



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HCCA NO.141 OF 2006

**LOCHAB BROTHERS LTD1ST
APPELLANT**

**VICTOR SAVO GOMES.....2ND
APPELLANT**

=VRS=

ABRAHAM K.

BETTRESPONDENT

R U L I N G

This application mainly seeks two orders namely that the ex-parte order issued on 25/5/2010 dismissing the applicant’s application dated 26/4/2010 be set aside and the said application be reinstated for hearing on merit. The main reason for the application is that the advocate for the applicant was unable to attend the Court in view of a boycott then in existence and that that failure should not be visited upon the party.

The application is supported by an affidavit sworn by **Kaira Nabasenge**, the applicant’s advocate – which in the main elaborates the said ground. The application is opposed and there is a replying affidavit sworn by **Alfred K. Chepkwony**, counsel for the respondent. In the affidavit, it is deponed, *inter alia*, that the reason for counsel’s absence in court is not genuine and that the appeal itself has no chance of success.

The application was argued before me on 30/11/2010 by **Mr. Nabasenge**, learned counsel for the applicant and **Ms Shivanda**, learned counsel for the respondent. Counsel restated the stand-points taken by their clients in their respective affidavits.

I have considered the application, the affidavits both in support of the application and in reply thereto and the submissions of counsel. Having done so, I take the following view of the matter. The principles governing the exercise of judicial discretion to set aside ex-parte judgments or orders are well settled. The discretion is entirely free and the main concern of the court is to do justice to the parties before it (see **Patel –vrs E.A. Cargo Handling Services Ltd [1974] EA 75**). The discretion is intended to be exercised to avoid injustices or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct the cause of justice (see **Shah –vrs- Mbogo [1969] E.A. 116**). The nature of the action should be considered and it should be remembered that to deny a litigant a hearing should be the

last resort of a court (see **Sebei District Administration –vrs Gasyali [1968] E.A 300**). The question as to whether the respondent can reasonably be compensated by costs for any delay should also be considered and so is the reason for failure to attend the court. Those principles have been applied in applications to set aside ex-parte judgments. In my view they apply with equal force when considering applications to set aside ex parte orders.

Applying those principles to the matter at hand, I find that this application has been brought without undue delay. The application sought to be reinstated was dismissed on 25/5/2010. This application was then lodged on 24/6/2010, one month thereafter. The record shows that when the said application was called out for hearing on 25/5/2010 before **Ang’awa J**, neither the parties nor their advocates responded and the learned Judge dismissed the application for non-attendance. It is noteworthy that it was the applicant’s application which was set to be heard. The applicant having instructed counsel need not have attended. Should it be penalized for counsel’s non-attendance? In the case of **Philip Chemwolo & Another –vrs Augustine Kubende [1992-88] IKAR 1036, Apaloo J.A**, as he then was delivered himself as follows:-

“I think a distinguished equity Judge has said:

Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits.’

I think the broad equity approach to this matter, is that unless there is fraud or intention to overreact, there is no error or default that cannot be put right by payment of costs. The court as often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

In **Ngome –vrs- Plantex Company Limited [1984] KLR 792, Chesoni Ag J.A**, as he then was in allowing an appeal against an order refusing to set aside an ex parte order of dismissal of a suit, held at page 798 as follows:-

By dismissing the applicant’s application as incompetent in that it could not be preferred under rule 8, both the magistrate and learned judge did not consider its merits and consequently, they failed to take into account matters they ought to have taken into account, which is an essential consideration in the exercise of a discretion :

..... and as said by **Hancox J.A** in **Herman Mugachia Supra**, by visiting the error of his advocate on the unfortunate appellant, the two courts denied him the right of having his case heard at all. That as said by **Ainley, J** (as he then was) in **Sodha –vrs- Hemray [1952] Uganda L.R. Vol. 7 P.H.** should be the last resort of any court.’

I have seen the application sought to be reinstated. The same sought the reinstatement of the appeal which had been dismissed for want of prosecution. The applicant herein has raised issues which cannot be termed as frivolous. The basis of the application is once more counsel’s mistake. I cannot however at this stage make definitive findings on those issues. But those issues are arguable.

I have further considered whether the respondent would be compensated by costs for any delay to be occasioned by setting aside the ex-parte dismissal. I have weighed this against driving the applicant from the judgment seat unheard. I have come to the conclusion that the respondent can be adequately compensated by costs particularly as the applicant cannot be said to be deliberately attempting to obstruct or delay the course of justice.

The upshot of my consideration of the applicant’s application dated 24/06/2010, is that the same should be allowed. The order dismissing the application dated 26/4/2010 is set aside and so are all consequential orders. The said application is hereby reinstated and will now be heard and determined on its merits.

The applicant shall pay to the respondent the costs of this application and all costs thrown away. Those are the orders of the court.

DATED AND DELIVERED AT ELDORET THIS 25TH DAY OF JANUARY 2011.

F. AZANGALALA

JUDGE

In the presence of:-

1. **Shivanda Ms** for the Respondents

F. AZANGALALA

JUDGE

25/1/2011