



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC.APPLICATION NO.3 OF 2021

SALIM MOHAMED.....DEFENDANT/APPLICANT

- VERSUS -

ROBERT FONDO KIRIMO.....PLAINTIFF/RESPONDENT

Coram: Justice Reuben Nyakundi

Mr. Kimonda Gachoka Advocate for the Applicant

Mr. Muranje & co. Advocate for the Respondent

RULING

By a notice of motion dated 26th January 2021, the applicant seeks an order of this court to exercise discretion to set aside the dismissal order issued on 26th January 2021 on the application to file an appeal out of time. It is expressed to be brought under Articles 47, 48, 50 of the Constitution, Section 1 (A), 1(B), 3 and 3 (A) of the Civil Procedure Act as read with order 22, Rule 22 and order 51 Rule 1 of the Civil Procedure Rules.

The applicant relied on the affidavit in support dated 26th January 2021. The respondent, in opposition filed grounds of opposition on consideration of the matter, I take the following view;

Determination

The critical issue here is whether the applicant merits the relief set out in the notice of motion. The principles on this question are well settled in a plethora of cases, for example, in **CMC Holdings vs Nzioki [2004] 1KLR 173** the Court stated that; **“In law, the direction that a court of law has in deciding whether or not to set aside ex-parte order was made to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence accident or error to be driven out of the seat of justice. Such an exercise of discretion will in our mind be wrong in principle. We do not think the answer to that weighty issue was to advice the appellant of the recourse open to it, in doing so the appellant will be thrown out of the seat of justice empty handed when it had what ought very well amounted to an excusable mistake visited upon the appellant by its advocate”.**

In the present case, the applicant asserted that non-attendance on the material day was as a result of technical hitches experienced by his legal counsel to log in to the virtual platform of the court. That if the dismissal order is allowed to subsist, it will highly prejudice the appellant and likely to occasion an injustice.

I have carefully considered the litigation history of this matter and the subsequent order for dismissal arising out of non-attendance of the appellant counsel. To prove the circumstances of this application, the applicant has alluded to the mistake of counsel as the ground sufficient enough for the court to exercise discretion to set aside the dismissal order. The dominant principle in any dispute resolution is adherence to the provisions under Article 50 of the Constitution on the right to a fair hearing. It is a Constitutional imperative that no negligent conduct, mistake, error, accident or blunder of a party or counsel shall be used to defeat the right to a fair hearing. This court is very much aware of the need for expeditious delivery of justice and for each party to have his or her day in court on the merits. There is no doubt the applicant's failure has been sufficiently explained in the averments stated in the affidavit.

Accordingly, for the reasons alluded to and the principles of law applicable to such applications, the applicant's motion has merit for it to be allowed with a throw away cost of 10,000 payable to the respondent on or before setting down the appeal for hearing. It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF APRIL 2021.

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R. NYAKUNDI

JUDGE

NB:

In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules. [muranje.law@gmail.com, info@kghazina.co.ke]