**Wilfred v Matwere (Civil Appeal 340 of 2019)**
**[2022] KEHC 11592 (KLR) (Civ) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11592 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 340 OF 2019**

**JK SERGON, J**

**JULY 27, 2022**

**BETWEEN**

**HARUN WILFRED ..... APPELLANT**

**AND**

**ZACHARY MANDERE MATWERE ..... RESPONDENT**

**RULING**

1. The appellant/applicant in this instance has brought the Notice of Motion dated April 4, 2022supported by the grounds set out in its body and the facts deponed in the supporting affidavit. The applicant sought for the substantive order that this court set aside its order of April 1, 2022, dismissing the appeal and reinstate the same for hearing and determination on merit.

2. The respondent opposed the Motion by filing the replying affidavit sworn on May 10, 2022.

3. When the Motion came up for interparties hearing the parties respective advocates chose to rely on the averments made in their respective affidavits.

4. I have considered the grounds laid out on the body of the Motion; the facts deponed in the affidavits supporting and opposing it; and the brief oral arguments.

5. In his affidavit filed in support of the motion dated 4/4/2022, Mr. Peter Manda advocate to the applicant, stated that on 1st of April, 2022, this court had scheduled this case for a notice to show cause why the appeal should not be dismissed for lack of prosecution. He was there throughout the virtual court hearings and even the court to called the out the matter because he was present for the appellant.

6. He avers that at about 12:36 pm as the court was going down the list, he noted that the microphone function on the teams' application was not functioning as he refreshed the application to enable it function but the same had already crashed and removed him from the virtual court session.

7. He further avers that he called the court assistant to ask for help getting him allowed back, that he resumed the team's application right away and that even after getting admitted back, the court session had already passed the matter on the cause list.

8. He contends that the mistake of non-appearance was inadvertent and generally a mistake of the advocate on record and should not be visited upon the appellant.

9. In response, the respondent stated that this application is only an afterthought by the applicant since they were not present and were not ready to appear before court on the said mention date.

10. The respondent avers that should the court be inclined to allow the applicant's application then it should order the applicant deposits the whole decretal sum in the lower court suit to the court.

11. I have given due consideration to the parties' respective positions as deposed. Order 12 Rule 7 of the *Civil Procedure Rules* under which the Application is brought provides:

> " Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just".

12. The orders sought are discretionary. I am inclined to accept applicant's advocate explanation that he was present for the virtual proceedings he noted that the microphone was not functioning, but by time he was able to be admitted back, the appeal had been called out and dismissed for non-attendance.

13. From the averments of the applicant's counsel, it is quite clear that this was not a case of deliberate failure to attendcourt but a mistake of non-appearance which was inadvertent and was not intentional and should not be visited upon the applicant.

14. Should the door of justice be closed to the applicant for the mistake of counsel? I think not. In this regard, I am guided by the holding in *Belinda Murai & others v Amos Wainaina* (1978) LLR 2782 (CALL) where Madan, JA (as he then was) stated:

> A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of Junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.

15. In an application for reinstatement of a dismissed suit or appeal, an applicant appeals to the discretion of the Court. The Court must caution itself not to exercise its discretion in a manner that will result in an injustice. This position is fortified in the case of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR, where the Court of Appeal stated:

> " We agree with those noble principles which go further to establish that the court's discretion to set aside an exparte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. I have considered the reasons that were offered by the appellant regarding their failure to attend court on the April 1, 2022 with anxious minds. I have asked myself whether failure to attend court on April 1, 2022, constituted an excusable mistake, an error of judgment or was it meant to deliberately delay the cause of justice.

16. The circumstances of this case are sufficient to persuade the Court that the non-attendance by the applicant at the mention of Notice to show cause, was not a deliberate attempt to obstruct or delay justice. Accordingly, he should not be denied a hearing.

17. The respondent urged the court to order the applicant to deposit in court the decretal sum in the lower court suit to the court.

18. With respect, the arguments by the respondent are premature. They relate to the dismissed application for stay of execution of the orders of the trial court. that is not the application presently before the court. notably, the respondent appears to concede the application for stay of execution subject to the conditions that the applicant deposits in court the decretal sum.

19. As stated earlier, the failure to attend court on 01.04.22 is purely a mistake of the applicant's counsel. My view is that the mistake on the part of counsel in the circumstances, is excusable and the door of justice ought not to be closed to the applicant. The mistake of counsel should not be visited upon the applicant. Further, courts must dispense substantive justice in line with the constitutional imperative inarticle 159 of the *Constitution* of Kenya, 2010 that justice shall be administered without undue regard to procedural technicalities. In the interest of substantive justice therefore, the dismissed appeal should be heard and determined on merit.

20. In the premises, I find merit in the application dated April 4, 2022 which I hereby allow and set aside the orders of April 1, 2022 dismissing the appeal and reinstate the same to hearing on merit. Costs shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 27TH DAY OF JULY,2022**

**.....**

**J. K. SERGON**

**JUDGE**

**In the presence of:**

Miss Kirimi for the Appellant/Applicant

N/A for the Respondent