



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL APPEAL NO. 97 OF 2019**

**HUSSEIN RAMADHAN HAMISI Alias HUSSEIN HAMISI.....APPELLANT**

**VERSUS**

**DAVID MURUU LAIKANYA (Suing as a Legal**

**Representative of the Estate of MUNG'ATHIA ABIRA.....RESPONDENT**

**RULING**

1. This ruling relates to an undated Motion on Notice filed on 4/11/2019. The same was brought under *Order 12 Rule 7 of the Civil Procedure Rules 2010, sections 1A, 1B and 3A of the Civil Procedure Act and Article 159 of the Constitution of Kenya 2010*.

2. The application sought the following orders: -

**“2. That the Honourable Court be pleased to set aside its order dated 14<sup>th</sup> October, 2019 striking out the applicant’s application dated 14<sup>th</sup> August, 2019.**

**3. THAT the status quo ante the striking out of Application dated 14<sup>th</sup> August, 2019 be restored/maintained.**

**4. THAT the Honourable Court be pleased to extend the time for filing the application for leave to file an appeal out of time and supplementary affidavit.**

**..”.**

3. The application was grounded upon the grounds set out in body of the Motion and the supporting affidavit of **Hussein Ramadhan Hamisi** filed on 4/11/2019. It was contended that the applicant was directed to file an application for leave to file an appeal out of time and a supplementary affidavit annexing the plaint file in the lower court. That the said documents were duly drawn and dispatched to an agent in Meru to file on 1/10/2019.

4. That however, due to an inadvertent mistake on the part of the agent in Meru, the said documents were not filed at all. That on 25/10/2019, the applicant’s advocates received a letter from the respondent’s advocates stating that their application dated 14/8/2019 had been struck out. Failure to file the documents was neither deliberate nor intentional. That the applicant has an arguable appeal with overwhelming chance of success.

5. The application was opposed vide the replying affidavit of **David Muruu Laikanya** sworn on 19/11/2019. He deponed that on 16/09/2019, the court gave directions for the applicant to file a supplementary affidavit as well as a formal application for leave to file an appeal out of time. That when the matter came up on 14/10/2019 to confirm compliance, none of the said documents had been filed. That further, neither the applicant nor his advocate appeared. That as a result the application was struck out. That the applicant had not shown any intention of having the matter determined.

6. The parties were directed to file and exchange written submissions within 14 days of 28/11/2019. None of the parties had filed the submissions as at the time of writing this ruling. Technically therefore, the applicant failed to prosecute his application.

7. On the merits, I have considered the affidavits on record. The parties seem to have misconceived the record. On 14/10/2019, this court did not strike out the application dated 14/8/2019, it dismissed the same for none attendance. The order of the Court was as follows: -

**“Court**

**It is now 10:30 am. There is no appearance on behalf of the applicant.**

**There being no reasons to be recorded under 012 R3 CPR, the application dated 14/8/2019 is hereby dismissed with costs. The order of stay is hereby discharged.**

8. In this regard, contrary to the averments of the respondent, the present application was brought under the correct provisions of the law, viz **Order 12 Rule 7** which provides: -

**“7. When under this order, judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”.**

9. It is clear that, it is in the discretion of the Court to vary or set aside an order of dismissal of a suit made under **Order 12 Rule 3(1)** However, such discretion, like all other discretion although perfectly free, has to be exercised judiciously.

10. In **Pithon Waweru Maina v Thuka Mugiria [1983] eKLR** the Court of Appeal held: -

**“2. The principles governing the exercise of the judicial discretion to set aside an ex parte judgment obtained in the absence of an appearance of defence by the defendant or upon the failure of either party to attend the hearing are:**

**a) Firstly, there are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just..... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76C and E.**

**b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand [1955] 22 EACA 48.**

**.....”**

11. In exercising its discretion under **Order 12 Rule 7**, the Court will consider, the reason for non-attendance of the party and the delay in applying for the setting aside of the order of dismissal or for the variation of the ex-parte judgment.

12. In the present case, when the matter came up on 16/9/2019, the applicant was represented. Mr. Thangicia Advocate held brief for the applicant’s advocates on record. The date of 14/10/2019 was therefore given in the presence of all the parties.

13. Come the 14/10/2019, neither the applicant nor his advocate appeared. In his lengthy affidavit in support of the application, the applicant has completely failed to explain why he and/or his advocates failed to attend Court on 14/10/2019. There being no reasons advanced, there is no basis upon which this Court is to exercise its discretion. The said affidavit dwelt on irrelevancies that did not explain the failure to attend Court when the subject application was dismissed for non- attendance.

14. Having in mind that, the applicant had delayed to file the appeal on time; that the applicant failed to comply with the directions of 16/9/2019; that the applicant failed to attend Court on 14/10/2019 and has failed to explain for his failure to attend Court, this Court is convinced that the applicant is not interested in having the ends of justice being met. He is only hell bent in impeding the wheels of justice.

15. Accordingly, the application is without merit. The same is dismissed with costs. The order of stay made herein on 21/11/2019 is hereby discharged.

**SIGNED at Meru**

**A. MABEYA**

**JUDGE**

**DATED and DELIVERED at Meru this 13<sup>th</sup> February, 2020**

**F. GIKONYO**

**JUDGE**