



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 15 OF 2013

BETWEEN

KITTS MBATI MUKONYOLE APPELLANT/APPLICANT

AND

LEVI NDOMBI MUKONYOLE RESPONDENT

(In the matter of an application to reinstate the appeal dismissed

pursuant to rule 102 (1) of the Court of Appeal Rules)

RULING OF THE COURT

On 23rd April, 2012, Civil Appeal No. 16 of 2007, came up for hearing before this Court differently constituted. Neither the appellant, nor the respondent nor their respective advocates were in court when the appeal was called out for hearing. The Court then made orders as follows:-

“On this appeal being called out for hearing this morning, neither the appellant nor the respondent is present though both were duly served with the hearing notice of today's hearing.

In the circumstances, the appeal is dismissed pursuant to Rule 102 (1) of this Court's Rules.

We make no orders as to costs.”

Thereafter, no activities are traceable in the file till 7th June, 2013, when the appellant, ***Kitts Mbat***
Mukonyole, filed this Notice of Motion before us dated 3rd June, 2013, in which he is seeking two Orders namely:-

“1. That the honourable court be pleased to set aside or vary the orders issued on 23rd April, 2012, dismissing the applicant's civil appeal No. 16 of 2007 under S. 102 (1) of the Court of Appeal Rules.

2. That the costs hereof be in the cause.”

The application is premised on six grounds which are:-

- “(i) *The appeal was dismissed for non attendance of parties.*
- “(ii) *The appellant was not aware of the date when the appeal ought to have been heard as he received no communication from his Advocate.*
- iii. *There was communication break down between the Honourable Court and the applicant's Advocate who switched firms and failed to inform the court of changing address.*
- iv. *The dispute regards occupation and ownership of land and is yet to be resolved.*
- v. *The failure of the Applicant and his Advocate to attend court was not deliberate and is thus excusable.*
- vi. *The appellant learnt of the Dismissal order on 20.05.2013.”*

Together with the above grounds, the applicant also swore affidavit in support of the application and Mr. Oscar W. Munyendo, who was applicant's advocate on record at the relevant time and is still on record for him also swore an affidavit explaining that when he assumed the conduct of the appeal, he was in a partnership known as M/S Munyendo, Muleshe & Co. Advocates. That partnership broke up in the year 2008, but he failed to inform the court of the change of address. Consequently that was the firm served with the hearing notice for the date the matter came up for hearing. As that firm was non existent, he never got the hearing notice in respect of the hearing date although his former colleague always forwarded to him documents received at the firm and intended for him. He however did not receive that hearing notice as it was not forwarded to him in case it was served as claimed and consequently, he did not inform his client, the appellant, of the hearing date much as the appellant was intensely interested in knowing the hearing date for his appeal and demonstrated that interest by writing to him inquiring about the hearing date. He however, did not state in that affidavit as to when he came to know that the matter had been dismissed for non attendance of the court on the hearing date. However, as we have set out above, the applicant, in the grounds in support of the application states that he came to know about the dismissal on 20th May, 2013.

The application was opposed, and the respondent, through his firm of Advocates filed what was headed “**Grounds of Opposition,**” a procedure unknown to the Court of Appeal Rules. He however, stated in that document that the application is fundamentally defective, bad in law, incompetent and a mere abuse of the due process of the Court; that the applicant is guilty of laches and that the delay in filing the application is inordinate.

Before us, Mr. Munyendo, in urging us to allow the application, repeated the same grounds raised in his and the applicant's affidavit whereas Mr. Osango, in opposing the application, was of the view that the application offended the provisions of **Sections 3A and 3B** of the **Appellate Jurisdiction Act** as it does delay the Judicial Process.

The appeal sought to be reinstated was dismissed pursuant to the provisions of **Rule 102 (1)** of this Court's Rule. That Rule states:-

“(1) 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 out for hearing.”

