



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 656 OF 2011

MAU WEST LIMITED.....APPELLANT

VERSUS

K.A.M COMPANY LIMITED.....RESPONDENT

RULING

1. The Applicant herein filed an application dated 5th August, 2016 seeking reinstatement of the Appeal which was dismissed on 18th June 2016. When the Application came up for hearing on 15th March, 2017 there was no appearance by both parties and the application was dismissed for non-attendance. Aggrieved by the orders made on of 15th March, 2017, the Applicant filed the Notice of Motion dated 3rd April, 2017 under the provisions of section 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules, 2010 seeking orders that;

- a. The orders issued on 15th March, 2017 dismissing the Application dated 5th August, 2016 be set aside.
- b. the Application dated 5th August, 2016 be reinstated, and
- c. any other relief that the Honourable Court may deem fit to grant.

2. The Application is premised on the grounds on the face of the application and on the Supporting Affidavit of **SIMON KAMERE**, the Appellant's Advocate. It is deponed that just before the hearing date of 15th March, 2017, the Applicant's Advocate was served with a hearing notice in a suit in which he is the Plaintiff being SPMCC NO. 5943 of 2002 and on 15th March 2017 he sent his pupil to request a counsel to hold brief and have the file placed aside but he was not able to have the same done in time. Counsel depones that he arrived in court at 9.21 am only to find the matter had been dismissed. The Applicant further states that for the previous two hearings he had attended court without fail.

3. The Respondent opposed the Application and filed grounds of opposition dated 16th September, 2016. The application is opposed on the grounds that the same is frivolous, that litigation must come to an end, that the appeal was filed out of the stipulated time and that the Applicant did not make any effort to prosecute the Appeal. It was also stated that the Appellant has no good reasons to justify setting aside the dismissal orders.

4. I have considered the Application, the Supporting Affidavit and the Grounds of opposition filed herein. Annexed to the Affidavit is a hearing notice for the matter in which the Appellant's counsel is a Plaintiff which hearing was scheduled for the same day with the Application dated 5th August, 2016. The court has also considered the Counsel's submissions that he sent his pupil to request a counsel to hold his brief but he could not do so in time as well as the fact that he attended court on the said date but found the application had been dismissed.

5. The Respondent has opposed the application on the grounds that there are no good grounds to justify the setting aside of the dismissal order and that the Appellant has not make efforts to prosecute the appeal. It is my view that those grounds would best be argued within the application dated 5th August, 2016 seeking reinstatement of the Appeal.

6. This Court has the power to set aside orders issued where there is non- attendance upon, the applicant giving a satisfactory explanation for the non- attendance. **Order 12 Rule 7 of the Civil Procedure Rules** provides that, "*Where 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.*"

7. In the case of **Kasturi Limited v Nyeri Wholesalers Limited [2014] eKLR** wherein the Applicant filed a notice of Motion seeking to

reinstate an appeal which had been dismissed for non-attendance, the Court of Appeal allowed the application and held that “ *Article 159 of the Constitution enjoins this Court to administer substantive justice. We are cognisant that Sections 3A and 3B of the Appellate Jurisdiction Act, through the overriding objective principles mandate this Court to act justly and fairly. The overriding objective principle is not aimed at giving justice to one party at the expense of another. Considering that there was no delay in bringing this application and being satisfied with the explanation for non-attendance as deposed in the supporting affidavit, we allow the Notice of Motion dated 4th April, 2014, and hereby restore Civil Appeal No. 248 of 2012, to be heard on merit. The registry is hereby directed to list the appeal for hearing on priority basis. Costs of this application shall be borne by the applicant.*”

8. Therefore, I will allow the application dated 3rd April 2016 and set aside the orders issued on the 15th March, 2017 dismissing the application dated 5th August, 2016. The application dated 5th August, 2016 is hereby reinstated for hearing. Costs of Ksh.5,000 to be paid to the Respondent within 7 days from today.

Dated, Signed and Delivered at Nairobi this 10th Day of May, 2018.

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L. NJUGUNA

JUDGE

In the Presence of

..... For the Applicant

..... For the Respondent