



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO 413 OF 2011

FRANCIS DRUMMOND INVESTMENT BANK.....APPELLANT

VERSUS

JUSTUS M'INOTI M'MWAMBIA.....1ST RESPONDENT

OBADIAH MUTAI T/A BROND INSURANCE AGENCIES.....2ND RESPONDENT

RULING

1. In the Notice of Motion application dated and filed on 10th June 2019, the Appellant herein sought the setting aside of the order issued on 10th June 2019 in which the Appeal herein was dismissed and that the said Appeal be reinstated for hearing on merit. Its said application was supported by the Affidavit of its advocate, Peter Masinde, which was sworn on the same date.
2. The said advocate stated that on 10th June 2019, he had another matter at the Employment and Labour Relations Court which he decided to deal with first as it was one of the first matters on that court's cause list and that by the time he got to this court, his court clerk informed him that the Appeal had just been dismissed.
3. He stated that his court clerk informed him that the court did not call out the matters chronologically and that the advocate who was to hold his brief left before the matter herein was called out and he was unable to call to get another advocate to hold his brief before the said matter was called out.
4. It was his contention that the Appellant was keen in prosecuting the Appeal herein and that because it was the first time the matter was coming up for hearing, it was in the interest of justice that the same be reinstated. The Appellant thus urged this court to allow its application as prayed.
5. In opposition to the said application, on 15th July 2019, the 1st Respondent's advocate, Patrick Kimathi Muchena, swore a Replying Affidavit on behalf of the 1st Respondent herein. The same was filed on 16th July 2019.
6. He averred that the Appellant had failed to prosecute its Appeal since 2011 and hence, the 1st Respondent had filed an application seeking the dismissal of the Appeal herein for want of prosecution.
7. He pointed out that the Appellant's counsel ought to have been in court at 9.00 am as stipulated in the cause list when court business commences. He was emphatic that the said advocate also failed to adduce any evidence that he was before the Employment and Labour Relations Court as he had contended and that having come to court two (2) minutes after the matter had been dismissed, as an officer of the court, he ought to have moved court appropriately.
8. He dismissed the said Appellant's advocate's and court clerk's explanation as unsatisfactory and stated that his client was being denied enjoyment of the fruits of his judgment that was delivered on 8th July 2011. The 1st Respondent thus asked this court to dismiss the present application with costs to him.
9. In his Supplementary Affidavit that was sworn on 2nd August 2019 and filed on 9th August 2019, the Appellant's advocate attached a copy of the Cause list showing that he had indeed been before the Employment and Labour Relations Court on 10th June 2019. He asked this court not to visit his mistakes on the Appellant who was not a party to the misadventures,
10. It was the Appellant's submission that it had made its application without any inordinate delay and pointed out that the conduct of its advocates showed that they never slumbered and hence asked this court to excuse their mistake. In this regard, they placed reliance on the

case of **Kasturi Ltd vs Nyeri Wholesalers Ltd [2014] eKLR** where the Court of Appeal held that a delay of two (2) days in filing an application for reinstatement of an appeal was not inordinate.

11. It submitted that sufficient cause was a question of fact and the court had to exercise its discretion in the varied and special circumstances as was held in the case of **Wilson Cheboi Yego vs Samuel Kipsang Cheboi [2019] eKLR** . It also placed reliance on several other cases to buttress this point.

12. It also relied on the case of **Philip Chemwolo & Another vs Augustine Kubende [1986] eKLR** amongst several other cases with similar holdings where it was acknowledged that blunders by advocates will continue being done and the case of **Shah vs Mbogo [1967] EA 116** where it was held that the court's discretion to set aside an *ex parte* order was intended to avoid injustice and hardship resulting from accident but not to assist a person who had deliberately sought to obstruct or delay the cause of justice.

13. On his part, the 1st Respondent also relied on the case of **Kasturi Ltd vs Nyeri Wholesalers Ltd** (Supra) in which it was also held that it was always prudent for litigation to come to an end when all parties had been heard on merit and substantive justice administered and that the court ought to consider the applicant's conduct throughout the proceedings.

14. It submitted that the Appellant's advocates conduct in the case herein was wanting and urged this court to find that the Appellant had been indolent and lackadaisical in prosecuting the Appeal herein. It further argued that he had been prejudiced as he was a man of advanced years who had been denied the fruits of his judgment for the last eight (8) years. It placed reliance on the case of **Kenya Marine Contractor Epz Ltd vs Kenya Engineering Workers Union [2017] eKLR** to support his case. However, he did not analyse the case and/or demonstrate how the same was relevant to the circumstances of the case herein.

