



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A.)**

**CIVIL APPEAL (APPLICATION) NO. 217 OF 2002**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**AND**

**THE DISTRICT COMMISSIONER, SIAYA ..... RESPONDENT**

**AND**

**JOHN AGORO MURUTO ..... INTERESTED PARTY**

*(An Appeal from the Ruling and Order of the High Court of Kenya at Kisumu (Tanui, J.) dated 23rd May, 2002*

**in**

**MISC. CIVIL APPLICATION NO. 29 OF 1996)**

\*\*\*\*\*

**RULING OF THE COURT**

The Notice of Motion dated 26th March, 2014 and filed on 31st March, 2014 seeks two orders which are that:-

- “1. The Ruling and Order of this Court made and delivered at Kisumu on the 20th of January 2014 by the Honourable Justices P. Waki, D. Maraga and S. ole Kantai be reviewed and set aside.***
- 2. The applicant's Notice of Motion application dated the 15th of November 2011 be restored and set for hearing.”***

The main ground in support of the application is that, the learned counsel handling the matter for the applicant who is the appellant, Nicholas Oluoch Lwanda in Civil Appeal No. 217 of 2008 was not aware that the matter dismissed on 20th January, 2014, which dismissal he seeks to set aside had been set down for hearing on 20th January, 2014, and only came to know that on 10th March, 2014, on routine check up of his files at the chambers, after perusing the court file out of curiosity, and that the application needed to be heard interpartes as it was also an application that sought to set aside an order of the Court that

marked as having abated pursuant to Rule 96 (2) of this Court's Rules, Civil Appeal No. 217 of 2002 the genesis of the entire saga. There was an affidavit sworn by A.O. Wasuna, the learned counsel for the applicant which reiterated the same grounds set out in the Notice of Motion.

The application was not opposed. There was no replying affidavit filed in response to the supporting affidavit and Mr. Maroro, the learned State counsel who was for the respondent told us that he was not opposing the application and thus naturally left the matter to us as is normally the case as the Court will always have the last say whether a matter is opposed or not.

The brief history will help ventilate the real issues raised by the application. By way of a Notice of Motion dated 13th March, 2002, the applicant **Nicholas Oluoch Luanda** sought orders of review which was mainly order of certiorari to remove into Court for purposes of being quashed the proceedings, decision and order of the District Commissioner, Siaya (*on behalf of the Minister for Lands and Settlement*), dated 22nd November 1994 in Appeal No. 187 of 1994. A preliminary objection was raised before Tanui, J. (*as he then was*), before that Notice of Motion could be heard. That objection was heard and in a ruling dated 23rd May, 2002, the learned Judge upheld it, found the Notice of Motion incompetent and fatally defective for non-compliance with the provisions of Order LIII Rule 7 (1) of the then Civil Procedure Rules and dismissed the same Notice of Motion with costs.

The applicant felt aggrieved. He moved to this Court by way of Civil Appeal No. 217 of 2002. That appeal came up for hearing on several occasions but could not proceed to hearing because, the information that the various counsel availed to the court on three occasions was that the interested party John Agoro Muruto had died. At last on 25th November, 2009, this Court differently composed, marked the appeal as having abated pursuant to Rule 96 (2) of the Court's Rules. However, in an application dated 15th November, 2011, and filed on 6th March, 2012, the applicant sought the setting aside of the order made and dated 25th November, 2009, on grounds *inter alia* that neither the appellant, nor the respondent was deceased and that much as John Agoro Muruto had indeed died, his death could not have put any impediment on the hearing of the appeal as he was only an interested party while the appellant and the respondent were still alive and could continue with the appeal. That application came up for hearing on 20th January, 2014 and this Court, again differently constituted made an order as follows:

**“The Notice of Motion dated 15th November, 2011 was listed for hearing today. Upon its being called out there is no appearance by counsel for the Applicant or the Respondent. Hearing Notices were received (sic) upon M/S Wasuna & Co., Advocates for the Applicant and the Provincial Litigation counsel, Kisumu on 11.12.2013. In the absence of the parties to the mention the same is hereby dismissed under rule 56 (1) of the Court rules. We make no order on costs.”**

That is the order that the applicant wants the Court to set aside and to reinstate the application for hearing.

Rule 56 (1) of this Court's Rules states as follows:

**“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.”**

and Rule 56 (3) states:

**“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 rehear 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 out for hearing.”**

The applicant now comes before us seeking restoration of the application dated 15th November, 2009, which was dismissed pursuant to rule (56 (1) on 20th January, 2014 and the only reason advanced by

Mr. Odhiambo, the learned counsel for the applicant, is that there was grave administrative mix up in his chambers resulting in his clerk failing to bring to his attention the date that was fixed for hearing the application dated 15th November, 2009, which date, he later came to learn was 20th January, 2014, but he came to know this on 10th March, 2014, long after the matter had come up for hearing and had been dismissed. Mr. Odhiambo accepted responsibility for the failure to show up in court on 20th January, 2014 and for the confusion that necessitated that failure. He however pleaded that the hearing of that dismissed application was important as if it remains dismissed then it could mean that the applicant would be thrown out of judgment seat without any opportunity to utter even a word in his matter.

We have considered the application. We think what happened to Mr. Odhiambo could happen to any practicing advocate and we commend him for being candid with the Court. That is what would enhance the integrity of practice. Much as we abhor any administrative failures in advocates' offices that would cause suffering to the unsuspecting clients and delay in dispensing justice, and would discourage the same, we think where the same has occurred, it is real strength to own to it and thereafter ensure it is not repeated.

Further, we have perused the Record of Appeal and we too agree that the application that was dismissed for non appearance needs to be restored, so as to enable the Court investigate fully whether or not the facts that led to the order of abatement of the appeal were properly ventilated, for if it was true that the appellant and the respondent are still alive then whether the interested party should have been described as the effective appellant are matters that the Court might need to revisit. We say no more for fear of prejudicing the future bench.

In conclusion, the application is merited. It is allowed. The dismissal of the application dated 15th November, 2011, is hereby set aside and that application is hereby restored to hearing. As the respondent in this application has not sought costs, we order each party to bear its own costs of the application.

**Dated and Delivered at Kisumu this 11th day of July, 2014.**

**J. W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

**F. AZANGALALA**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy

of the original.

**DEPUTY REGISTRAR**

