THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

HCCA NO. E070 OF 2022

TONY NYAMAI MWONGELA……APPELLANT/APPLICANT

VERSUS

AFRICA BROTHERHOOD CHURCH……RESPONDENT

RULING

1. Following the order of this court dated 26/06/2025 reinstating the application dated 14/11/2023, the matter came up on 24/7/2025 where only the Respondent appeared.

2.The said application sought the following orders;

"a. Spent

b. This Honourable Court be pleased to vary or set aside its orders of 25/10/2023 dismissing the appellants/applicants appeal for non -attendance.

c. The appellant's appeal be and is hereby ordered reinstated for hearing and determination on merit and parties be granted leave to file written submissions as earlier directed.

d. *The costs of this application be provided for*."

3.The Application is premised on the grounds that the matter was to be mentioned before the Deputy Registrar on 25/10/2023 to confirm whether parties had filed submissions but on the said date, a notice had been issued that the Deputy Registrar would not be sitting from 23/10/2023 to 27/10/2023 and that matters

would be given fresh dates at the Registry only to be informed that the matter was mentioned before the Honourable Judge on 25/10/2023 and was dismissed for non- attendance. He therefore contends that the failure of counsel to attend court was not intentional.

4.The application was opposed by a Replying affidavit sworn on 10/07/2025 in which Philip Mbulu deposed that e court to note that the appeal was mentioned before the Deputy Registrar on 20th April, 2023 and who at this point directed the matter to be placed before a judge and in particular Lady Justice Hon. Muigai. That the proceedings before the Deputy Registrar at that time came to an end on the 20th April, 2023 and the subsequent mentions were before Lady Justice Hon. Muigai. It was contended that the Applicant ought to have annexed a notice of absence of Hon. Lady Justice Muigai and not the Deputy Registrar. The court was told that the Applicant had clearly demonstrated a complete lack of desire to prosecute his appeal before the court by failing to attend court a record three (3) times and cannot now cry foul.

5.The Application was canvassed by way of written submissions with the Applicant submissions being dated 21/08/2025 and those of the Respondent 22/07/2025.

6.The Applicant submitted that he is willing to pursue the Appeal on record. That the applicant attended court pursuant to the notice that the matter would before the Deputy registrar on 04/06/2025 and immediately upon being informed of the dismissal, for this

applicationn and it is not denied that a notice had been issued that led to the nonattendance and as such the non-attendance cannot be levelled against the applicant. Consequently, the non-attendance was caused by excusable mistake and/or error that would call for the court to exercise its discretion in favour of the applicant. In support of its submissions, reliance was placed on the cases of ***Richard Nchamp Leitag – VS - lebc and 2 Others (2-13(e KLR), Reynolds Construction Company (n/g) Ltd Vs Festus M Arithi M'Mbooroki (2022) e KLR, C.K Yano in Kangethe – VS - Nkiroite (Environmental and Land Case e)12 of 2002_KEELC 5191 (KLR) , Joseph Kinyua - VS — GO Ombachi (2019) eKLR.***

7. The Respondent submitted that the Appellant's/Applicant's Advocates attempt to mislead this court to an extent of even annexing a Notice of Absence of Hon. Victoria Ochanda was unacceptable; it well clear form the E-filling that the matter was seized with Hon. Lady Justice Muigai on 12th July, 2023, 26th September, 2023 and 25th October, 2023 when the appeal was dismissed for nonattendance.He relied on the cases of ***Civil Suit 371 of 2016; Thathini Development Company Limited v Mombasa Water & Sewerage Company & another [2022] KEELC 689 (KLR).***

DETERMINATION

8.The Court has considered the application before the court and the rival affidavits as well as the submissions of the parties. The question before this court should reinstate the appeal.

9. The Court of Appeal in the case of **Pithon Waweru Maina V Thuka Mugiria [1983] KECA 117 (KLR**) rendered itself on the factors to be considered when setting aside and stated as follows;

"This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice: Shah v Mbogo [1969] EA 116,123 BC Harris J.

> ***The matter which should be considered, when an application is made, were set out by Harris J in Jesse Kimani v McConnel [1966] EA 547, 555 F which included, among other matters, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any material factor which appears to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been ex parte and whether or not it would be just and reasonable to set aside or vary the judgment, upon terms to be imposed. This was approved by the former Court of Appeal for East Africa in Mbogo v Shah [1968] EA 93, 95 F. There is also a decision of the late Sheridan J in the High Court of Uganda in Sebei District Administration v Gasyali [1968] EA 300,301,302 in which he adopted some wise words of Ainley J, as he then was, in the same court, in Jamnadas v Sodha v Gordandas Hemraj (1952) 7 ULR 7 namely: "The nature of the action should be considered, the defence if one has been brought to the notice of the court, however, irregularly, should be considered, the question as to whether the***

plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court." And, because it is a discretionary power it should be exercised judicially, or in the Scots phrase, used by Lord Ainslie in Smith v Middleton [1972] SC 30: "... in a selective and discriminatory manner, not arbitrarily or idiosyncratically," for otherwise, as Lord Diplock said in his speech in Cookson v Knowles [1979] AC 556: "... the parties would become dependent on judicial whim ..."

10. In addition, in the case of **Hajar Services Limited v Peter Nyangi Mwita [2020] eKLR**, the Court reiterated that discretion must be exercised judicially, not whimsically. The court stated that;

'This being an exercise of judicial discretion, like any other judicial discretion must on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so, since as was held in Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633, there is no difference between the words "sufficient cause" and "good cause".

It was therefore held in Daphne Parry vs. Murray Alexander Carson [1963] EA 546 that though the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles.'

11. From the record be, the order of 25/10/2023 was to the effect that the appeal was dismissed for non-attendance. Consequently, the case file was closed. Preceding this date, the matter was to be mentioned before the Deputy Registrar on 20/04/2023 who indicated that the Lower Court file had been called for and mention would be on 12/7/2023. On this date the Appellant was represented by Ms Mutua Advocate and the Respondent By Kimanzu Advocate. Further directions were that the matter was to be mentioned on 12/7/2023. On the said date, the Appellant was represented and the court directed that submissions were to be filed and exchanged. The next mention was on 26/7/2023 and both parties were again represented. It is on 25.09/2023 that none of the parties appeared and the appeal was dismissed.

12. It is therefore clear that the Appellant/Applicant is not being truthful by stating that he relied on the notice of the Deputy Registrar. The Deputy Registrar had no role to play on the material date and her presence or absence was inconsequential. However, in the interest of justice, I will allow the application on condition that the Applicant shall pay to the Respondent thrown

away costs of Kshs 50,000/- and prosecute the appeal within sixty days of today's date failing which it shall stand dismissed.

It is so ordered.

Ruling signed, dated and delivered virtually this 14th day of November, 2025.

E. N. MAINA

JUDGE

IN THE PRESENCE OF:

Mr. Mbulu Advocate for the Respondent

Ms Omari Advocate for Mr. Mulyungi for the Applicant

C/A: Geoffrey