15. This court carefully considered the Written Submissions and the case law they relied upon. It also had due regard to the cases of **Richard Ncharpi Liyagu vs Independent Electoral Boundaries Commission & 2 Others [2013] eKLR** and **Simon Muragu Kaigi & Another vs Kamau Kaigi [2008] eKLR**, 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 no mistake cannot be compensated by way of costs.

16. A perusal of the file herein showed that on 16th December 2011, Ang'awa J (as she then was) granted the Appellant a stay of execution pending appeal of the lower court decision. On 9th June 2016, the Appeal herein was admitted for hearing. Before the matter was listed for hearing on 10th June 2019, parties appeared before several judges in the High Court of Kenya Milimani Law Courts Civil Division for the taking of directions.

17. It was evident that the directions were not given for want of proof of service of the directions notices upon the Respondents herein. Notably, on several occasions, the Appellant failed to file Affidavits of Service leading to the matter being referred back to the Registry.

18. On 20th July 2018, Njuguna J granted the Appellant leave to serve the 2nd Respondent herein by way of registered mail. Directions certifying the matter as ready for hearing and directing that the hearing date be taken at the Registry were finally given on 2nd November 2018 by Githua J.

19. On 7th March 2019, Sergon J directed that the 1st Respondent's Notice of Motion dated 21st January 2019 seeking to have the Appeal herein dismissed for want of prosecution be listed for inter partes hearing on 1st April 2019. However, the same did not appear to have proceeded on that day. On 25th April 2019, the Appellant's advocates fixed the hearing of the Appeal for 10th June 2019. It was on this day that the Appellant's advocates failed to attend court leading to the dismissal of its Appeal.

20. Notably, to date, nine (9) years had since lapsed from the time the Appellant was granted an order for stay of execution pending appeal. Three (3) years had passed since the Appeal was admitted for hearing and when it was certified ready for hearing. Although this court was of the considered opinion that the Appellant contributed to the delay in the prosecution of the Appeal herein, it was not possible to attribute the delay in the prosecution of this matter entirely on it as it took five (5) years from the time the order for stay of execution pending appeal was granted to the time the Appeal was admitted for hearing on 9th June 2016.

21. The court did not find the excuse that was proffered by the Appellant's counsel regarding the circumstances leading to the dismissal of the Appeal herein to have been sound. This is because if the Appellant's matter had been called earlier than it should have, it was not possible that there were no advocates in court to have held the Appellant's advocate's brief after the advocate who had been asked to hold brief had left court. Indeed, the said advocate deponed that he came to court two (2) or so minutes after the Appeal was dismissed at 9.29 am, which was very early in the day as the court business commenced at 9.00 am.

22. The Appellant did not furnish this court with proof that there were no other matters after 9.31 am to have persuaded this court to find that there was really no other advocate to hold its advocates brief. There appeared to have been negligence from the offices of the said Appellant's advocates.

23. 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.

24. In addition, as was held in the case of **Shah vs Mbogo & Another** (Supra), courts are called to exercise their discretion in excusing mistakes that have resulted from inadvertence or excusable mistake or error to avoid hardship and injustice. Indeed as was held in the case of **Kasturi Ltd vs Nyeri Wholesalers Ltd** (Supra), it is always prudent for litigation to come to an end when all parties had been heard on merit and substantive justice administered. If no order for reinstatement of the suit is made, the litigation would have come to an end without the Appeal herein having been heard on merit.

25. 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 1st 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.

26. Whereas the 1st Respondent had been kept out of the fruits of his judgment for close to nine (9) years now, this court did not see the prejudice he would suffer if the Appeal herein was reinstated that could not be compensated by way of costs. If he did suffer such prejudice, he did not demonstrate the same.

27. Having said so, it was clear that the 1st 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 cannot therefore be allowed to go scot free and has to compensate the 1st Respondent for that cost of wasted time.

DISPOSITION

28. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated and filed on 10th June 2019 was merited and the order of the same date be and is hereby set aside on the following terms:-

- 1. THAT the Appellant shall pay to the 1st 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 28(1) hereinabove, the Appeal herein shall stand as automatically dismissed.**
- 3. To progress this matter further, I hereby direct that the Appellant files and serves its Written Submissions by 9th November 2020.**
- 4. The Respondents are hereby directed to file and serve their Written Submissions by 23rd November 2020.**
- 5. It is hereby further directed that this matter will be mentioned on 26th November 2020 before the Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division for further orders and/or directions regarding the hearing of the Appeal herein.**
- 6. The Appellant is further hereby directed to serve the 2nd Respondent with a copy of this Ruling for his further action.**
- 7. Costs of the application will be in the cause.**

29. It is so ordered.

DATED and DELIVERED at NAIROBI this 26th day of October 2020

J. KAMAU

JUDGE