REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO. 3 OF 2016

KEVIN OMARE NYAYIEMI.....APPELLANT

=VRS=

PETER MARONGO.....RESPONDENT

[Being an Appeal from the Judgement and Decision of Hon. N. Kahara (RM)

dated the 29th day of January, 2018 in the original KEROKA PM CC NO. 171 OF 2015]

JUDGEMENT

This is an appeal against the ruling of the trial magistrate who having dismissed the plaintiff's case for non-attendance rejected an application by the plaintiff to reinstate the same. The impugned ruling is dated 29th January 2016.

In the memorandum of Appeal filed herein on 9th February 2016 the appellant contends: -

> **"1. THAT the Learned trial Magistrate's orders made on 29th January 2016 are unconstitutional.**
>
> **2. THAT the Learned trial Magistrate erred in law and in fact in denying the Appellant an opportunity to be heard even when sufficient reason had been given to warrant the reinstatement of the suit.**
>
> **3. THAT the Learned trial Magistrate erred in law and in fact in dismissing the Appellant's application which in essence denied him his constitutional right of being heard on merit.**
>
> **4. THAT the Learned trial Magistrate erred in law and in fact in finding that the Appellant should suffer for the mistakes committed by his advocate.**
>
> **5. THAT the Learned trial Magistrate erred in law and in fact in applying a higher standard of proof than balance of probability in civil proceedings.**
>
> **6. THAT the Learned trial Magistrate used language unknown in law in referring to the Appellant's Application as a "water of court's time" when she is being paid by taxpayers to hear and determine cases.**
>
> **7. THAT the Learned trial Magistrate failed to consider the fact that the Application was unopposed and the respondent against whom interlocutory judgement had been entered stood to suffer no prejudice whatsoever if the application was allowed."**

The appellant urges this court to set aside the decision of the trial court and substitute it with an order reinstating the suit Keroka SPMCC No. 171 of 2015.

Arguing that this court's discretion to set aside the order of the trial magistrate is unlimited, Counsel for the appellant urged this court to set it aside and reinstate the dismissed suit. Counsel submitted that the appellant is desirous of prosecuting his case and stands to suffer for the mistake of his Advocate. Counsel cited the following persuasive authorities: -

> **1. Intermart Manufacturers Ltd v Akiba Bank Ltd 2007 eKLR**

2. Transami (K) Limited Sokhi International (K) Limited [2007] eKLR.

3. Hezron Obadiah v Alphonse Oladipo & Another [2015] eKLR.

In all the above cases, the cases were dismissed for non-attendance but judges allowed the appeals and reinstated the suits.

The defendant (respondent in this appeal) having been duly served with the summons to enter appearance neither entered appearance nor filed a defence and the trial court had upon the application of the appellant entered interlocutory judgement against the respondent. The suit was then set down for formal proof but on the date fixed for hearing neither the appellant nor his advocate attended and the suit was dismissed for non-attendance. The appellant sought to set aside the order for dismissal on the ground that his then advocate had misdiarized the date but the trial magistrate dismissed the application as the appellant had not tendered proof that his advocate had in fact misdiarized the date. That order of dismissal is what gave rise to this appeal.

I have considered this appeal carefully and seek to echo the words of Apaloo, JA, as he then was in **Phillip Chemuolo & Another v Augustine Kubende [1982 – 88] KAR** that: -

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits. I think the broad equity approach to this matter is that unless there is fraud, or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."***

These words were quoted with approval by Azangalala J in **Intermart Manufacturers Ltd v Akiba Bank Ltd [2007] eKLR**.

In **Hezron Obadiah v Alphonse Oladipo & Another [2015] eKLR** a case on all fours with this one Mbogholi Msagha, J held: -

> ***"7. The plaintiff has all along shown willingness to prosecute the suit. The reason given for failure to attend court on 2nd December 2014 is not peculiar or improbable; on the contrary, it is eminently possible for an advocate's clerk to diarize a case on the wrong date especially in firms handling numerous matters. The explanation is credible."***

In that case as in this one the plaintiff did not adduce evidence to support the claim that it was the advocate's mistake the date of the hearing was not properly diarized. I too find that the reason given for the non-attendance in the lower court was credible and that in the circumstances the trial magistrate ought not to have dismissed the application. I find this appeal has merit.

Accordingly the order dismissing the appellant's application dated 29th January 2015 is set aside and is substituted with an order allowing the same and reinstating the said Keroka PMCC No. 171 of 2015. The appellant shall bear his own costs.

It is so ordered.

Dated, signed and Delivered at Nyamira this 4th day of October, 2018.

E. N. MAINA

JUDGE