. Masime, J.A.) in Civil Appeal No. 133 of 1986)). It seems that after delivery of the judgment in the **Divorce Cause No. H.C.D.C. 73 of 1985** (by P. M. O’Conner, Ag. J.) decree nisi was issued.

The appeal came up for hearing on 19.10.2006 but as neither the appellant (M A) nor the respondent, (M A) turned up in court, there having been no service, it was taken out of the hearing list.

The ruling of this court dated 10.3.2009 shows that the applicant complained to the Court that her record in civil appeal No.133 of 1986 was altered or replaced without her knowledge or consent. The applicant sought 75 days to prepare and submit her own record of appeal before the appeal was heard. Her request was granted by the Court (R.S.C. Omolo, P. N. Waki, and D.K.S. Aganyanya JJ.A.) as is evident from the ruling. The appeal was to be re-listed for hearing thereafter.

On 31.5.2010, the appeal (No.133/1986) came up for hearing but was adjourned at the behest of the applicant and the order of the Court on that day which the applicant has exhibited in her application before me shows that the applicant was not ready to proceed with the hearing as she had filed that morning an application seeking extension of time to file another record of appeal on the ground that the record filed on 22.5.2009 with the leave of the Court was defective and she (the applicant) desired that her application in this regard be heard first. The Court therefore adjourned the hearing of the appeal to enable the applicant to pursue the hearing of the said application first. The Court also granted her wish to act in person as she had dispensed with the services of Messrs Rakoro & Company Advocates who had filed a notice (of advocates) to act for her.

On 20.9.2010, the applicant’s application seeking

“extension of time for a period of three months to withdraw wrong copies of memorandum and record of appeal and to file right copies from the judgment of the High Court of Kenya in Divorce Cause No.73 of 1985”

was adjourned because the applicant needed to photocopy her application from the Court file which she told the Court was missing from her own file. This is evident from the order of the Court of that date. It also seems the application was re-listed for hearing on 12.7.2012 when it came up for hearing again but neither the applicant nor the respondent was in court, and consequently it was dismissed by Koome, JA

pursuant to rule 56(1) of the Court of Appeal Rules for non-attendance, hence the present application.

The notice of motion dated 16.9.2013 which came up for hearing before me on 28.11.2014 seeks the aforementioned orders and specifically an order to set aside the order of Koome, J.A, so as to restore the dismissed application. The grounds for making the application appear on the face of the application and include the averment that the applicant had no notice of the hearing of the application. The applicant indicates in her supporting affidavit sworn on 16.9.2013 that she was not served with a hearing notice to attend court on 12th July 2012 and that her failure to be in court when her application was called out and subsequently dismissed was not deliberate. Her appeal is in place but she does not, in absence of the record of appeal which she desires to rectify, wish to proceed with the appeal to hearing. During the hearing of the application, the applicant pleaded that she is not a lawyer and is not conversant with court procedures and urged the Court to grant her application.

Mr. Chahenza, learned counsel for the respondent, objected to the application on the ground that no good reason had been shown for restoration of the dismissed application and that, in any case, rule 56(4) of the Rules of this Court has not been complied with. Rule 56(1) pursuant to which the application was dismissed on 12.7.2012 provides:

“56(1) If on any day fixed for the hearing of an application, the applicant does not appear, the application may be dismissed, unless the Court sees fit to adjourn the hearing.”

Rule 56 (3) of the Rules of this Court shows who may apply for restoration of a dismissed application. It states:

“56(3) Where the 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.”

Rule 56(4) of the Rules of this Court sets the time-lines for applying for restoration of such application. It states;

“56(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.”

(the underlining is mine)

In light of rule 56(4), the applicant was enjoined to show (1) when she learned that her application was dismissed and (2) that she filed her application for restoration of the dismissed application within 30 days of her first learning of the dismissal.

Rule 57(1) gives this Court jurisdiction to vary or rescind the order by Koome, J.A. as Koome JA is stationed at Nyeri providing the Court is satisfied that the applicant had not been served with a hearing notice as she asserts and further if the applicant shows that she brought her application within 30 days of learning of the dismissal. The applicant’s supporting affidavit does not show the time when the applicant learnt that her application was dismissed. In paragraph 3 of the said affidavit, she avers that *“I have come to learn from my inquiry at the Court of Appeal registry that my said application was dismissed for non-attendance....”*

In paragraph 4 of her said affidavit, the appellant avers that;

“... I was not served with the hearing notice to attend the hearing and I did not willfully fail to attend neither (sic) my lawyer (was) served with hearing notice.”

The dismissal was on 12.7.2012. The application for restoration of the dismissed application was lodged on 16.9.2013, after a period of one year and two months. Being a lay person, the applicant may not have known that she was required to apply for restoration within 30 days of learning of the dismissal. To be able to ascertain the period she took to apply from the date she learned of the dismissal, it was necessary for her to disclose the date she learned of the dismissal. That was an important matter of fact. I also observe that the applicant alleges that she learned about the dismissal from the court registry following her inquiry but she does not indicate even roughly when she went to the registry or how soon she filed the application thereafter. There is failure of disclosure of vital facts while the record shows that she was duly served.

I observe that before the order for dismissal of the application, the learned Judge (Koome, J.A.) was satisfied that the applicant had been duly served with a hearing notice. The applicant denies this in her application. Under rule 56 (3) (supra), an order in an application to restore a dismissed application can only be made where the applicant **was prevented by any sufficient cause** from appearing in court when the dismissed application was called for hearing.

The reason advanced by the applicant is inconsistent with the court record. In my view, the court record overrides the contrary allegation by the applicant.

But even if I were wrong in so holding, it is also my finding that the applicant has failed to show that she was prevented by any sufficient cause from appearing in court when the dismissed application was called out for hearing not least because she failed to disclose when she learned of the dismissal and from whom. In short, the applicant has not been candid and her lack of candour has resulted in her failure to satisfy the requirements of rule 56 of the Court of Appeal Rules. I am alive to the fact that the applicant is a lay person who dispensed with the services of her advocates although in paragraph 4 of her affidavit in support of the application she alludes to her lawyer, who is not named, as not having been served with a hearing notice. I observe from the history of this litigation, that the obfuscation and inordinate delay in the hearing of the appeal has, in large part, clearly been caused by the applicant. But my decision in this application is not influenced by that fact. But it is not lost on me that the judgment appealed from was delivered in 1986, exactly 28 years ago, and since that time the applicant has been in and out of court in connection with applications in appeal.

The upshot of my findings is that the application by notice of motion dated 16.9.2013 has no merit. I dismiss it with no order as to costs.

Dated and delivered at Nairobi this 28th day of February 2014.

G. B. M. KARIUKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR