



**IN THE COURT OF APPEAL**

**AT NYERI**

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

**CIVIL APPEAL (APPLICATION) NO. 121 OF 2010**

**BETWEEN**

**PHILIP MUCHIRI MUGO ..... APPELLANT/ APPLICANT**

**AND**

**MBEU KITHAKWA ..... RESPONDENT**

*(An application to set aside this Court's order dated 22<sup>nd</sup> July, 2013 which dismissed the appeal herein for non- attendance from a ruling of the High Court of Kenya at Nyeri (Makhandia, J.) dated 26<sup>th</sup> February, 2009*

*in*

***HCCC No. 111 of 1990***

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**RULING OF THE COURT**

1. Before us is a Notice of Motion application dated 1<sup>st</sup> August, 2013 wherein the applicant seeks the following orders:-
  - ***That the order made by this Honourable Court on 22<sup>nd</sup> July, 2013 dismissing the appeal be set aside and/or vacated.***
  - ***That the appeal herein be restored for hearing.***
  - ***That the costs of the application abide by the outcome of the appeal.***

The grounds upon which the applicant relied on in support of his application were that the appeal herein was dismissed on account of non-attendance by the applicant's counsel; at all material times the applicant was present in court; the applicant's counsel arrived late in court when the dismissal order had already been issued; the failure by the applicant's counsel to attend court on time was not deliberate but due to circumstances that were beyond his control; the applicant is desirous of prosecuting his appeal to its logical conclusion; the subject of the appeal is a land dispute; the applicant ought not to be punished for his counsel's mistake; if any prejudice is occasioned to the

respondent the same can be compensated by way of costs.

2. The genesis of this application is that the appeal herein came up for hearing before us on 22<sup>nd</sup> July, 2013. When the matter was called out the applicant who was present in court requested us to place the matter aside for a while since his advocate who was travelling from Nairobi had not yet arrived. We acceded to the request and placed the file aside until 10:00 a.m. The matter was then subsequently called out at 10:45 a.m but still the applicant's counsel had not arrived. Pursuant to an application made by Mr. Mungai, learned counsel for the respondent, we dismissed the appeal herein for non attendance.
3. In support of the application before us Mr. Kipkorir Arusei, learned counsel for the applicant, deponed that he had instructed his associate Miss Mary Kerubo Ongaki to attend to the appeal which was scheduled for hearing on 22<sup>nd</sup> July, 2013 since he would be engaged on the same day in an Election Petition which was been heard in Kericho. On the evening of 21<sup>st</sup> July, 2013, Miss Mary Kerubo Ongaki informed Mr. Arusei that she was unwell and would not be able to attend court the following day; immediately thereafter Mr. Arusei instructed Mr. Donald Ochieng Omondi to attend to the matter. Mr, Donald Ochieng deponed that due to the short notice, the arrangements that were made for him to obtain the file coupled with the delay on the road he arrived in court late. He stated that he was in constant communication with the applicant whom he instructed to seek the indulgence of this Court on his behalf; he made several efforts to contact the respondent's counsel to seek his indulgence without success. He maintained that the delay in attending before this Court was not deliberate and was due to circumstances beyond his control; he attended court on the same day albeit late. Mr. Arusei also deponed that the mistake of counsel should not be visited upon the applicant who is desirous of prosecuting the appeal to its conclusion.
4. In opposition Mr. Mungai, learned counsel for the respondent deponed that the application before us was vexatious, bad in law and an abuse of the court process; once this Court issued the dismissal order it was *functus officio* and the only avenue available to the applicant was to file an appeal against the said order to the Supreme Court. It was Mr. Mungai's position that the applicant would not suffer any prejudice if the application was not allowed. Further, the respondent deponed that the appeal which was dismissed arose from H.C.C.C No. 11 of 1990; the applicant was not a party in the said High Court suit and therefore lacked *locus standi* in this appeal. It was the respondent's contention that the dismissed appeal had been overtaken by events since the suit property had since been registered in his favour pursuant to an order issued in the above mentioned High Court suit.
5. Mr. Omondi who appeared for the applicant, submitted that the mistake of counsel should not be visited upon the applicant; justice dictated that the applicant should be given an opportunity to prosecute the appeal. He stated that the dispute involved family land. He urged us to exercise our discretion and re-instate the appeal. Mr. Mungai on the other hand, in opposing the application, submitted that the applicant had not give sufficient cause as required under **rule 102** of the **Court of Appeal Rules** to warrant the re-instatement of the appeal. He urged that in the event that we are minded to re-instate the appeal the applicant should be ordered to deposit in court Kshs. 150,000/= as costs.
6. **Rule 102** of the **Court of Appeal Rules** provides:-

***(1) If on any day fixed for hearing of an appeal the appellant does not appear, the appeal may be dismissed .....***

***Provided that where an appeal has been so dismissed .... the appellant may apply to the Court to restore the appeal for hearing ....., if he can show that he was prevented by any sufficient cause from appearing when the appeal was called for hearing.***

***(2)....***

***(3) An application for restoration under the proviso to sub-rule (1)..... shall be made within thirty days of the decision of the Court..”***

From the foregoing the applicant must demonstrate that the failure by his advocate to attend court on 22<sup>nd</sup> July, 2013 on time was reasonable; that the current application seeking reinstatement was filed within the requisite time frame after the dismissal of the appeal. We are satisfied that the reasons advanced by the appellant's advocate for his failure to attend court on time on 22<sup>nd</sup> July, 2013 are reasonable and excusable. Moreover, we also take note that the applicant's counsel did appear on the same day although after we had issued the dismissal order and apologised for his late attendance. The application that is before us was filed on 1<sup>st</sup> August, 2013, 9 days after the appeal was dismissed. Therefore, the application was filed within the requisite time frame.

7. In ***Shah – vs- Mbogo (1967) EA 116*** it was held that the court's discretion to set aside an *ex parte* order is intended to avoid injustice or hardship resulting from accident or inadvertence or excusable mistake or error but not to assist a person who has deliberately sought to obstruct or delay the cause of justice. In this instant case we are convinced that the failure of the applicant's counsel to attend court was not deliberate and was not aimed to delay the hearing of the appeal. Further, we are of the view that pursuant to the overriding objective of this Court to facilitate just and expeditious resolution of appeals we ought to exercise our discretion in favour of the applicant.
8. The upshot of the foregoing is that we allow the application herein; accordingly we set aside the orders dated 22<sup>nd</sup> July, 2013 dismissing the appeal for non attendance and re-instate the appeal. However we order the applicant to pay the costs of this application to the respondent.

***Dated and delivered at Nyeri this 10th day of December, 2013***

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***MARTHA KOOME***

.....

***JUDGE OF APPEAL***

***J. OTIENO-ODEK***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**