



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CIVIL APPEAL NO 34 OF 2013

NJERU NJAU alias KAMAGAAPPLICANT

VERSUS

MBURIA KUGEREKA.....1ST RESPONDENT

ELENDI MUCHIRA WAWIRA2ND RESPONDENT

AGNES NGENDO KARANJA.....3RD RESPONDENT

EDWARD MUGO MUNENE.....4TH RESPONDENT

(Being an application to restore the appeal dismissed on 9th January, 2014 for non- attendance)

RULING OF THE COURT

[1] Before us is a Notice of Motion brought under the provisions of **Rules 102 (2)** of the **Court of Appeal Rules** in which the applicant seeks to restore the appeal that was dismissed on the 29th January, 2014, for non- attendance. The application is supported by the following grounds:

- 1. That the appeal was set down for hearing on the 29th January 2014 at 9.00 am.***
- 2. The appellant's advocate for several months has been unwell and was under treatment in Nairobi Hospital.***
- 3. The advocate has been taking heavy doses of medication.***
- 4. That on the 29th January 2014 the appellant's advocate due to effect of drugs slept and woke up late.***
- 5. The advocate arrived in Court at 9;15 am just to find the court reading the dismissal order.***
- 6. The advocate informed the court of his predicaments and said sorry and the Court wished him well.***

7. This is a land matter and the appellant would suffer irreparable damage if his appeal stay dismissed without hearing him.

[2] Further to the forgoing grounds, there is a supporting affidavit in which Mr. P. N. Mugo learned counsel for the applicant has reiterated the above grounds in greater details and attached documents to support his assertion that on the material time, he was under medical treatment. Due to the effects of the medications, counsel overslept and came to court late. During the hearing of the application, Mr Maggee wa Magee learned counsel for the 2nd 3rd, and 4th respondents indicated that although Mr. Mugo had offered sufficient reasons why he did not attend court on the date the matter was fixed for hearing, nonetheless there were so many interested parties who purchased some of the suit land and who would be affected if the appeal were to proceed to hearing. In the event that the application to restore the appeal was allowed he prayed for costs.

[3] The 1st respondent, Mr. Muria Kugereka, who was acting in person, opposed the application. While relying on his replying affidavit he submitted that that Mr. P. N Mugo Advocate is not a party to the appeal; the appeal is old; the appellant has no valid claim on the suit land where the 1st respondent claims to have settled and buried many relatives. He urged us to disallow the application.

[4] The background of this matter is that the appeal was fixed for hearing on the 29th January, 2014, at 9.00 am and the hearing notice was served on all the parties. When the appeal was called out for hearing, there was no appearance by the appellant or his counsel. Mr. Abubaker learned counsel for the 2nd 3rd and 4th respondents applied for the appeal to be dismissed for non- attendance under **Rule 102** of this **Courts Rules**. The court made the following order:

“This appeal was coming up for hearing before us this morning. Upon being called out, there was no appearance by the appellant who was duly served with a hearing notice on 21st November, 2013. Mr. Abubaker, learned counsel for the 2nd, 3rd, and 4th respondents applied for the appeal to be dismissed for non-attendance under Rule 102 of this Court’s Rules. Accordingly, this appeal is dismissed for non-attendance under Rule 102 (1) of this Court’s Rules. Costs to the 2nd 3rd and 4th respondents”.

[5] Under **Rules 102 (2)** of this **Court Rules**, a party whose appeal is dismissed for non- attendance can apply for its reinstatement as long as he or she offers sufficient reasons:

“(2) If the appellant appears and the respondent fails to appear the appeal shall proceed in the absence of the respondent and any cross-appeal may be dismissed, unless the Court sees fit to adjourn the hearing:

Provided that where an appeal has been allowed or cross-appeal dismissed in the absence of the respondent, he may apply to the Court to re-hear the appeal or to restore the cross-appeal for hearing, if he can show that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing”.

[6] In our own appreciation of this matter we are satisfied the reasons advanced by Mr Mugo are plausible. Counsel states in the affidavit and supports the depositions with documents to show that he was affected by medications that made him oversleep. He nonetheless made it to court late after the order dismissing the appeal was made. We are also guided by the dicta in the case of **Philph Chemowolo & Another v Augustine Kubede, [1982-88] KAR 103 at 1040 Apalo J.A.** (as he then was) posited as follows:

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties

and not the purpose of imposing discipline”.

[7] Having considered the depositions by the applicant and the respondents it is our considered view that sufficient reason has been given for the applicant’s non-attendance. Moreover, this being a dispute relating to land, it may be too harsh to deprive the applicant an opportunity to ventilate his case in the appeal. The respondents’ inconveniences could be taken care of by an order for costs.

In view of the foregoing, we allow this application and restore the Applicant’s ***Civil Appeal No.34 of 2013***, for hearing. Costs of this application are to be awarded to the respondents in any event.

Dated and delivered at Nyeri this 30th day of June, 2014.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR