



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: NAMBUYE, J.A (IN CHAMBERS))**

**CIVIL APPLICATION NO. NAI. 221 OF 2011**

**BETWEEN**

**MARY MUTHONI NJERU..... APPLICANT**

**AND**

**DUNCAN MUGO NDATA.....RESPONDENT**

*(An application for extension of time to file a Notice and Record of Appeal against the Judgment of the High Court of Kenya at Embu (Karanja, J.) dated 9<sup>th</sup> June, 2010*

*in*

***H.C.C.C No. 78 of 2008)***

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**RULING**

The background to this ruling is that in a judgment delivered in Embu HCCC No. 78 of 2008 delivered by W. Karanja J, (as she then was,) the court found for the respondents. The applicant became aggrieved with that judgment and moved to this court and preferred an application by way of notice of motion dated the 3<sup>rd</sup> day of August, 2011 and filed on the same 3<sup>rd</sup> August, 2011 firstly seeking leave of court to extend time within which to lodge a notice of appeal and the draft notice of appeal be deemed to have been filed and lodged upon payment of the requisite filing fee and that upon granting prayer 1, for extension of time within which to lodge the notice of appeal, that the court do proceed to extend time within which to file the record of appeal.

The application came up for hearing on the 24<sup>th</sup> day of May, 2012 and when called out for hearing, Wangechi Munene, learned counsel for the applicant though served was absent. Only Mr. Joe Kathungu learned counsel for the respondent who had allegedly just been served the previous day attended court and since there was no explanation for non attendance by the applicant's counsel, the respondents counsel prayed for the dismissal of the application for want of prosecution and E. M. Githinji, J.A accordingly marked the application as dismissed under Rule 56 (1) of the Court of Appeal Rules.

On 20<sup>th</sup> June, 2012, the applicant presented the application subject of this ruling brought by way of a notice of motion brought under section 56 (3) of the Court of Appeal rules seeking the setting aside of the dismissal order of 24<sup>th</sup> May, 2012 and reinstatement of the application of 3<sup>rd</sup> August, 2011 for hearing

and disposal on its merit.

When the application came up for hearing inter partes before me, Wangechi Munene, learned counsel appeared for the applicant, whereas Ms E. Nyaga holding brief for Mr. Joe Kathungu appeared for the respondent. In her oral highlights to court, Wangechi Munene for the applicant conceded that indeed she was absent from court on the 24<sup>th</sup> May, 2012 when the application came up for hearing inter partes but asserted that she had asked another counsel to hold her brief only to learn later that the said counsel could not hold her brief as he was related to the 2<sup>nd</sup> respondent in their capacity as a father and son. She maintained she was genuinely indisposed and asked me to ignore allegations in the replying affidavits filed in opposition to the application for reinstatement firstly for being incompetent and secondly for the affidavit of Robinson Ndata Mugo being displaced as the said deponent is not a party to these proceedings. Lastly that I should not punish the litigant for any errors or omissions occasioned by her as counsel on record. With that she urged me to reopen the matter for her client to be heard on merit.

In response, Miss E. Nyaga holding brief for Mr. Joe Kathungu opposed the application. She placed reliance on the contents of both affidavits deposed by Robinson Ndata Mugo and Joe Kathungu. It is their stand that Mr. Mugo was not in court on the date mentioned by Wangechi Munene and secondly that the medical chit exhibited by Wangechi Munene is suspect and should be disregarded. On that account, she urged me to find that no reasonable explanation had been given for non attendance and considering that the intended appeal is not arguable, there is no need for me to exercise my discretion to revive the dismissed application.

In response to that submission, Wangechi Munene urged me to disregard the respondents allegation that the medical documents are suspect as there is no basis for such an assertion. As such, her allegation of indisposition on account of sickness has not been ousted. Lastly that there is nothing to suggest that she had served the application a day to the hearing date.

My jurisdiction to revive the application dismissed for want of prosecution has been invoked under rule 56 (3) of the Court of Appeal rules. It provides:

***“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 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 for hearing”***

The central command in the rule is found in word 'may'. It is now trite that this denotes the exercise of my discretion. The parameters for the exercise of such a discretion have now been crystallized by case law. In the case of ***Samken Limited, Abercrombie & Kent Limited versus Mercedes Sanchez Rau Tussel & Mohamed Osman Maalim – Civil Application No. Nai. 21 of 1999 (unreported)*** the Court of Appeal stated inter alia that:

***“We said at the beginning of this ruling that rule 4 under which the applicants went before the single Judge gives an unfettered discretion to the single Judge in deciding whether or not to grant an extension sought. Though the discretion is unfettered, like all judicial discretion, it must be exercised on reason, not caprice, and the exercise must not be arbitrary or oppressive. Accordingly, the Courts have over the years put down guidelines on how the exercise of a discretion ought to be done”***

There is also the celebrated case of Shah versus Mbogo (1967) EA 116 where it was held inter alia that:-

***“that the courts discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused”***

Applying the above set out guidelines and principles to the rival arguments herein, I am of the opinion that as submitted by the applicants counsel there is nothing to prove that she feigned illness. She has exhibited a medical chit on her indisposition. I therefore find that counsel for the applicant was genuinely indisposed.

As for making arrangements for another counsel to be present in court, I find this is borne out by the content of the deponement of Mr. Mugo save that he was not in court on that date and could not hold brief.

As for lack of belated service of the application on the respondent, I agree with the applicant's assertion that there is no proof of the same.

As for the issue of lack of arguability or otherwise of the intended appeal fronted by the respondent, I believe this is for the merit argument to be taken up by the parties if the dismissed application is reinstated.

Lastly, I agree with the applicant's assertion that non attendance was occasioned by learned counsel and this should not therefore be visited on the client and curtail her intended undoubted right of appeal, which is constitutional and entrenched as a fundamental right. I do bear in mind the prescriptions in article 22 (3) (d) and 159 (2) (d) of the current Kenya Constitution 2010, which enjoins me not to render justice on the basis of technicalities. Shutting out the applicant from the seat of justice in the manner suggested by the respondent will amount to rendering justice to her on the basis of technicalities.

I also bear in mind the overriding objective principle enshrined in section 3 A and 3 B of the Appellate Jurisdiction Act Cap 9 Laws of Kenya which enjoins me to strive to achieve fair, just, speedy, proportionate time and cost saving disposal of cases in litigations coming before me. Shutting out the applicant from the seat of justice prematurely cannot be construed to be fair and just. Interest of justice to both parties demands that issues in controversy as between the applicant and the respondent in the application which had been filed on 3<sup>rd</sup> August, 2011 and dismissed by E. M. Githinji JA on 24<sup>th</sup> May, 2012 be disposed off on their merit.

In the premises and for the reasons given in the assessment, I am inclined to grant prayer 1 of the notice of motion application filed herein on 20<sup>th</sup> June, 2012.

The dismissal order dismissing the application of 3<sup>rd</sup> August, 2011 for want of prosecution made by E. M. Githinji Judge of Appeal on 24<sup>th</sup> day of May, 2012 is set aside.

The application filed on 3<sup>rd</sup> August, 2011 is reinstated. The same is directed to be re-listed at the registry on any convenient date on priority basis. The respondent will have costs of this application.

**Dated and delivered at Nyeri this 6<sup>th</sup> day of June, 2013.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**