



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 54 OF 2017

KENINDIA ASSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

KLING DEVELOPMENT LIMITED.....RESPONDENT

RULING

1. The Appellant's Notice of Motion application dated 18th September 2019 and filed on 19th September 2019 sought the setting aside and/or varying and/or reviewing the order made on 9th September 2019 dismissing the Appeal for non-attendance (**sic**) during the Service Week. The said application was supported by the Affidavit of its advocate, Jackson Omwenga, which was sworn on 18th September 2019.
2. He stated that on 19th August 2019, it was directed that the Appeal herein would be heard on 9th September 2019 but that the advocate who attended court when directions were given failed to communicate the same to him. As a result, the said hearing date was not diarised.
3. It was his contention that the Appellant ought not to be punished for the mistakes of his advocates. He added that the Appellant had an arguable Appeal and ought to be given a chance to prosecute his Appeal on merit. It was therefore the Appellant's prayer that its application be allowed as prayed.
4. In opposition to the said application, the Respondent filed Grounds of Opposition dated 23rd October 2019 on 24th October 2019. It was its averment that the Appellant had not set down good reasons why the dismissal should be set aside, that the Appellant had failed to file Written Submissions as at the date of the dismissal despite having been given ample opportunity to do so and that the application being unmeritorious and frivolous, the same ought to be dismissed with costs.
5. The Appellant placed reliance on the cases of **Richard Ncharpi Liyagu vs Independent Electoral Boundaries Commission & 2 Others [2013] eKLR**, **Simon Muragu Kaigi & Another vs Kamau Kaigi [2008] eKLR** amongst several other cases where the common thread was that courts are called upon to excuse inadvertent mistakes because a party must not suffer the penalty of not having his case heard on merit for the reason that mistake could not be compensated by way of costs.
6. On its part, the Respondent did not refer to any case law but it reiterated its grounds of opposition. It was also categorical that the Appellant had no arguable appeal.
7. A perusal of a copy of the extract of the Appellant's advocates' diary of 9th September 2019 that was annexed to the Supporting Affidavit showed that the hearing of the Appeal herein was not diarised for that day. It was, however, clear from the court proceedings that directions to file Written Submissions were given on 22nd July 2019 and time to do so extended on 19th August 2019 as parties had not complied with the said directions. The Appellant was at all times represented in court by its counsel. Their advocates were dilatory in the way they conducted the matter herein and there having been obvious lack of diligence on their part, Onginjo J could not be faulted for dismissing the Appeal herein.
8. Having said so, it is trite law that no party should be penalised just because there was a blunder particularly by his or her advocate. In the case of **Republic vs Speaker Nairobi City County Assembly & Another Ex Parte [2017] eKLR**, it has been held that blunders will continue being made and that just because a party has made a mistake does not mean that he should not have his case heard on merit.
9. In addition to the cases that the Appellant relied upon and which this court fully associated itself with, this court also had due regard to the case of **Shah vs Mbogo & Another (1967) EA 1116** where it was held that the court's discretion is intended to be exercised to avoid hardship or injustice resulting from inadvertence or excusable mistake or error.

10. Accordingly, weighing Appellant's right to be heard in a fair trial as enshrined in Article 50(1) of the Constitution of Kenya, 2010 and the equally important Respondent's fundamental right that justice shall not be delayed as stipulated in Article 159 (2) (b) of the Constitution of Kenya, it was this court's considered view that there would be more injustice in the Appellant being denied an opportunity to ventilate its

case on merit.

11. The court did not see the prejudice the Respondent would suffer if the Appeal herein was reinstated. If it did suffer such prejudice, it did not demonstrate what that prejudice was. Having said so, it was clear that the Respondent would have to be kept in the court system a while longer re-litigating this matter due to the negligence of the Appellant's advocates. The Appellant could not therefore be allowed to go scot free and had to compensate the Respondent for that cost of wasted time.

12. It is important to point out that this court was not sitting on appeal on the decision of Onginjo J to set aside her decision but rather it was considering an application for setting aside of her orders made during the Service Week of the High Court of Kenya Milimani Law Courts Civil Division and she is currently no longer sitting in the Division to hear the present application.

DISPOSITION

13. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated 18th September 2019 and filed on 19th September 2019 was merited and the order of 9th September 2019 be and is hereby set aside on the following terms:-

1. THAT the Appellant shall pay to the Respondent throw away costs in the sum of Kshs 50,000/= within thirty (30) days from the date of this Ruling.

2. In the event that the Appellant shall fail to comply with Paragraph 13(1) hereinabove, the Appeal herein shall stand as automatically dismissed.

3. The Senior Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division is hereby directed to facilitate the placing of the original lower file in the file herein forthwith to enable the Appellant fix a date for the hearing of the Appeal herein in the normal manner within sixty (60) days from the date of this Ruling.

4. The Respondent will be at liberty to move the court appropriately to safeguard its interests in the event the Appellant will not take the initiative to progress the matter.

5. Costs of the application herein will be in the cause.

6. Either party is at liberty to apply.

14. It is so ordered.

DATED and DELIVERED at NAIROBI this 29th day of July 2020

J. KAMAU

JUDGE