REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 92 OF 2010

BETWEEN

DANIEL OTIENO AWUOR.. APPELLANT

VERSUS

1. HARDWARE TRADING STORES LTD...........................1ST RESPONDENT

2. DOUGLAS GITONGA MATHENGE.................................2ND RESPONDENT

(Appeal from the Ruling of Honourable D.K. Mikoyan, Senior Resident Magistrate Nakuru delivered on the 12th April 2010 in Nakuru CMCC No. 1435 of 2004 dismissing the application dated 13th October 2009)

JUDGMENT

1. This is an appeal from the Ruling of the trial court delivered on the 12th April 2010 in Nakuru CMCC No.1435 of 2004 dismissing the application dated 13th October 2009 filed on 19th October 2009.

The said application was brought by the Appellant then plaintiff seeking:

> ***(a) an order of stay of proceedings and/or further proceedings and or tendering of submissions pending the hearing and determination of the application.***
>
> ***(b) that the orders made on 5th October 2009 closing the plaintiffs case be set aside and the plaintiffs case be re-opened to allow the plaintiffs remaining witness testify.***

It was premised on the provisions of **Order 9B rule 8 of the Civil Procedure Rules and Section 63 and 3A of the Act.**

2. A brief background leading to the appeal is that the appellant had testified in the case which was then adjourned for further hearing. On the two subsequent hearing dates, the plaintiff and his advocates did not attend court. The trial magistrate then closed the plaintiffs case that paved way for defence hearing.

Before the defence evidence was taken, the appellants Advocate Mr. Kibellion appeared and told the court that he was not aware of closure of the plaintiff's case, and sought to re-open plaintiff's case as the two court hearings had not been brought to his attention by his court clerk.

3. In a ruling, the trial magistrate denied the oral application to have the case re-opened. The defence then proceeded with its case, and Mr. Kibellion proceeded to cross examine the Defence witness.

He then filed the application dated 13th October 2009, seeking stay of the proceedings and for leave to re-open the plaintiff's case. The application was argued interpartes.

On the 12th April 2010, the trial Magistrate dismissed the application. In his ruling, the trial magistrate observed that the plaintiff's case had not been dismissed nor was there judgment entered. He faulted the provisions of law under which the application was brought as in appropriate as no judgment had been delivered.

4. In his Memorandum of Appeal, the appellant faults the trial Magistrate for dismissing the application not on merit but on grounds that same was brought on wrong provisions of the law, thus denying the appellant an opportunity to be heard fully.

He urged the court to set aside the said dismissal order, and uphold Justice by an order re-opening the plaintiffs case.

5. I have considered submission by counsel and the trial court's proceedings. It is evident that the appellant's application was dismissed on a technical error by quoting wrong provisions of the law. I have considered the legal provisions under which the application was brought. These are **Section 63 and 3A of the Civil Procedure Act and Order 1 X B Rule 8** of the rules. The trial court held that the applicable provision ought to have been **Section 80 of the Civil Procedure Act**.

6. **Order 1XB Rule 8 of the Civil Procedure Rules** together with **Section 80 of the Ac**t envisages a situation where Judgment has been entered or the suit has been dismissed then the application to set aside such orders or judgment may be made.

Section 80 of the Act however provides for the remedy of review of a decree or order from which an appeal is allowed but no appeal has been preferred or from a decree or order where no appeal is allowed.

The position of the matter at hand is that there was no order of dismissal of judgment. The matter was pending for judgment. **Section 80 of the Act** is therefore in appropriate.

Likewise, Order I X B is also inappropriate there having been no judgment entered or the suit dismissed.

Section 3A of the Civil Procedure Act is more appropriate. It invokes the courts inherent jurisdiction to give life to the provisions of **Article 159(2) (d) of the Constitution** which enjoins the courts to administer justice without undue procedural technicalities. Further, **Section 1A and 1B of the Civil Procedure Act**, gives oxygen to court proceedings. They provide:

> IA *(1) The overriding objective of this Act and the Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.*
>
> *(2) The court shall in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in the Subsection (1).*

Section 1B mandates courts to handle matters before it to attain:

> ***a) The just determination of proceedings***
>
> ***b) The efficient disposal of the business of the court etc.***

7. It is evident that had the trial Magistrate considered the overriding objective and the Oxygen principles as opposed to mere technicalities, he would have arrived at a different finding. The merits of the application were not considered at all going by the record.

The Advocate may have been wrong. I agree he failed to attend court to prosecute the plaintiff's case. Should this however be visited on the plaintiff and more so when there was no Judgment delivered.

As stated in the case **Richard Ncharpi Leiyagu -vs- IEBC & 2 Others (2013) e KLR,**

> ***"--- A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interest of the Justice so dictate---"***

8. I find no good reason to shut the door of justice to the plaintiff being aware that there is no judgment in this case nor is the case dismissed. The respondent will not be prejudiced by allowing the appeal, and the re-opening of the appellant's case. The prejudice that may be suffered by the respondent can easily be remedied by an award of costs.

9. For those reasons, and with respect to the respondents submission, I find the appeal merited. It is allowed. The trial Magistrates ruling dated the 12th April 2010 is set aside and substitute with an order that:

> ***1. That further proceedings in the trial court case No. Nakuru CMCC No. 1435/2004 are hereby stayed.***
>
> ***2. The appellant's case before the trial Magistrate is hereby re-opened and the appellant is allowed to call further evidence in his case.***
>
> ***3. The respondents evidence adduced by DW1 is set aside, with an option of parties retaining the same by consent if they so wish.***
>
> ***4. That the appellant shall pay costs assessed at Kshs.5,000/= to the respondent before further hearing of the case.***

It is so ordered.

Dated, signed and Delivered in court this 29th day of September 2016.

JANET MULWA

JUDGE