



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)**

**CIVIL APPLICATION NO. 54 OF 2016**

**BETWEEN**

**HOLY REDEEMED APOSTOLIC MINISTRIES INTERNATIONAL..... APPELLANT**

**AND**

**NEW SPRING OF LIFE MINISTRIES.....RESPONDENT**

***(Being an application to set-aside and/or vary this Honourable Court's Ruling/Order dated 21<sup>st</sup> April 2016, dismissing the appellant's Civil Appeal No. 58 of 2015 for want of prosecution pursuant to the provisions of section 102 of the Appellate Court Rules arising from the High Court at Busia***

***Environment and Land Case No. 6 of 2015)***

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**RULING OF THE COURT**

The applicant's Notice of Motion dated 14<sup>th</sup> July, 2016 seeks the setting aside of this Court's Order dated 21<sup>st</sup> April 2016, which dismissed the appellant's *Kisumu Civil Appeal No. 58 of 2015*, and allow the appeal to be set down for hearing *inter partes*. It was further prayed that the Court grant any other orders or directions as it deemed fit.

The application was on grounds that the appeal was dismissed for non-attendance of the applicant's advocate and the appellant on 21<sup>st</sup> April 2016 when the appeal came up for hearing; that the failure to attend Court was on account of an omission by the advocate's clerk to diarise the hearing date; that on the material day the advocate's clerk was ill and was subsequently admitted for a period of four days; that the omission should not be visited on the appellant; that the appeal raised triable issues and should be heard on its merits; that the appellant will suffer irreparable loss and damage; that the appellant was willing to compensate the respondent by way of thrown away costs. Finally, an apology was rendered to this Court for the inconvenience caused.

The motion was supported by the affidavit of ***Rayola Ochieng Olel*** dated 14<sup>th</sup> July, 2016 who deponed that he was unaware that the appeal had been fixed for hearing, and that it was only when he perused the file that he discovered that the appeal had been dismissed on 21<sup>st</sup> April 2016 for non-attendance. It

was further deponed that the hearing notice was received in their office on 15<sup>th</sup> March 2016 by one James Goga Ochola, their office clerk who at the time was unwell and later went to hospital; that he subsequently returned to work on 21<sup>st</sup> March 2016; that on account of his illness, the hearing date was not recorded in the advocate's diary. The deponent averred that the non-attendance was not deliberate or intentional but due to the explained circumstances.

The respondent filed a replying affidavit on 30<sup>th</sup> September 2016, wherein it was deponed that the applicant had failed to explain the inordinate delay as no explanation was provided for the delay between the time the dismissal was discovered and 20<sup>th</sup> July 2016, the date when the application was filed and in any event, the application was filed out of time.

In his submissions learned counsel for the applicant, **Mr. Onyango**, reiterated the grounds of the motion and supporting affidavit and concluded that the appeal is meritorious, and in the interest of justice, the applicant should not be condemned unheard on account of the mistakes of his advocate.

On his part, **Mr. Kopere**, learned counsel for the respondent opposed the application and submitted that the application was incompetent as, it was filed after the lapse of 30 days from the date of dismissal contrary to the stipulations of **rule 102 (3)** of the **Court of Appeal Rules**. Counsel argued that the lapse of time rendered the application incompetent, and furthermore no explanation for the delay had been provided. Counsel cited the case of ***Charles Alexander Kiai vs Frasia Wangui Gicheru Nyeri Civil Appeal (Application) No 247 of 2010***.

In his reply, **Mr Onyango**, argued that time begun to run from the date that counsel learnt of the dismissal of the appeal.

We have considered the motion, the supporting and replying affidavits together with counsels' submissions. What is before us is an application for the setting aside of an order by this Court dated 21<sup>st</sup> April 2016 dismissing the appellant's appeal for non-attendance of the applicant or his counsel.

**Rule 102 (1)** and **(3)** of this Court's Rules stipulate,

***"(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.***

**(2) ...**

***(3) An application for restoration under the proviso to sub –rule (1) or the proviso to sub rule 2(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 the hearing but was not served, within thirty days of his first hearing of that decision."***

From the record, the appeal was dismissed on 21<sup>st</sup> April 2016 by this Court for non-attendance of the applicant or his counsel. There is no dispute that the applicant's counsel was served with the hearing notice on 15<sup>th</sup> March 2015. It was explained that when it was received it was not recorded in the advocate's diary hence, the applicant's counsel was unaware of the hearing date, and so did not attend Court. Since the hearing notice was served on the applicant's counsel, Mr. Onyango's argument that the time under **rule 102(3)** begun to run from the date that counsel learnt of the dismissal of the appeal, is otiose as, on account of the service and acknowledgment of receipt of the hearing notice, the provision to **rule 102 (3)** was inapplicable to the circumstances of this case.

On the question of whether the application was filed out of time, the appeal was dismissed on 21<sup>st</sup> April 2016. This application was filed on 14<sup>th</sup> July 2016. The period between dismissal and filing of the application is computed as 84 days. Clearly, this was well outside of the 30 days period specified by the rules. We were provided with no explanation as to the reason for the delay, which was inordinate bearing in mind the time frame specified by the rules.

In the circumstances, we find that our hands are tied, and we must strike out the application with costs to the respondent.

***Orders accordingly.***

***Dated and delivered at Kisumu this 16<sup>th</sup> day of December, 2016.***

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**



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