



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE-J)**

**CIVIL CASE NO. 64 OF 2018**

**BETWEEN**

**CHARLES WESONGA MBINGI.....APPELLANT**

**AND**

**BERNARD ODHIAMBO OMUSI.....1ST RESPONDENT**

**ATTORNEY GENERAL.....2ND RESPONDENT**

**(Being an Appeal from the Ruling and Order in Kisumu CMCC No. 86 of 2016 by Hon. C. Yalwala (PM) on 17<sup>th</sup> July, 2018)**

**JUDGMENT**

**Background**

1. On 28.01.18, the court fixed **Kisumu CMCC No. 86 of 2016** for hearing on 06.03.18 in the presence of Mr. Ochieng, counsel for the 1<sup>st</sup> Respondent and Mrs. Wafula counsel who was holding brief for Mr. Ashioya for the Appellant.

2. Come 06.03.18, Mr. Munuangó who was holding brief for Mr. Ochieng appeared for the 1st Respondent; Mr. Nyauma appeared for the 2nd Respondent and there was no representation for the Appellant.

3. The court after satisfying itself that the date was taken by consent proceeded with the hearing and both the Respondents closed their cases. The case was fixed for judgment on 22.05.18 and it was delivered as scheduled and judgment was entered against the Appellant for Kshs. 1,200,000/-.

4. By an application dated and filed on 28.05.18, the Appellant sought orders to set aside the judgment delivered on 22.05.18 on the ground that his advocate was not informed of the hearing date by counsel that held his brief on 28.01.18. The court considered the application and the replying affidavit and by a ruling dated 17.07.18 dismissed the Appellant's application.

**Appeal**

5. The Appellant being dissatisfied with the lower court's decision preferred this appeal on 20.07.18 mainly on the ground that his constitutional right to be heard had been violated

6. This appeal was argued by way of written submissions filed by the counsels for the Appellant and 1<sup>st</sup> Respondent.

7. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See **Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123**.)

8. The gravamen of this appeal is whether the Appellant ought to have been allowed to defend the suit.

9. In its ruling, the trial court faulted the Appellant's counsel for failing to confirm the orders given by court on 28.01.18, from Mrs. Wafula who was holding his brief on that date.

10. **Madan, JA**, had this to say of mistakes by a lawyer in the case of **Belinda Murai & 9 others vs. Amos Wainaina [1979] eKLR**,

**“The former advocate's belief was a mistake on a point of law however wrong he might have been in his belief. No one has**

said that it was a deliberate act. On the contrary, his obstinate adherence to his wrong belief shows that he genuinely, though mistakenly, believed his view was correct.

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 a 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 interests of justice so dictate.**

**It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of the years since the decision was delivered so requires. It is all done in the interests of justice. A static system of justice cannot be efficient. Benjamin Disraeli said change is inevitable. In a progressive country change is constant. Justice is a living, moving force. The role of the judiciary is to keep the law marching in time with the trumpets of progress”.**

11. I fully agree with those sentiments which I am happy to adopt for purposes of this ruling.

12. The application the subject of the impugned ruling was filed on 28. 05.18 which was 6 days after the impugned judgment was delivered and was therefore brought without delay.

13. It should be the court's last resort to deny a party a chance to be heard. The overriding objective of the civil procedure rules is to facilitate the just, expeditious, proportionate and affordable resolution of disputes. Judicial authority to do justice to all, vested on this court by Article 159 of the Constitution cannot be said and be seen to be exercised if the courts were to deny a party a chance to be heard on merit especially where failure to attend court has been explained and the party has moved the court without delay.

14. Failure by counsel and Appellant to attend court was explained. The prejudice suffered by the 1<sup>st</sup> Respondent can safely be compensated by an award for costs.

15. Consequently, the notice of motion dated 8th December, 2018 is allowed in the following terms: -

**a) The Ruling and Order in Kisumu CMCC No. 86 of 2016 dismissing the Appellant's application dated and filed on 28.05.18 is set aside and substituted with an order allowing the application in terms of prayers 3 only with throw away costs of Kshs. 15,000/- to the 1<sup>st</sup> Respondent**

**b) The Appellant is at liberty to apply for leave to re-amend its defence and to enjoin AYOTI DISTRIBUTORS LIMITED as a party to the suit if he so wishes**

**c) The Appellant is condemned to pay the costs of this appeal.**

**DATED AT KISUMU THIS 14<sup>th</sup> DAY OF October, 2020**

**T. W. CHERERE**

**JUDGE**

Court assistant - Ms. Amondi

For Appellant - Mr. Mirembe for Ashioya & Co. Advocates

For 1<sup>st</sup> Respondent - Mr. Ochieng for P.Ochieng Ochieng & Co. Advocates For 2<sup>nd</sup> Respondent - State Law Office