



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 24 OF 2016

NIXON ANDATI.....APPELLANT/APPLICANT

VERSUS

MOSES MUDAKI NDEYA.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. The applicant has filed an application dated 7th December, 2016 seeking for orders that -

(1) This honourable court be pleased to set aside, vary and/or review its orders entered herein on the 12th day of October, 2016, dismissing the appellant/applicant's application dated 18th day of March, 2016

(2) This Honourable court be pleased to reinstate the appellant/Applicant's application dated 18th day of March, 2016 for hearing on merits.

(3) Costs of this application be provided for.

2. The application is based on the grounds on the face of the application and supported by an affidavit of the applicant. The grounds thereof are that the application's application dated 18th March, 2016 came up for inter-parties hearing on 12th October, 2016 when the applicant was absent and the matter was dismissed for non-attendance. That at the material time the applicant was a student at Kenya Medical Training College, Vihiga Campus. That between 18/9/2016 and 18/10/2016 the applicant was among other students who were on attachment as evidenced by Letter "NA" annexed to the application. That his immediate supervisor declined to accord him permission to attend court as the hearing fell close to the assessment date shown in the annexed letter. That after he finished attachment he came to court to find out the position of the application and found that it had been dismissed.

3. The applicant contends that the failure to attend court was not intentional. That he has a good appeal with overwhelming chance of success.

4. The application dated 18th March, 2018 was seeking for stay of execution of a decree granted in Vihiga court Civil Case No. 33 of 2014 pending hearing and determination of an intended appeal.

5. The application was opposed by the 2nd respondent, the Attorney general, vide the grounds of opposition dated 5th March, 2018. The grounds are that:-

(1) The Applicant's application is frivolous vexatious and an outright abuse of the court process

(2) That the application does not disclose any reasonable grounds to warrant the orders sought

(3) The applicant's motion seeks to enjoin a party to a suit that has been dismissed and is yet to be reinstated by an order of the court

(4) That the application is an afterthought and made in bad faith.

6. The application was opposed by Mr. Chitwah, advocate for the 1st respondent. I have however perused the court file and I have not seen any grounds of opposition filed by Mr. Chitwah. The advocate opposed the application through oral submissions in court.

7. Mr. Chitwa stated in his oral submissions that the hearing date of the application was taken by consent of the parties. That the applicant did not bring it to the attention of the court that he would be absent. That the appeal is still pending and the applicant has not prepared a record of appeal. That in the event that the application is allowed the applicant be condemned to pay throw away costs.

8. The litigation counsel did not appear in court to argue the application.

9. I have considered the grounds in support of the application and the grounds in opposition thereto. It is the discretion of the court to reinstate the hearing of an application that has been dismissed. Such discretion has however to be exercised judiciously. In **Alex Wainana t/a John Commercial Agencies - vs – Janson Mwangi Wanjihia (2015) eKLR**, the Court of Appeal set out the principles governing the exercise of discretion and held that:-

“The principles governing the exercise of judicial discretion were set out by Ringera JA (as he then was) in the case of Gathiaka vs Nduriri (2004) 2KLR 67. These are that such discretion should be exercised on sound reason rather than whim, caprice or sympathy and with the sole aim of fulfilling the primary concern of the court, that is to do justice to the parties before it.”

In **Stephen Ndichu –vs – Monty’s Wines and Spirits Ltd (2006) eKLR** Azangalala J considered the applicable principles for reinstatement of a suit and held that:-

“.....The discretion is free and the main concern of the court is to do justice to the parties before it (See patel versus EA cargo Handling Services Ltd 1974 EA 75.) The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (See Shah –Vs- Mbogo 1969 EA 116.). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration -Vs-Gasyali 1968 EA 300). It also goes without saying that the reason for failure to attend should be considered.

10. In **Ivita – vs – kyumbu (1984) KLR 441 Chesoni J** (as he then was) stated that the test as to whether a suit should be reinstated is whether there is delay that is prolonged and inexcusable and if justice will be done despite the delay.

11. The applicant herein has explained that he was at the material time a student at Kenya Medical training College, Vihiga Campus. That the application came up for hearing on 12th march, 2016 when he was to undergo training assessment between the 10th and 14th October, 2016. That his supervisor denied him permission to attend court on the 12th October, 2016. Upon considering these grounds I find that they are excusable. The applicant did not deliberately fail to attend court. The re-instatement of the application will not occasion any prejudice to the respondents who can be compensated by way of costs.

12. The upshot is that the application dated 7th December, 2016 is allowed but with costs going to the respondents.

Delivered, dated and signed in open court at Kakamega this 17th day of December, 2019.

J. N. NJAGI

JUDGE

In the presence of:

.....N/A.....for 1st respondent

Applicant – Present in person

1st respondent- present

2nd respondent -absent

Court Assistant:- Polycap

30 days right of appeal.