



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPEAL (APPLICATION) NO. 167 OF 2009

BETWEEN

HENRY NJAGI MURUARIUA APPLICANT

AND

A.O OKELLO, DISTRICT COMMISSIONER

MBEERE DISTRICT1ST RESPONDENT

GUTU NTHARANO2ND RESPONDENT

(An application for reinstatement of the appeal from the ruling of the High Court of Kenya at Embu (Karanja, J.) dated 3rd June, 2009

in

H.C Misc. Applic. No. 18 of 2008(JR)

RULING OF THE COURT

1. Before us is an application brought pursuant to **Rule 102(1)** of the **Court of Appeal Rules** (the Rules) seeking *inter alia* an order setting aside this Court’s orders dated 10th March, 2014 dismissing the appeal herein and restoration of the appeal for hearing.
2. The background of this application is that the appeal herein came up for hearing before us on 10th March, 2014 and was dismissed for non-attendance. The applicant filed the aforementioned application on 19th March, 2014. Mr. Daniel Kamunda, the applicant’s advocate, swore an affidavit in support of the application. He deposed that the appeal was dismissed because he was absent. At all material times the applicant was present in court. Mr. Kamunda deposed that he was not served with the hearing notice and only learnt about the hearing date on the material morning from the applicant. By then it was too late to travel to Nyeri from Nairobi. Consequently, he instructed an advocate in Nyeri to hold his brief, explain his predicament and pray for an

adjournment and seek the Court's indulgence for the appeal to be disposed by way of written submissions. He also contacted the 2nd respondent's counsel and informed him of his predicament. According to Mr. Kamunda, this Court declined to grant the adjournment sought and dismissed the appeal. He maintained that the applicant was keen to prosecute the appeal and the respondents would not suffer any prejudice if the order sought was granted. He deposed that unless the orders sought are granted the applicant would be condemned unheard. He urged the Court to restore the appeal.

3. In opposing the application, Mr. Duncan Okwaro Muyodi, learned counsel for the 2nd respondent, swore an affidavit. He deposed that the appeal was filed on 15th July, 2009 and came up for hearing for the first time on 10th October, 2013; the appeal was adjourned on the grounds that the applicant's advocate had just come on record and needed time to familiarize himself with the matter. The appeal came up again for hearing on 10th March, 2014 when it was dismissed for non-attendance. According to Mr. Muyodi, the applicant's counsel was aware of the hearing date and there was no reason to justify the orders sought. He deposed that the application lacked merit and urged the Court to dismiss the same.
4. The appeal herein was dismissed under **Rule 102(1)** of the Rules which provides:-

“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 rehear the cross appeal, if he can show that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing.” Emphasis added.

From the foregoing, the power to reinstate a dismissed appeal is discretionary and the onus is on the applicant to satisfy the Court that his advocate was prevented by any sufficient cause from appearing when the appeal was called for hearing. See this Court's decision in ***K&K Kamman Limited –vs- Mount Kenya Game Ranch Limited & 3 others- Civil Appeal (Application) No. 120 of 2003.***

Musinga, J.A in ***The Hon. Attorney General –vs- The Law Society of Kenya & Another – Civil Appeal (Application) No. 133 of 2011*** while considering the meaning of sufficient cause observed as follows:

“Sufficient cause or good case in law means:-

‘The burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused.’ See Black’s Law Dictionary, 9th Edition, page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

5. We have considered the explanation given by the applicant's advocate for his absence on the hearing date and find it plausible. We therefore give the applicant the benefit of doubt. We also find that the application seeking restoration of the appeal was filed without delay and within 30 days of the dismissal as required under the provisions of **Rule 102 (3)** of the Rules. In ***Richard Nchapi Leiyagu –vs- IEBC & 2 others- Civil Appeal No. 18 of 2013*** this Court held,

“ We agree with the noble principles which go further to establish that the Court’s discretion to set aside an ex-parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or

error.”

6. Consequently, we allow the applicant’s application and hereby restore the appeal herein to be heard on merit. Costs of the application shall be borne by the applicant.

Dated and delivered at Nyeri this 22nd day of July, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR