



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI. NAI NO. 21 OF 2006 (UR. 12/2006)

HAITHAR HAJI ABDI & ANOTHER

ABDI RAHIM HAITHAR HAJI APPLICANTS

AND

KENYA NATIONAL CAPITAL CORPORATION LIMITED 1ST RESPONDENT

SOUTHDOWNS DEVELOPING LIMITED 2ND RESPONDENT

(Application for stay of execution pending hearing and determination of an appeal from the ruling of the High Court of Kenya, Milimani Commercial Courts, Nairobi (Kasango J) dated 7th December, 2005

in

H.C.C.C. NO. 447 OF 2004)

RULING OF THE COURT

This is an application under **Rule 55 (3)** of the Court of Appeal Rules, for an order that the application dated 30th January, 2006 which was dismissed on 13th December, 2007 for non-attendance be reinstated to hearing.

The application is supported by an affidavit sworn by Albert Khaminwa and a second affidavit sworn by Dr. John Mugalasinga Khaminwa which affidavits explain why the applicants' advocates did not attend the hearing of the application on 13th December, 2007.

Both Mr. Njeru and Mr. Njenga, learned counsel for first and second respondent respectively opposed the application and contended, among other things, that the application is incompetent as it was filed after the 30 days stipulated by **Rule 55 (4)** of the Court of Appeal Rules.

Rule 55 provides:

“55. (1) If on any day fixed for the hearing of an application, the applicant does not appear, the application may be dismissed, unless the court sees fit to adjourn the hearing.

(2)

(3) *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.*

(4) *An application made under sub-rule (3) 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 served, within 30 days of his first hearing of that decision”.*

In this case, the applicants’ advocates were served with the hearing notice two months before hearing date but did not attend the hearing of the application on 13th December, 2007. This Court thereupon dismissed the application under *Rule 55 (1)*.

The present application was filed on 29th February, 2008. The 30 days stipulated by *Rule 55 (4)* started running from 14th December, 2007 but did not run during the Christmas Vacation from 21st December, 2007 to 13th January, 2008. The time started running again from 14th January, 2008.

According to our computation, the 30 days expired on or about 5th February, 2008. That means that the present application was filed 24 days out of time, thereby rendering the application incompetent.

In the result, we strike out the application as incompetent with costs to the respondents.

Dated and delivered at Nairobi this 11th day of July, 2008.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

A. ALUOCH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR