**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CIVIL APPEAL NO. 13 OF 2019**

**THE HERITAGE INSURANCE LTD.....APPELLANT**

**- VERSUS –**

**JOY BATHROOMS LIMITED.....RESPONDENT**

**RULING**

1. Before me is a Notice of Motion application dated 17th December 2019. That application is filed by the appellant. The prayers in that application are directed at the order of this court, made on 3rd September 2019, whereby this appeal was dismissed for want of prosecution. The prayers in that application are:

> *1. "THAT this Honourable Court's order made on 3rd September 2019 dismissing the Appellant's suit for want of prosecution be reviewed.*
>
> *2. THAT this Honourable Court's order made on 3rd September 2019 dismissing the Appellant's suit for want of prosecution be set aside.*
>
> *3. THAT the appeal be reinstated unconditionally for determination.*
>
> *4. THAT the Appellant/Applicant be granted enlargement of time within which to file his submissions.*
>
> 5. *THAT the Appellant/Applicant's submissions filed on 6th August 2019 be deemed to be properly on record*."

**BACKGROUND**

2. The appellant filed this appeal, on 26th March 2013, against the judgment of the Resident Magistrate **Mr P.W. Wasike** of 8th March 2013. The appeal was initially filed in the Civil Division of Milimani Law Courts. The appellant filed the record of appeal on 26th July 2017. The appeal was certified ready for hearing on 24th October 2018. Directions on the hearing of the appeal were given on 12th July 2019 when this court directed that the appeal be heard by written submissions. The appellant was on that date directed to file written submissions within 21 days and the appeal was fixed for hearing on 3rd September 2019.

3. On 3rd September 2019 the appellant informed the court that it had filed its submissions two days later than directed and further that those submissions had not been served on the respondent. The appellant on that date requested that the hearing of the appeal be adjourned to enable it to serve the respondent with its written submissions. On hearing that application by the appellant for an adjournment the court dismissed the appeal for want of prosecution and in so doing the court stated thus:

**IT IS HEREBY ORDERED**

> *1. THAT the Appellant was given 21 days from 12th July 2019 to file submission but failed to comply with the Order of this Court.*
>
> *2. THAT the Appellant has not given any satisfactory reason or at all why they failed to file submissions on time.*
>
> *3. THAT further still, has failed despite prompting from this court to show that the submissions were served on the Respondent.*

*4. THAT it is apparent that the Appellant is guilty of laches and in the interest of expediency this court finds no merit to adjourn or give more time to the Appellant to serve the Respondent.*

*5. THAT consequently this Appeal is hereby dismissed for want of prosecution as the appellant has failed to give reasons why they have not diligently proceeded to prosecute it and serve the Respondent.*

**ANALYSIS AND DETERMINATION**

6. When the application came before me for hearing on 28th July 2020 the appellant's learned advocate Mr. Waweru informed me that the same had been served on the respondent by registered mail because counsel for the respondent had moved from their offices.

7. I confirm I checked the E-filing platform of this file and I was unable to see an affidavit of service showing that indeed the respondent was served as stated by Mr. Waweru. That notwithstanding I will proceed to consider the application.

8. There are two prayers that require this court's consideration depending and on the determination of those two prayers then the court will consider the remaining prayers.

9. The two prayers that need determination first is the prayer for review of the order of 3rd September 2019 (the impugned order) and the other is for the setting aside that impugned order.

10. Review order is provided under Order 45 Rule 1 (1) of the Civil Procedure Rules, which states:

*"1. (1) Any person considering himself aggrieved—*

*(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."*

11. Under that Rule the appellant was required to show that it had discovered new and important matter or evidence which after exercising due diligence was not within its knowledge. The appellant's affidavit in support of the application, sworn by Kairu Timothy Waweru stated that the dismissal of this appeal was not based on merit but on technicality, that it had diligently, prosecuted the appeal upto the point of filing its submission and it failed to file those submissions in time because of reasons beyond their control.

12. It is clear from those grounds of the appellant that Order 45 Rule 1 (1) is not satisfied because there is no new and important matter which could not be produced at the time the impugned order was issued. Indeed my understanding of the appellant's grounds is that the appellant is faulting the court for issuing the impugned order. It is trite that erroneous conclusion or decision is not a ground for review: see the case **Francis Njoroge v Stephen Maina Kamore (2018) eKLR** where it was stated :

the Court of Appeal in **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR**held that:

*"In **Francis Origo & another v. Jacob Kumali Mungala** (C.A. Civil Appeal No.149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. This court stated:-*

***"our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the respondent.**.....*

*We think Bennett J was correct in **Abasi Belinda v. Frederick Kangwamu and another [1963] E.A. 557** when he held that:*

***"a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for……***

13. For the above reasons the prayer for review of the impugned order does and must fail.

14. The appellant supports its prayer for setting aside the impugned order on the same grounds as the prayer for review. In other words that the impugned order should be set aside because it was granted on a technicality and not on merit and that the appellant had diligently prosecuted its appeal. It must be clear, even as I consider the prayer to set aside the impugned order, that I do not sit as an appellant court to the judge who granted the impugned order. It follows that my task is not to fault the learned judge but rather it is to find whether there are

sufficient reason to set aside the dismissal.

15. The learned judge, before making the impugned order afforded the appellant opportunity to explain why its written submissions had not been served on the respondent, contrary to the directions of the court issued on 12th July 2019. The appellant counsel submitted before the court thus:

> ***"We also may not have served the respondent. I pray that you grant us upto the end of the day to serve the submission."***

16. To reiterate this court on 12th July 2019 directed that this appeal be heard by written submissions. Because the respondent was not present when those directions were issued the court on that day made the following order:

> ***"Respondent to be served with hearing notice and directions on hearing."***

17. It is clear that when the appeal came up for hearing, on 3rd September 2019 the appellant had failed to abide by the period it was ordered to file its submissions, had failed to serve the submission on the respondent and also had failed to serve on the respondent a notice of the directions issued by the court on 12th July 2019. On being given opportunity to explain that failure, before the court made the impugned order, the appellant simply asked it be given to the end of the day to serve the respondent. It is no wonder the learned Judge made a finding, before making the impugned order, that the appellant was guilty of laches and had failed to show merit why the hearing of the appeal should be adjourned. It is for that reason that the court issued the impugned order dismissing this appeal for want of prosecution.

18. Before me the appellant has not offered any reason why the respondent was not served with the submissions. It is useful to cite the case **Peter Kiplagat Rono v Family Bank Limited (2018) eKLR** where the court stated:

> "In its decision in **The Council, Jomo Kenyatta University of Agriculture and Technology vs Joseph Mutuura Mbeera & 3 Others [2015] eKLR**, the Court of Appeal (Waki JA) stated:
>
> ***"In this case, however, the applicant's advocates simply plead ignorance and consequential inaction which cannot avail them. This Court said so in Rajesh Rughani – Vs- Fifty Investment Ltd. & Another (2005) eKLR:-***
>
> ***"If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy".***
>
> ***In the case of Bains Construction Co. Ltd. -Vs- John Mzare Ogowe 2011 eKLR this Court also observed:-***
>
> ***"It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties as principal and does not perform it, surely such principal should bear the consequences".*** (Emphasis added)

19. I also find in this case that the grounds presented by the appellant hereof cannot avail it the prayer for setting aside the impugned order. That prayer for setting aside is also disallowed.

20. The appellant having failed to obtain orders in the first two prayers of the application it follows that there cannot be a basis for granting the other prayers for reinstatement of the appeal nor for extension of time to file the submissions.

21. The application dated 17th December 2019 for the reasons set out above is dismissed but because the respondent did not participate in its hearing there shall be no order as to cost in respect to that application.

**DATED, SIGNED and DELIVERED at NAIROBI this 30th day of SEPTEMBER 2020.**

**MARY KASANGO**

**JUDGE**

Before Justice Mary Kasango

C/A Sophie

For the Appellant

For the Respondent

***ORDER***

This decision is hereby virtually delivered this **30th** day of **September 2020.**

**MARY KASANGO**

**JUDGE**