

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 660 OF 2007

NIMROD MIRUIKI NJOROGEAPPELLANT/RESPONDENT

VERSUS

ROBERT MWANGI MBURU.....RESPONDENT/APPLICANT

RULING

The appellant's appeal proceeded ex parte on 15th February 2012 when the respondent's advocate failed to attend court for hearing. The respondent has now filed the notice of motion dated 29th June, 2012 seeking orders that:

- a. This honourable court be pleased to set aside its judgment of 16th May 2012 against the Respondent/Applicant allowing the Appellant's appeal and the consequent decree thereto.
- b. This honourable court be pleased to set down the appeal for hearing inter parties.
- c. The cost of this application be provided for.

The application is premised on the grounds on the face of the application and the supporting affidavits of P. Ngunjiri Maina and Ambani Jusa sworn on 29th June 2012. Mr. Ngunjiri and Mr. Ambani have admitted that Mr. Ambani inadvertently failed to inform Mr. Ngunjiri of the date for hearing if the appeal occasioning Mr. Ngunjiri's failure to attend court during the hearing of the appeal.

The application is opposed by the appellant's grounds of opposition dated 30th August 2012. It is contended that although the appeal proceeded ex parte, the judge considered the two versions of the record of appeal in determining the appeal; and that the suit accident occurred ten (10) years ago thereby parties and insurer cannot indefinitely await the outcome of litigation. The appellant further contend that the respondent's counsel's error is inexcusable since the mode of cause listing matters is now digitalised.

I have considered affidavits and the rival submissions. The submissions reiterate the averments in the affidavit. What falls for this court's determination is whether the respondent has given sufficient reason to warrant setting aside the judgment.

Counsel for the respondent has explained their reason for non-attendance on the date set for hearing of the appeal. The said explanation coupled with the fact that this application has been filed timeously shows good faith. On the other hand, the appellant has not established that he shall be prejudiced in the event this application is allowed. I have also taken the liberty to peruse the proceedings in the appeal. The appellant had a chance to canvass its appeal orally in court such that not only the records were considered in determining the appeal. The respondent was on the other hand not heard.

Considering that no prejudice will be suffered by the appellant and holding the same position as in the case of *Maina v. Muriuki [1984] KLR 407* that: ***"the mistake of the Counsel should not be visited upon a litigant who has a good case which should be heard and determined on merit"*** and in the interest of justice, I allow the application. Costs shall be in the cause.

Dated, Signed and delivered in open court this 24th of October 2014.

J.K.SERGON

JUDGE

In the presence of:

Gichuru D. N. h/b for Patel for the Appellant

N/A for the Respondent