REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 664 OF 2012

ALLAN OTIENO OSULA.....APPELLANT/APPLICANT

- V E R S U S -

GURVEV ENGINEERING & CONSTRUCTION LTD.....RESPONDENT

RULING

1. The application subject of this ruling is the one dated 29th February 2016, where the applicant prays for the following orders:

> ***1. THAT this application be certified as urgent and be heard on a priority basis.***
>
> ***2. THAT this honourable court be pleased to reinstate the appeal.***
>
> ***3. THAT this honourable court be pleased to stay execution of judgment pending the hearing of this application.***
>
> ***4. THAT the court be pleased to issue direction on the appeal.***

2. When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have the matter disposed of by way of written submissions. I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavits filed for and against the application. The applicant avers that the respondent filed an application dated 24th April 2014 which was heard and determined on 21st April 2015. It's the applicant's submission that that ruling was delivered on notice which notice its counsels on record received but misplaced the same. It is his contention that he was not present in court, hence he didn't know of the delivery of the ruling. They further aver that they were not aware of the fact that they were required to take a hearing date within 90 days as per the notice failure to which the appeal would stand dismissed. On the issue of stay of execution of the judgment, it submitted that should the orders of stay of execution fail to issue, the appeal will be rendered nugatory and Articles 49 and 59 of the Constitution would be contravened. It averred further that, it is willing to deposit half of the decretal sum in a joint interest earning account. The applicant concluded that the respondent's resources are unknown to the applicant and if the appeal is successful it might not recover the decretal sum.

3. The respondent on his part submitted that this court lacks jurisdiction as provided under Order 42 of the Civil Procedure Rules in relation to prosecution and dismissal of appeals. He argued that an appeal may be dismissed for want of prosecution and want of attendance by the appellant at a hearing and that the appeal maybe re-admitted after dismissal only where it ws dismissed for want of attendance. He argued that there is no provision for reinstatement of an appeal that is ordered to stand dismissed in default of

prosecution within a time limit given by the court as in this case. He contended that the applicant is dishonest with the court since while it deposes to having no notice of the ruling it has averred that it had notice in its submissions.

4. I have perused the court record. Indeed vide a ruling dated 21st April 2015, E. A. Lady Justice Aburili ruled on an application dated 24th April 2014 where the respondent sought to have the appeal struck out. In her ruling, the learned judge dismissed the application and directed that the appellant/applicant sets down the appeal for hearing within 90 days from the date of the ruling, failure to which the appeal will stand dismissed. It is also evident from the record that the appellant/applicant was not present in court when the ruling was delivered. In its defence, the applicant's counsel claims that his secretary misplaced the notice before she could take note of the date of delivery of ruling as a result of which they were not aware of the contents of the ruling including the ninety days within which they were to take a hearing date as intimated in the ruling. The applicant therefore seeks the leniency of the court for the appeal to be reinstated as it currently stands dismissed.

5. In my view, the applicant has been candid with the court that the secretary misplaced the ruling notice which notice was delivered in the absence of the firms advocates. Their advocates would have taken steps to figure out the ruling date they should have been vigilant, but they were not. However given that this was a mistake on the part of the advocates secretary, the mistake should not be visited on their client, the applicant herein. I am guided by the Court of Appeal in the case of **Savings & Loan Kenya Ltd V. Onyancha Bwo'mote (2014) eKLR** where they echoed the words of Chief Justice C. B. Madan who in the case of **Belinda Murai & 9 others vs Amos Wainaina C. A. No. Nairobi 9 of 1978** remarked that:

> **"A mistake is mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court may feel compassionate more readily. 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 have known better. The court may not condone it but it ought to certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that the courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.."**

6. It is evident from the record that the applicants' advocate was not present in court when the ruling was delivered. It is therefore possible that he was not aware of the ruling delivery date and further of the contents of the ruling. That being the case, it was only courteous that the respondents advocate who was in court to inform his fellow counsel of the delivery of the ruling. The applicant was therefore left in the dark as a result of which, he failed to take a hearing date within the prescribed 90 days. As I have stated above, this was a mistake on the part of the applicant's counsel which mistake in the interest of justice should not be visited on the applicant. The respondent can be compensated by an award of costs for the delay. I will therefore exercise my discretion and reinstate the appeal.

7. On the prayer for stay of execution the principles of granting of stay of execution are governed by Order 42 Rule 6 of the Civil Procedure Rules. The applicant is required under this provision to prove that he will suffer substantial loss, that the application is brought without unreasonable delay and to offer security. While the applicant has stated that he is ready to offer whatever security the court deems fit, it has failed to show that it will suffer substantial loss should the orders of stay of execution fail to issue. In fact the applicant did not in any way show to the satisfaction of this court how it will suffer substantial loss as it only claims that the appeal will be rendered nugatory if the orders are not granted.

8. In the end, the orders for stay of execution shall not issue.

However, as I stated earlier, the appeal is hereby reinstated. The appellant/ applicant to set a hearing date within 60 days from the hereof failure to which the appeal shall stand dismissed for want of prosecution. The respondent to have the costs of the application.

Dated, Signed and Delivered in open court this 25th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent