



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO.99 OF 2020

1. THE PRINCIPAL MARIAKANI SECONDARY SCHOOL

2. THE BOARD OF GOVERNORS,

MARIAKANI SEC. SCHOOL.....APPELLANTS/APPLICANTS

- VERSUS -

MAGLENA AMINA KAMAU.....RESPONDENT

RULING

1. On the 13th August, 2020 the Applicants filed a **Notice of Motion** application dated 7th August, 2020 pursuant to **Sections 1A, 1B, 3A and 63 (b) and (e)**, all of the **Civil Procedure Act** and **Order 50 Rule 15** of the **Civil Procedure Rules, 2010**. The Application seeks for the following Orders:

a. Spent;

b. That the orders of this court of 4/8/2020 dismissing the Applicants' Notice of Motion dated 21st July, 2020 and filed on 24th July, 2020 be set aside and the said application be reinstated;

c. That costs of this application be in the cause and/or as directed by the Court;

2. The grounds upon which the Application is premised are;

a. That the Firm of M/S Odhiambo S.E, Advocates for the Appellant/Applicants did not attend court virtually because he could not Link despite several attempts to do so.

b. That the failure to link virtually was not intentional but due to the reasons stated above.

c. That the Appellants stand to suffer and their Motor vehicle in possession of the auctioneers will be sold and more goods are likely to be removed and sold in execution of the Judgment if the application is not reinstated.

d. That it is not the Appellants' mistake that their Advocate did not attend Court.

e. That it is in the interest of justice that the Application be allowed.

3. The application was further supported by an **Affidavit** sworn on 7th August, 2020 by **Samuel Odhiambo Eleakim**, the Appellants/ Applicants' advocate. He deponed that the application dated 21st July, 2020 had been fixed for hearing on 4th August, 2020. On the said date, he met the Court Assistant, one Mr. Kaunda who informed him that the matter would proceed virtually at around 12 O'clock. That he further informed **Mr. Ogutu**, Counsel for the Respondent that the matter would proceed at 12 noon. The Link was sent to him at 11.30 am but when he tried to log in, the connection could not go through. He annexed correspondences wherein he informed the court assistant that the Link could not connect him to the Virtual Court.

4. **Mr. Odhiambo** further asserted that he took a proactive measure to follow up with the Court I.T Personnel only for the Link to be sent to him at 14.10pm when the court session had ended. Besides all the efforts, the Counsel deposed that the Chief Magistrate, Hon. Evans Makori

had sent an email Communication to all the advocates acknowledging that on **4th August, 2020** there was a general problem with the **Virtual Microsoft Teams Network**. On the foregoing, the Counsel averred that the circumstances were beyond the Appellants' control and the orders issued then should be set aside in the interest of justice.

5. The Respondent opposed the application vide a **Replying Affidavit** sworn by her advocate, **Seth J. Ongiri**. He deponed that all parties were supplied with the **Virtual Link** and it is not explained why the Applicants were the only ones faced with challenges of logging in. In any event, if there were any challenges in accessing the Link, the Applicants' advocate could have used a different gadget to access the court. The Counsel further submitted that the application is lacking in merit and the application sought to be reinstated seeks prayers which have already been determined.

6. On **25th August, 2020**, parties were directed to canvass the application dated **7th August, 2020** by way of written submissions. The Applicants' Counsel filed their written submissions on **9th September, 2020** while the Respondent filed theirs on **5th October, 2020**.

Analysis and Determination

7. In considering this kind of application at hand, I find it relevant to invoke the provisions of the Statute. **Section 1A(1)** of the **Civil Procedure Act** provides for an overriding objective which is that the objective of this Act and the rules made hereunder is to facilitate the just expeditious, proportionate and affordable resolution of the court disputes governed by the Act. **Section 3A** thereof provides that nothing shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

8. The general principles of law in applications of this nature are anchored in the realm of judicial discretion. The Constitution of Kenya has deposited judicial power with Judicial Officers for the purpose of being used to adjudicate disputes and administer justice substantively and fairly without due regard to technicalities. (**See Article 159 of the Constitution**).

9. The court's discretion is therefore free and is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. But it is not designed to assist a person who deliberately seeks, whether by evasion or otherwise, to obstruct or delay the cause of justice (**See the case of Shah –vs- Mbogo**).

10. Emphasis for the need to have all parties heard on merit is to be traced under **Article 50** of the **Constitution**. Therefore, a litigant who is not guilty of dilatory conduct should not be debarred from pursuing his/her rights in court because of inadvertence of the Counsel.

11. In the present case, the main ground upon which review is being sought is for the dismissal Order of **4th August, 2020** to be set aside to enable parties be heard on the merit. According to the affidavit evidence, the Applicants' Counsel failed to attend the **Virtual Court Proceedings** on the material day on the ground that he had challenges in accessing the **Microsoft Teams Link**. He has annexed communications to that effect and the proactive efforts he undertook in bid to attend the court virtually. This court further takes judicial notice of the email sent by the Chief Magistrate to Mombasa Law Society Members acknowledging the technical hitch on that material day.

12. As this application stands, I am satisfied that the Applicant has shown sufficient cause for non-attendance in Virtual Court on **4th August, 2020**.

13. Applying the provisions of **Sections 1A, 1B, 3A**, of the **Civil Procedure Act**, the **Notice of Motion** dated **7th August, 2020** requesting this court to set aside the dismissal Order is allowed as prayed.

14. The cost of this application shall abide with the outcome of the Appeal.

It is hereby so ordered.

DATED, SIGNED and DELIVERED at MOMBASA on this 17th day of November, 2020.

D. O. CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.

D. O. CHEPKWONY

JUDGE