



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 51 OF 2011

ALEXANDER L. SHIKOND.....
PLAINTIFF/APPLICANT

VERSUS

JAMES MURIITHI MWANIKI & MARGARET NYAWIRA
MUHARA

(SUING AS THE PERSONAL REPRESENTATIVES OF JANE WAITHIRA
KARANJKA..DEFENDANT/RESPONDENT

RULING

By a notice of motion dated 26th August 2015, the appellant/applicant seeks to set aside this courts orders made on 24th June 2015 dismissing the applicants appeal for want of prosecution and reinstate the same for hearing. The application is premised on the grounds stated in the supporting affidavits of the applicants advocate annexed thereto. Essentially counsel insists that he never received the notice to show cause why this appeal ought not to have been dismissed for want of prosecution hence his failure to attend court as required. I note that there is absolutely nothing on record to show that the said notice was served as required and in absence of evidence of service, I conclude that there was no service at all.

The Respondent in his replying affidavit has annexed a copy of the notice to show cause issued by the court, but there is absolutely nothing to demonstrate that the notice was served on either party. In absence of an affidavit of service or clear evidence that the notice was served as required, I am unable to conclude that the appellant failed to attend court. Also, there is nothing to show that the Respondent received the notice or attended court at the time the orders in question were made, which raises a possibility that none of the parties was served as required.

The applicant and her advocate maintain that she never received the notice, hence the reason why there was no attendance. The copy in the court file only bears the postal address but there is no certificate of posting to show it was dispatched to the applicant or the respondent. There was no attendance by either side on the material day. I find that there is nothing to demonstrate that the applicant or his advocate received the notice as required, hence both cannot be blamed for non-attendance to show cause.

This court has jurisdiction to reinstate a suit dismissed under the above provision. Section 3A of the Civil Procedure Act^[1] provides that *'Nothing in this Act 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.'*

I find that the reason given by the applicants advocate for failing to attend court is excusable and that this is a proper case for the court to exercise its discretion in favour of the applicant. In this regard, I find useful guidance in the court of appeal decision in the case of *Richard Nchapai Leiyangu vs IEBC & 2 others*[2] where the court expressed itself as follows:-

“We agree with the noble principles which go further to establish that the courts’ discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice”

I hold the view that it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard the opportunity of prosecuting his case. The court in the above cited case of *Richard Nchapai Leiyangu vs IEBC & 2 others* proceeded to state as follows:-

“The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality” [3]

The above case was cited with approval by the Court of Appeal in *Harrison Wanjohi Wambugu vs Felista Wairimu Chege*[4] where by the court reinstated an appeal that had been dismissed for non-attendance. A similar position was held by the court of appeal in the case of *Cecilia Wanja Waweru vs Jackson Wainaina Muiruri*[5] where the court allowed an application to reinstate an appeal that had been dismissed for want of prosecution. Similarly, I stand guided and persuaded by the decision of the court of appeal in *CMC Holdings Ltd vs James Mumo Nzioka*[6] where it was held *inter alia*:-

“The discretion that a court of law has, in deciding whether or not to set aside ex-parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error”

I also find help in the position held by the court of appeal in the case of *Wenendeya vs Gaboi*[7] where the court in reinstating an appeal that had earlier been dismissed for non-attendance stated that disputes ought to be determined on merits and that lapses ought not necessarily debar a litigant from pursuing his rights. In *Katsuri Ltd vs Nyeri Wholesalers Ltd*,[8] a dismissed appeal was restored the mistake involved having been the omission of counsel to enter a date of the hearing in his diary.

In conclusion and after carefully analysing the facts before me, I find that this is a proper case for this court to exercise its discretion in favour of the applicant. Accordingly, I make the following orders:-

- a. ***That*** the orders of this court made on 24th day of June 2015 dismissing this appeal for want of prosecution be and are hereby set aside and this appeal is hereby reinstated and I direct that the same proceeds for hearing and be determined on its merits.
- b. ***That*** the appellant is further ordered to file and serve a record of appeal and fix a date for directions within the ***next 60*** days from the date of this ruling in default of which this appeal shall stand dismissed.
- c. *No orders as to costs.*

Orders accordingly. Right of appeal 30 days

Dated at Nyeri this ***15th*** day of ***June*** 2016

John M. Mativo

Judge

[1] Cap 21, Laws of Kenya

[2] Civil Appeal No. 18 of 2013

[3] Supra

[4] Civil Appeal No. 295 of 2009, Visram, Koome, Otieno-Odek , JJA, Nyeri Court of appeal

[5] Civil Appeal no. 49n of 2013, Nyeri Court of appeal,

[6] {2004}KLR 173

[7] {2002}2EA 662

[8] CA App No. 248 of 2012, Nyeri