



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL APPEAL NO.8 OF 2018

BETWEEN

THE MONARCH INSURANCE COMPANY LTD.....APPELLANT/APPLICANT

AND

CHRISTINE NYARANGI OSILIMONG (*Suing as a legal representative of the estate of Francis Osilimong Obwana- deceased*).....RESPONDENT

RULING

1. The appellant/applicant herein moved the court by way of Notice of Motion dated 28th June 2019 under Order 12 Rule 7, Order 51 Rules 3 & 15 of the Civil Procedure Rules, and Sections 3A and 63(e) of the Civil Procedure Act.

2. The applicant is seeking the following orders:

- a) That service of the application be dispensed with in the first instance and the matter be certified urgent. (Spent).
- b) That this court be pleased to set aside the proceedings of 10th June 2019 and direct that the respondent's application dated 5th March 2019 be heard de novo and the appellant's annexed replying affidavit be deemed to be properly on record.
- c) That costs of this application be provided for.

3. The application is premised on the following grounds:

- a) That the applicant's counsel sent his clerk to file a replying affidavit and request an advocate to hold his brief when the application was coming for inter partes hearing but the clerk failed to attend court on the said date.
- b) That the appellant is desirous to have the application heard and determined on merits.
- c) That the appellant will suffer immense and irreparable loss if the orders sought herein are not granted.
- d) That the mistake of a counsel should not be visited on a client.
- e) That no prejudice whatsoever or at all shall be suffered by the respondent if the orders sought are granted.

4. The respondent opposed the application on the following grounds:

- a) That the application is frivolous and vexatious and an abuse of the court process.
- b) That the application is misconceived and bereft of merit.
- c) That the application is inconsequential as there is an express admission that the appeal was filed out of time.

d) The application is founded on unsubstantiated allegations.

5. Mr. Dennis Cheruiyot, the advocate for the appellant/applicant swore a supporting affidavit. This affidavit raises very serious issues.

a) Was the advocate indisposed? He cannot expect the court to take him seriously if he fails to attach a document to support his claim.

b) Even if we give him the benefits of doubt and assume that he was sick, at the time of hearing the application, no response had been filed. He ought to have filed his response and served the same at least three days to the hearing. The application was therefore unopposed.

c) There was no way an advocate would have been given instructions by an advocate's clerk to hold brief. The identity of the advocate has not been disclosed. This is a practice that has no legal basis and it exposes an advocate receiving such instructions to legal proceedings should he acted erroneously based on the "instructions" from a clerk.

d) The averment that the mistake of a counsel should not be visited on a client has become a tired and gravely abused cliché. All manner of incompetency is cleverly tucked in so as to persuade the court to be sympathetic. It is time that parties should institute proceedings against their advocates who fail to act without a good cause. It is also time that parties should carefully vet advocates before instructing them for they will be responsible for their choices.

6. From the foregoing, I find that the application lacks merit and the same is dismissed with costs.

DELIVERED and SIGNED at BUSIA this 25th day of February, 2020

KIARIE WAWERU KIARIE

JUDGE