

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
(Coram: Rawal, DCJ & VP of the Supreme Court)
MOTION NO. 4 OF 2013

IN THE MATTER OF COURT OF APPEAL
CIVIL APPLICATION NO. SUP 15 OF 2012 (UR 9/2012)

AND

IN THE MATTER OF REVIEW OF THE RULING OF THE COURT
OF APPEAL DATED 8TH MARCH 2013

BETWEEN

KOINANGE INVESTMENT & DEVELOPMENT LTD
.....APPLICANT

AND

ROBERT NELSON NGETHE
.....RESPONDENT

RULING OF THE COURT

The Originating Motion No. 4 of 2013 filed by the applicant herein was dismissed on 2nd July, 2013, the date fixed for its hearing by consent of both parties, on the ground of non-appearance of counsel for the applicant

as well as the applicant or its representative. The order of dismissal was made pursuant to **Rule 28(1)** of this **Court's Rules**.

The applicant, thereafter, filed an application on 22nd July, 2013 seeking orders to set aside the order of dismissal and to rehear the Motion dated 18th March, 2013. The application is premised upon Rule 28(2) of this Court's Rules, and is supported by the affidavit sworn by counsel on record for the applicant, Kennedy O. Ochieng on 18th July, 2013.

The reason for non-appearance by either of the counsel for the applicant was the confused recording of the hearing dates in their diaries. The affidavit in support annexed the pages of those diaries.

The respondent filed a replying affidavit sworn by his counsel **George Gitonga Murugara**, sworn on 13th August, 2013, contending *inter alia* that no confusion has been shown in the supporting affidavit.

The learned leading counsel, **Mr. A. B. Shah** submitted upfront that the said non-appearance was solely due to an error on the part of counsel of the applicant and their clerks.

Mr. Shah further submitted that the filing of the application after 20 days does not amount to inordinate delay. The case of ***Mwangi –vs- Mwangi (1999)***

E. A. (CAK) 234 was relied on wherein the following passage from the case of ***Njoroge “B” & others –vs- Chege (1997) LLR 614 (CAK)*** was adopted:

“The next question that arises is: what of the litigant? Should he suffer because of his advocate’s oversight? Rules of procedure are said to be good servants but mad masters. I am not saying that the rules can be flouted with impunity. All rules have their specific purpose(s) but I would not want a rule of procedure to drive a litigant out of the judgment seat if other rule(s) allow such a litigant to come back to this Court.

I bear in mind that this is the last Court for any litigant in this Republic of ours and the tendency of the Court ought to be to give a chance to the litigant to be heard on merit as far as possible. I am of course mindful of the fact that our rules of procedure have had their origin in England and the tendency in England is to move away from form to substance. I refer to the decision in Macfoy v United Africa

Company Ltd. [1962] at 152 and Pantin v Wood
[1962] 1 QB 594.” (emphasis supplied)

Lastly Mr. Shah laid emphasis on the issue that the original Motion filed by the applicant is merited not only on the ground of public interest, but also on the additional ground of miscarriage of justice. The Court, thus, was urged that the matter be heard on the merits, it being the apex court.

Ms. M. K. Karimi, learned counsel for the respondent, opposed the application, contending that the alleged confusion is not sufficiently demonstrated from the supporting affidavit. As per annexure GGM1 of the replying affidavit, the date of the Court of Appeal application was fixed in May, 2013 while the date for the matter on hand was fixed in April, 2013. Hence there was no reason for any confusion of the dates between the two matters.

I have duly considered the facts and submissions made before the Court and I am of the firm opinion that the unwarranted oversight of counsel cannot be visited on the applicant in this case.

I also take into consideration that the matter involves a valuable piece of land, and the applicant has raised an issue of miscarriage of justice. This

Court being the last court open to the applicant to canvas his claim, I shall grant him this last chance.

On this premise, I shall allow this application, set aside the Court's order dated 2nd July 2013, and direct that the Motion No. 4 of 2013 be set down for hearing. The costs of this application shall be borne by the applicant. I shall expect that counsel on record for the applicant may deem it fit to pay the costs themselves, considering that this situation arose due to their fault.

Orders accordingly.

Dated, signed and delivered at Nairobi this 21st day of **August, 2013**

Hon. Lady Justice Kalpana Rawal,
DEPUTY CHIEF JUSTICE