REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 40 OF 2003

GEORGE WILIMASON.....APPLICANT

VERSUS

PHILIP KIPLAGAT KERICH.....RESPONDENT

RULING

This is an application by the appellant primarily for an order setting aside the order dismissing the appeal for non-attendance and for reinstatement of the same for hearing on merits. The application is based on the grounds that when the appeal came up for hearing, counsel for the applicant was checking on other matters before another court and the appeal was dismissed for non-attendance of the parties on 18th May, 2010 and that the appeal raises serious issues which should be determined on merits. In the applicant's view the respondent stands to suffer no prejudice.

The application is supported by an affidavit sworn by **Ms. Abigael Lusinde Khayo**, counsel for the applicant. It is deponed in the affidavit, *inter alia*, that on the said date before the appeal was called out for hearing, she met her counter-part, Ms. Shivanda who intimated to her that she was not ready with the appeal and would apply for adjournment but when the appeal was called out for hearing the said counsel did not address the court with the result that the appeal was dismissed for non-attendance. In her view, the appeal raises triable and weighty issues and she should be accorded an opportunity to ventilate them otherwise the applicant will be condemned because of her mistake.

The application is opposed and there is a replying affidavit sworn by the said Ms. Shivanda, counsel for the respondent. She depones, *inter alia*, that the appeal was indeed dismissed for non-attendance but not in her presence and that counsel for the applicant should have instructed an advocate to hold her brief if

she was engaged elsewhere as she alleges. In her view the applicant has not demonstrated that it deserves the order sought and the application is an abuse of the process of the court.

I have considered the application the affidavits filed and the record of this appeal. Having done so, I take the following view of the matter. The principles governing the exercise of judicial discretion to set aside exparte orders are settled. The discretion is intended to be exercised to avoid injustice 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 or delay the course of justice **(See Shah -Vs - Mbogo (1969)E.A116)** the discretion is perfectly free and unfiltered and is exercised on such terms as are just **(See Patel -Vs- East African Cargo- handling services (1975) E.A 75).** In exercising the discretion, the court should considers, *inter alia*, the facts and circumstances both prior and subsequent and the merits of either side. The court should also consider whether or not the affected party can reasonably be compensated by costs for any delay and should remind itself that to deny a party a hearing should be the last resort of the court **(See Jamndas -Vs- Sodina Gormanda (1952) 7 ULR** and **Sebei District Administration -Vs- Gasyeli (1968) EA 300)**

In **Shabir Din -Vs- Ram Parkash Anand (1958) 22 EACA 48** the court stated as follows:-

"The discretion of the court is perfectly free and the only question is whether upon the facts of any particular case it should be exercised. In particular mistake or misunderstanding of the appellant's legal advisers even though negligent may be accepted as a proper ground for granting relief but whether it will be so accepted must depend on the facts of the particular case."

Those are the applicable principles. I am alive to them. I am also alive to the fact that the discretion, though free, must be exercised judiciously. In the present case, counsel for the applicant has sworn, *inter alia*, that the applicant is desirous of being heard on its appeal and should not be shut out because of her mistake. Counsel for the respondent acknowledges that her counterpart was indeed in another court when the appeal was dismissed. There is no suggestion that counsel for the applicant was deliberately obstructing or delaying the hearing of the appeal. That cannot be the position given the acknowledgement of counsel for the respondent. Considering all the circumstances both prior to and subsequent to the dismissal of the appeal, I have come to the conclusion that the larger interests of justice will be served if the dismissal order is set aside. I have come to that conclusion after taking into account the fact that counsel for the respondent, on her own admission, was also not in court when the order was made and further that the respondent can reasonably be compensated by costs for the resultant delay.

In **Philip Chemwolo & Another -VS- Augustine Kubende (1982 – 88) KAR 103, Apoloo JA,** as he then was, said as follows at page 1042:-

"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 over reach there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

In the premises, I allow the application dated 15th May, 2010, in terms of prayers 2 and 4 thereof. The respondent shall have the costs of the application.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 21ST DAY OF JUNE 2011

F. AZANGALALA

JUDGE

READ IN THE PRESENCE OF : -
Mr. Chepkwony for the Respondent

F. AZANGALALA

JUDGE

21ST JUNE 2011