



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 446 OF 2016**

NANZALA JONATHAN.....APPELLANT

- V E R S U S -

NJIWA SAVINGS AND CREDITCO-OPERATIVE SOCIETY.....RESPONDENT

**RULING**

1) The subject matter of this ruling is the motion dated 19.8.2016 taken out by the appellant herein, in which he sought for the following orders:

- 1. The dismissal orders issued in this case on the 17<sup>th</sup> August, 2016 be set aside.***
- 2. The appellant's application dated 13<sup>th</sup> July, 2016 be reinstated for hearing and disposal.***
- 3. The interim orders granted on 21<sup>st</sup> July, 2016 be reinstated.***
- 4. Costs of this application be in the cause.***

2) The motion is supported by the affidavits of Simoni Namada and Geoffrey Anami. When served with the motion, the respondent filed the replying affidavit of Benjamin Mwikya Musyoki to oppose the motion. When the motion came up for interpartes hearing this court gave directions to have the application disposed of by written submissions.

3) I have considered the grounds stated on the face of the motion plus the facts deponed in affidavits filed in support and against the application. I have further taken into account the rival submissions. It is the submission of the appellant/applicant that the motion dated 13.2.2016 was dismissed by this court for want of attendance on 17.8.2016. The appellant/applicant argued that the legal clerk working for the firm of Namada & Co. Advocates, failed to diarise the matter despite being given clear instructions to note in the diary. The learned advocate for the appellant stated that all along he has acted diligently in filing the defence.

4) The respondent is of the view that the appellant has given no plausible reasons to enable this court exercise its discretion in favour of the appellant hence the motion is filed with malice with the aim of perpetuating delay in concluding the matter.

5) After a careful consideration of material placed before this court, it is clear to me that the main reason put forward by the appellant's advocate for failing to attend court on 17.8.2016 is that the legal clerk of the firm of Namada & Co. Advocates failed to note in the diary that the matter was coming up for interpartes hearing of the motion dated 13.7.2016. The respondent did not deem it fit to controvert this fact. The respondent instead concentrated in attacking the competency of the appeal. The respondent stated that the appellant should have sought for prior leave before filing the appeal. With respect, this is a very important point which can be determined as a preliminary point. However, I do not think that issue should be considered at this stage because the respondent still remains its right to raise the preliminary even when the motion is reinstated. Conversely, the appellant still retains the right to have the anomaly corrected. I am convinced that the appellant/applicant has given a plausible reason why the order dismissing the motion dated 13.7.2015 should be set aside. The appellant's advocate due to inadvertent mistake failed to diarise the motion. On the basis of the above, I find motion dated 19.8.2016 to be well

founded. It is allowed in terms of prayers 1 and 2. The interim order which was issued ex parte to the appellant on 21.7.2016 lapsed by effluxion of time and upon the ex parte dismissal order. Consequently prayer 3 of the motion dated 13.7.2016 is re-issued to subsist until 20.4.2017 when the aforesaid motion is fixed for interpartes hearing.

6) In the circumstances of this matter, I think a fair order on costs is to direct which I hereby do, that each party meets its own costs.

**Dated, Signed and Delivered in open court this 24th day of March, 2017**

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Appellant

.....for the Respondent