IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, M'INOTI & MURGOR, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 70 OF 2004

BETWEEN

SAVINGS & LOAN KENYA LTD.....APPLICANT

AND

ONYANCHA BWOMOTE.....RESPONDENT

(Application for reinstatement of Civil Appeal No 70 of 2004 dismissed

on 7th November, 2013 being an appeal from the judgment and

decree of the High Court of Kenya at Nairobi (Mutungi J.)

dated 10th February 2004,

in

H.C.C. C. NO. 212 OF 2002)

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RULING OF THE COURT

On 7th November, 2013, the applicant's appeal, **Civil Appeal No. 70 of 2004,** was dismissed for non appearance under **Rule 102(1) of the Court of Appeal Rules**. The record indicates that when the appeal was called out for hearing as scheduled, counsel for the respondent was present in court and ready to proceed with the hearing, but there was no appearance by the appellant or its counsel, even after the matter was placed aside until 11.00 am.

On 6th December, 2013, the applicant filed the Motion on Notice now before us under **Rule 102**,**Sections 3A and 3B of the Appellate Jurisdiction Act** and **Article 159 of the Constitution** seeking reinstatement of the dismissed appeal. The Motion is supported by an affidavit sworn on 6th December, 2013 by **Mr. Walter Amoko,** learned counsel for the applicant, in which he has deponed to the circumstances under which he failed to attend the Court for the scheduled hearing on 7th November, 2013.

Mr. Amoko confirms that the hearing date of 7th November, 2013 was taken with the consent of both parties. He explains that he duly entered the date in his electronic diary and subsequently in their law firm's master diary. As the date of the hearing drew near, by oversight of the court clerk, the file was not brought to Mr. Amoko who was assigned the appeal, but was instead taken to one of his partners who had previously attended to the matter. Arising from that confusion, neither of the two partners attended the hearing on the appointed date, resulting in the dismissal of the suit.

Learned counsel submitted the failure to attend court on the appointed day was inadvertent and not deliberate and that he had fully taken responsibility for the mistake. He relied upon the ruling of the Uganda Court of Appeal in **WANENDEYA VS GABOI & ANOTHER (2002) 2 EA 662** where in reinstating an application that had earlier been dismissed for non attendance, the court stated that disputes ought to be determined on merits and that lapses ought not necessarily debar a litigant from pursuing his rights. Mr. Amoko also cited the ruling of this Court in **KATSURI LTD VS NYERI WHOLESALERS LTD, CA (App) No 248 of 2012 (Nyeri)** where a dismissed appeal was restored, the mistake involved having been the omission of counsel to enter the date of the hearing in his diary.

The respondent opposes the application on the basis of two paragraphs in an affidavit sworn on 20th December, 2013 by **Mr. Livingstone Maina Ombete**, learned counsel for the respondent. The gist of the response is that no sufficient cause has been demonstrated and indolence on the part of counsel is not sufficient cause.

In his submissions Mr. Ombete argues that Rule 102(3) of this Court's Rules requires the application for reinstatement to be made within 30 days of the dismissal; that instead of making the application immediately, the applicant did so towards the end of the 30 days period; that though notified of the hearing date by its counsel, no representative of the applicant was in Court on 7th November, 2013 when the appeal was dismissed; and that the suit had been in court for a long time, and so required to be brought to a speedy conclusion.

We have considered the application, the submissions of learned counsel and the authorities cited.

Rule 102 gives this Court discretion to reinstate an appeal that has been dismissed for want of appearance. The rationale behind the rule is the fact that sometimes, for reasons beyond the control of the parties or their counsel, they may fail to attend court on the appointed day. The rule has two conditions that the appellant must satisfy before the court can exercise its discretion in his favour. The first is that the application for reinstatement should be made within 30 days of the dismissal. The second is that, the applicant must show that he was prevented by sufficient cause from appearing for the hearing.

It is not disputed that this application was filed within 30 days of the dismissal of the appeal as required by Rule 102. The respondent's complaint is that it was filed towards the tail end of the 30 days. With respect we do not think this complaint is well founded. The law gives the applicant 30 days to file the application and consequently, the applicant who files the application for reinstatement of the appeal on the 1st day of the 30 days, or the one who files on the last day are both within the law.

As for sufficient cause, in our view, sufficient cause means no more than reason enough that explains or excuses the applicant's default. The applicant's counsel has candidly explained the blunders that caused him to miss the court date. There is no dearth of authority on the approach taken by our courts where a mistake is involved. In **CMC HOLDINGS LTD VS JAMES MUMO NZIOKA (2004) KLR 173** this Court stated as follows regarding mistakes in the context of applications to set aside ex parte orders:

> **"[T]he discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be aproper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error."**

Before that decision, the former Chief Justice, **Kwasi Apaloo,** while still a judge of appeal, stated as follows regarding blunders and mistakes such as those involved in this application:

> **"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 parties and not the purpose of imposing discipline."**
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> (See **PHILIP CHEMOWOLO & ANOTHER -VS- AUGUSTINE KUBEDE**
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> **(1982-88) KAR 103 at 1040).**

A few years earlier before Apaloo, JA spoke another former Chief Justice, **C. B. Madan,** when also a judge of appeal, had uttered his now famous words in **BELINDA MURAI & 9 OTHERS -VS- AMOS WAINAINACA No. NAI. 9 OF 1978** regarding mistake by counsel:

> **"A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court may feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to have known better. The court may not condone it but it ought to certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometime overrule.."**

Though spoken years long before the promulgation of the Constitution of Kenya, 2010 and the enactment of sections 3A and 3B of the Appellate Jurisdiction Act, the words of justices Madan and Apaloo resonate too well with the letter and spirit of the Constitution and the Act. Article 159 of the Constitution admonishes us to administer justice without undue regard to procedural technicalities whilst the Appellate Jurisdiction Act as amended demands the just, expeditious, proportionate and affordable resolution of appeals.

There is nothing on record to suggest that the applicant is trying or has previously tried to undermine or delay the expeditious and just determination of the appeal, or is otherwise guilty of overreaching or dilatory conduct in this litigation. Beyond the failure by counsel to attend Court on 7 th November, 2013, the failure of a representative of the applicant to attend is not difficult to understand in the hearing of an appeal where no witnesses are required to testify. That this litigation has taken sometime in the courts is not in dispute. However there is nothing on record to suggest that the applicant is the culpable party. The reasons advanced by the applicant fall within the permitted boundaries for allowing this application.

We are satisfied that the failure by the applicant's counsel to attend court on 7th November, 2013 is not only excusable, but has also been explained to our satisfaction. An order of restatement of the appeal will enable both parties to properly have their day in court, for the Court strives to do justice, and denying a party a chance to be heard on merit is a last resort measure. Though inconveniencing to the respondent, the inconvenience is capable of being adequately compensated by an award of costs.

In the event, we allow the application and reinstate Civil Appeal No. 70 of 2004. We direct that the same be set down for hearing and determination forthwith. The respondent shall have costs of this application in any event.

Dated and delivered at Nairobi this 3rd day of October, 2014

M. WARSAME

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

jkc