



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, O’KUBASU & NYAMU, JJ.A)

CIVIL APPLICATION NO. NAI. 303 OF 2009 (UR 209/2009)

BETWEEN

WESTLANDS TRIANGLE PROPERTIES LIMITED APPELLANT

AND

WESTLANDS SUNDRIES LIMITED & 2 OTHERS RESPONDENTS

(Application for Restoration of Civil Application No. NAI. 64 of 2009 (UR 37/2009))

RULING OF THE COURT

Before us is an application expressed to have been brought under **Rule 1 (2), 5 (2) (b), Rule 47 (1) & (2)** and **Rule 55 (3)** of the Court of Appeal Rules in which the applicant WESTLANDS TRIANGLE PROPERTIES LIMITED seeks the orders that:-

“2. The Applicant’s Application under Rule 5 (2) (b) dated

10th March, 2009 and presented to court on 11th March,

2009 and dismissed under Rule 55 (1) of the Court of

Appeal Rules on the 12th October, 2009 is restored to

hearing for hearing and determination inter partes.

3. Pending the hearing and determination of the application dated 10th March, 2009 the parties shall observe the status quo obtaining on the 12th October, 2009.

4. The costs of this application be in the appeal.”

This application which is supported by the affidavit of Stephen Musalia Mwenesi, the Advocate of the applicant, is brought on the following grounds:-

“a. The Applicant was the Plaintiff in the superior court Environmental and Land Law Division Civil Case No. 112 of 2008.

- b. The Applicant desires to appeal against the whole of the decision of the Honourable Lady Justice R. N. Sitati given on the 28th November, 2008.**
- c. The Applicant filed and served Notice of Appeal dated 28th November, 2008 respectively on 1st December, 2008 and 2nd December, 2008.**
- d. The Applicant lodged the notice of Appeal in the Court of Appeal on the 4th December, 2008 and served a copy of the lodged notice of Appeal on the 17th December, 2008.**
- e. The Applicant has an arguable appeal and seeks stay of execution and proceedings. In that regard the Applicant through the firm of S. MUSALIA MWENESI, ADVOCATES applied under rule 5 (2) (b) of the Court of Appeal Rules by application dated 10th March, 2009 which application was dismissed on the 12th October, 2009 under rule 55 (1) of the Court of Appeal Rules.**
- f. The Counsel for the Respondents has threatened contempt proceedings against the Applicant and its officers. The Respondents may also disturb the status quo unless the application for stay is restored to hearing and heard and disposed of urgently.**
- g. The Honourable Court has jurisdiction and powers under rule 55 (3) to order that the Applicant's application dated 10th March 2009 be restored for hearing and be heard and determined.**
- h. The jurisdiction of the Court of Appeal to grant stay under rule 5 (2) (b) of the Court of Appeal is original and discretionary.**

In his affidavit in support of this application Mr. Mwenesi depones:-

- “1. THAT I am advocate of the High Court of Kenya and I am instructed by the Applicant Westlands Triangle Properties Limited in this matter.**
- 2. THAT this application is brought under rule 55 (3) praying that the application dated 10th March, 2009 be restored for hearing and that the Honourable Court do rehear it.**
- 3. THAT on the date fixed for hearing on 12th October 2009 as the matter was called on for hearing inside the court I was at the court precincts robbing and the order marked “SMM 1” was made.**
- 4. THAT I had inadvertently omitted my Advocate wings and had informed counsel for the Respondents of my predicament.**
- 5. THAT my non-appearance was not intentional nor out of spite for the court but there was a genuine dress flaw. and I did not wish to appear wrongly dressed. I had sent a clerk to purchase the wings.**
- 6. THAT on coming to court I met counsel for the Respondents who informed me that the matter had been called out and had been dismissed under rule 55 (1) of the Court of Appeal Rules.**
- 7. THAT I am asking the court to indulge the Applicant who made no mistake in the matter and should have its day in court in accordance with the spirit of rule 55 of the Court of Appeal rules.**
- 8. THAT I am aware of the principle that the mistakes of counsel should not be visited on an innocent party and I ask the court to apply the same in this case.**
- 9. THAT I make this affidavit to support the Notice of Motion for restoration and rehearing of the Application dated 10th March, 2009.**

10. THAT I make this affidavit believing all that I have stated in it is true to the best of my knowledge information and belief.”

When this application came up for hearing before us on 5th February, 2010, Mr. Mwenesi, for the applicant, sought to rely on his supporting affidavit and the grounds on which the application was brought.

On his part, Mr. Issa, the learned counsel for the respondent, had no objection to the application for restoration of the earlier application but he opposed the granting of prayer 3 of the application.

There is no dispute that the applicant’s notice of motion was dismissed on 12th October, 2009 under Rule 55 (1) of this Court’s Rules. It is that order of dismissal that has necessitated this application for the restoration of the dismissed application. From the grounds in support of the application and the affidavit of Mr. Mwenesi there can be no dispute that this application was brought within the time prescribed by the rules. Again the reasons given for the non-attendance cannot be described as frivolous. In our view, the reasons have shown that there was sufficient cause for non-attendance.

Rule 55 (3) of this Court’s Rules 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 on for hearing.”

In view of the foregoing, we are satisfied that sufficient cause has been shown for non-attendance. The applicant is entitled to the order for restoration of the notice of motion.

As regards prayer (3) of the application there was opposition from Mr. Issa. On our part, we are of the view that to allow the application in terms of prayer 2 only and refuse prayer 3 would be an exercise in futility. We say so because unless the status quo is maintained then by the time the notice of motion is heard and determined the subject matter might have been interfered with as to render any further action by the applicant fruitless. We therefor allow this application and grant prayers 2 and 3 of the application. Costs shall abide the outcome of the notice of motion.

Dated and delivered at NAIROBI this 12th day of February, 2010.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APEPAL

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

DEPUTY REGISTRAR.