



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 165 OF 2017

JOHN MUTHAMA.....APPELLANT

-VERSUS-

ASSOCIATED BATTERY.....RESPONDENT

RULING

1. On 18th November, 2019, this Court dismissed this appeal on the ground that despite service on the appellant of the notice for directions, the appellant failed to attend court and had by then not filed a record of appeal. In dismissing the appeal, the court expressly stated that it was exercising its inherent jurisdiction.
2. By a Motion on Notice dated 18th November, 2019, the Appellant seeks to have the said order reviewed or set aside and the appeal reinstated.
3. The application was supported by an affidavit sworn by Mutua J. Makau, the Appellant's advocate on 18th November, 2019.
4. According to the deponent, the non-attendance was due to misdiarising and it was only upon checking the matter on 18th November, 2019 to follow up that he got the information that the appeal had been dismissed. He deposed that he had religiously attended court and that on the date the matter was dismissed it was fixed for mention for directions and not for hearing.
5. In the submissions filed in support of the application, the Appellant relied on **John Nahashon Mwangi vs. Kenya Finance Bank Limited (in Liquidation) [2015] eKLR** and **Belinda Murai & Others vs. Amos Wainaina (1978) KLR 278**.
6. The application was opposed by way of a replying affidavit sworn by **Philip M. Mulwa** the Respondent's advocate. According to the deponent, there is no tangible explanation why the hearing of 18th November 2020 was never attended to since the notice by the court was so clear and the issue of Diarizing is a non-starter.
7. It was noted that since the memorandum was filed on 20th December 2017, no action was taken for almost two (2) years, prompting the court to issue a notice on its own motion and that even after filing the application to reinstate the appeal, it took over a year to serve it upon the Respondent on 4th November 2020, a further manifestation of the lack of interest in the appeal. It was contended that other than an expression of willingness to prosecute the appeal, nothing else has been done to show such seriousness. It was further noted that even the record of appeal is yet to be prepared and served and the typed proceedings have not even been collected from the court.

Determination

8. I have considered the application herein, the affidavits in support thereof as well as in opposition to the application.
9. As indicated at the beginning of this ruling, the appeal was dismissed, partly for failure to file the record of appeal and failure to attend the court when the matter was listed for directions. In my view the appeal was properly dismissed since the matter was not for mere mention but to give directions on the appeal and such directions may encompass its dismissal where there is non-compliance with the rules.
10. The Court of Appeal in **Murtaza Hussein Bandali T/A Shimoni Enterprises vs. P. A. Wills [1991] KLR 469; [1988-92]** held that there is inherent power to restore a case for hearing after it has been dismissed. However, the decision whether or not to reinstate a dismissed

appeal is no doubt an exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the applicant for such orders. See Gharib Mohamed Gharib vs. Zuleikha Mohamed Naaman Civil Application No. Nai. 4 of 1999.

11. In this case the failure to attend is attributed to the failure to diarise the date and bring the matter to the attention of the advocate. In Kalemera vs. Salaama Estates Ltd [1971] EA 284 a matter that has striking similarities to the present case, the Court expressed itself as follows:

“the failure to attend at the hearing was due to the fact that the applicant's advocate wrongly diarised the date and immediately he became aware of the error he filed the present application. To treat such mistake as an indication of negligence would be to take an extreme view of the circumstances. The court prefers to treat the circumstances as arising out of honest mistake...The test to be applied under section 101 which speaks of “the ends of justice” is wider in its terms and permits a greater discretion. Poverty of the excuse is not the sole matter which must be considered, the defence, if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally it should always be remembered that to deny the subject a hearing should be the last resort of a court.. In this suit, the plaintiff's claim is for damages for wrongful dismissal. The defendant contends that the dismissal was justified under the terms of the written contract between the parties. Clearly, the circumstances require that the defence be heard on its merits. The defendant is here and is anxious to be put in a position to defend. Looking at the matter from the plaintiff's side, the court does not think that he will be prejudiced or suffer hardship if he can be adequately compensated by costs...The circumstances of this case are such that “ends of justice” require that a rehearing should take place. To avoid any misunderstanding about this conclusion, the court has riveted its attention to the circumstances of the error in this particular case, and not attempted to prescribe a general rule for dealing with all errors because there can be errors and errors involving circumstances of infinite variety.”

12. That mistakes do occur in the process of litigation was appreciated by the Court of Appeal in Murai vs. Wainaina (No. 4) [1982] KLR 38 where it was held that:

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior Counsel the Court might 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 know better. The Court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that Courts of Justice themselves make mistakes which are politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.”

13. As was held in Shital Bimal Shah & 2 Others vs. Akiba Bank Limited Civil Appeal (Application) No. 159 of 2005 [2006] 2 EA 323:

“An error of judgement on the part of a legal adviser may help build up sufficient reason under rule 4 to induce the court to exercise its discretion to extend time for the doing of any act under the Rules of the Court. Mistakes of counsel come in all shapes and sizes but some have been rejected by the Court such as total inaction by counsel disguised as a mistake. A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by a senior counsel though in the case of junior counsel the court might 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 person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate.”

14. In Meghji Velji Chhaya vs. Attorney General & 3 Others Civil Application No. Nai. 136 of 1996, the Court of Appeal held that an omission by an advocate's clerk to enter a hearing date in the diary is sufficient cause for reinstatement of a dismissed application.

15. In Chemwolo and Another vs. Kubende [1986] KLR 492; [1986-1989] EA 74, it was held that:

“Unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs since the Courts exist for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

16. In this case, the application was filed soon after the dismissal which indicates the Appellant's desire to prosecute the appeal.

17. The Respondent has not contended that if the appeal is reinstated it will suffer such prejudice that cannot be compensated by an award of costs. Costs, it has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine. See Waljee's (Uganda) Ltd Vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.

18. In Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22, Oder, JSC stated:

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered.”

19. I find that this is a proper case for the exercise of discretion in favour of the Appellant. Accordingly, I allow the application, set aside the order dismissing the appeal and reinstate the same to hearing. The costs of this application will be in the appeal.

20. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 8TH DAY OF MARCH, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Muthama for Mr Mutua Makau for the Appellant

Mr Nzuba Kitonga for Mr Mumma for the Respondent

CA Geoffrey