That Rule does not end there, **Rule 102 (3)** sets out the time within which such application for restoration of the dismissed appeal may be made. It states:-

“An application for restoration under the proviso to Sub-rule (1) or the proviso to Sub-rule (2) shall be made within thirty days of the decision of the court, or in the case of a party who should have been served with notice of the hearing but was not so served, within thirty days of his first hearing of that decision.

The appellant says he heard about the dismissal of his appeal on 20th May, 2013. That is not in the affidavit. It is in the grounds in support of the application. That may be treated as very weak evidence but as there is no affidavit or averment challenging it – not even in what the respondent calls grounds of opposition, we have no reason to discard it. The effect of that is that this application having been filed on 7th June, 2013, only 18 days after the applicant knew of the dismissal, cannot be said to have been filed late. The applicant indeed had thirty days from 20th May, 2013, to file it but he filed it long before that period expired. Thus the application is properly before us.

Mr. Osango submitted that it offends the provisions of **Sections 3A and 3B** of the **Appellate Jurisdiction Act**, but he did not explain in what way for we have found, it was timely filed. We appreciate that when one considers the date of decision dismissing the appeal which was 23rd April, 2012, then the application was filed one year later, but **Rule 102 (3)** makes it clear that in case of application for restoration based on lack of service then the date the applicant knew of the decision is the effective starting point in computing the period for filing the application and that date, in this application was 20th May, 2013. In effect a year may have passed, but the applicant claims that despite his anxiety to have the appeal heard and finalised, he never knew it had actually come up for hearing and had been dismissed. In short there was no delay.

That leaves the main matter to be considered and that is, has the applicant demonstrated sufficient cause that prevented him from appearing when the appeal was called out for hearing? In our view, we think in considering this aspect the Court must consider whether the appellant has adduced sufficient evidence as to why he could not appear on the hearing date. In our view, the Court in considering this, exercises, unfettered discretionary powers. The standard required, we think is the same as was stated in the case of ***Shah v Mbogo and Another (1967) EA 116*** which was a High Court decision but which in our view could be applicable here. There, the principles to be applied before setting aside a judgment were stated as follows:-

“Applying the principles that the court's 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.”

This Court, in the case of ***Philip Keipto Chemwolo and Mumias Sugar Co. Ltd v Augustine Kubende (1982) 1 KAR***, held as follows on similar issue of setting aside a judgment:-

“1. The Court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties.”

The above two cases were dealing with judgments entered in default of appearance, but we think that in general, the principles would apply in a case such as before us where the appeal was dismissed for non appearance and the appellant now seeks to set aside the dismissal and to restore the Appeal. As the rule says the applicant must demonstrate cause why the appeal should be restored and the court, as we have said, in considering the same exercises discretionary powers which must be exercised judiciously and not upon any whims of the Court or capriciously.

In the matter before us, the unchallenged facts are that the hearing notice for the date set down for

hearing the appeal may have been served upon the firm of Advocates that was in the record and in which Mr. Munyendo was a partner, but Mr. Munyendo says by the time the service might have been done the partnership had dissipated and was no longer in existence. His erstwhile partner who used to forward to him documents concerning him did not forward to him the relevant hearing notice and so he did not know of the hearing date and could not therefore inform his client, the appellant, who had all along been interested in knowing that date. In the circumstances obtaining and there being nothing to rebut those allegations, we are persuaded that the applicant has demonstrated cause to our satisfaction, why the appeal should be restored. As we have stated, we do not see in what way **Section 3A** and **3B** are violated, for the application in effect seeks that the appeal be heard on merit so as to ensure justice in the entire matter and thus to remove the dismissal which was a technical manner of disposing of the appeal. In our view the applicant is on the contrary seeking the application of **Section 3A** and **3B** to ensure fair and just disposal of the appeal.

We allow the application. The order made on 23rd April, 2012, is hereby set aside and the Appeal is restored to hearing. We make no order as to costs as the respondent was also absent on 23rd April, 2012, when the appeal was dismissed.

Dated and Delivered at Kisumu this 24th of October, 2013.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR