REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISCEL. CIVIL APPL. NO. 473 OF 2009

1. MARINDICH BIWOTT

2. KIPKOSGEI BIWOTT .....APPLICANTS

=VERSUS=

JACOB IRWA KEMBOI .....RESPONDENT

RULING

On 17/8/2009, the applicants, **Marindich Biwott** and **Kipkosgei Biwott,** lodged an application mainly for leave to file an appeal out of time from the Judgment of the Resident Magistrate in Eldoret CMCC No. 990 of 2005. That application was fixed for hearing on 18/5/2010. Come that date, neither the applicants nor the respondent or their advocates attended the court with the consequence that the application was dismissed for non-attendance. The dismissal triggered this application which seeks to set aside the order dismissing the said application.

The reasons for the application as expressed in the body of the application are that counsel on record had instructed another counsel to hold her brief but the said counsel did not and that it is necessary and in the interest of justice that the orders be set aside. The application is supported by affidavits sworn by **Risper Arunga**, the applicant's advocate and **Walter Wanyonyi** counsel, whom she had briefed. In her affidavit, the applicant's counsel has deposed that the date the application came up for hearing, she had other matters in Kitale and therefore instructed **Mr. Wanyonyi** to hold her brief. **Mr. Wanyonyi** in his affidavit confirms that he was indeed requested by **Ms Arunga** to hold her brief on 18/5/2010 but the application was not listed and he assumed that the same would therefore not be heard.

The application is opposed on the basis of the following grounds of opposition, filed by the respondent's advocates:

1) That the application is frivolous, vexatious and an abuse of the court process.

2) That the applicants are guilty of laches.

3) That the applicants have not purged the contempt or lifted the warrants of arrest issued against them and which they have defied with impunity.

4) That the instant application should be dismissed with costs.

The application was canvassed before me on 9/11/2010 by **M/s Nderitu,** learned counsel instructed by **M/s Arunga** and **Mr. Omboto**, learned counsel for the respondent. Counsel reiterated the parties' stand-points taken in their affidavits and grounds of opposition respectively. I have considered the application, the affidavits and the grounds of opposition. I have also given due consideration to 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 orders are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it. (See **Peter =vrs= E.A. Cargo Handling Services Ltd (1974) E.A. 75**). 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 cause of justice (See **Shah =vrs= Mbogo [1969] E.A. 116**). The nature of the action should be considered and so should the question as to whether the other side can reasonably be compensated by costs for any delay bearing in mind 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**). It also goes without saying that the reason for the failure to attend should be considered. Those principles are applied in applications to set aside an ex parte judgment. They apply with equal force in applications to set aside ex-parte orders.
Applying those principles to the matter at hand, I find that this application has been brought into court rather late. The application sought to be reinstated was dismissed on 18/5/2010 yet this application was lodged on 24/9/2010, four (4) months thereafter. The four months delay has not been explained. However, that is not the only consideration in determining this application. The other principles discussed above must still be considered notwithstanding the delay. The record shows that when the application sought to be reinstated was called out on 18/5/2010 at 3.45 p.m., none of the parties including the respondent attended. **Mr. Wanyonyi's** explanation for not holding **M/s Arunga's** brief at the time is therefore not altogether unreasonable. That explanation is in any event not disputed. In the premises, the applicants cannot really be said to be deliberately delaying or obstructing the cause of justice. I also do not find that the delay involved cannot reasonably be compensation by costs.

Heavy weather was made of the fact that the applicants had not invoked the correct order and rule under which they seek relief. The short answer to that complaint is found in Order VI Rule 12 of the Civil Procedure Rule. This application cannot therefore be defeated on the basis that the correct Order and rule have not been cited.

Finally, I cannot lose sight of the fact that the application belongs to the applicants and not to their advocates. It is clear that the application dated 17/8/2009 was dismissed because of counsel's mistake. I do not think that the mistake should be visited on the applicants.
The upshot is that the applicant's application dated 24/9/2010 is allowed in terms of prayer 1 thereof. The applicants shall pay to the respondents the costs of this application.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 30TH DAY OF NOVEMBER 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-
Mr. Barasa holding brief for Mr. Omboto for the respondent.

F. AZANGALALA

JUDGE

30/11/2010