



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 54 OF 2017

RADIO AFRICA GROUP LIMITED t/a THE STAR.....1ST APPELLANT/APPLICANT

JUSTUS OCHIENG.....2ND APPELLANT/APPLICANT

VERSUS

JAMES MWANGI MWANIKI.....RESPONDENT

RULING

1. By a notice of motion dated 8.6.18 brought under Sections 1A, 1B, 3, 3A and 89 of the Civil Procedure Act, Order 42 rule 21 and Order 51 rule 15 of the Civil Procedure Rules, the applicants prays for orders: -

1) THAT the order of dismissal of this appeal made on 15.5.18 be and is hereby set aside

2) The appeal be re-admitted for hearing

3) The costs of this application be provided for

2. The application is based on the grounds among others that applicant's advocate was prevented by sufficient cause from appearing on 15.5.18 when the appeal was called out and dismissed. The application is also supported by two affidavits sworn on 8.6.18. In the first affidavit, Nelson Havi, advocate for the applicants avers that he requested his secretary Ms. Emily Kamweti to call Ms. Wafula advocate to hold his brief and indicate to court that the appeal was not ready for direction or hearing as the typed judgment and proceedings had not been availed from the Chief Magistrate's Court. He avers further that he expected that the matter would be handled as he had instructed but Ms. Wafula called him sometimes on 15.5.18 and informed him that she had informed Ms. Kamweti that she could not attend court because she was bereaved.

3. In the second affidavit, Ms. Kamweti takes the blame for not informing Mr. Havi that Ms. Wafula was bereaved and could not attend court on 15.5.18.

3. The application is opposed by way of an affidavit sworn by the respondent on 22.6.18 in which he avers among other averments that there is no evidence that Ms. Wafula had been instructed to attend court as alleged.

4. I have considered the notice of motion in the light of the affidavits on record. This application was filed 23 days after the dismissal order. It was therefore filed without delay.

5. In *Patel v EA Cargo Handling Services Ltd [1974] EA 75 at page 76*, Sir William Duffus P held:

“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.

6. 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 court were to punish litigants for mistakes of counsel. It should be the court's last resort to deny a party a chance to be heard on the basis of mistake by counsel. The overriding objective of the law is to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The applicants' counsel has explained, to the satisfaction of the court, the circumstances that led to the dismissal of the appeal.

7. Consequently, the notice of motion dated 8.6.18 is allowed in the following terms:-

a) The order of dismissal of this appeal made on 15.5.18 is hereby set aside

b) The appeal is re-admitted for hearing

c) The applicants are condemned to pay Kshs5,000/- to the respondent as throw away costs within 14 days from today's date.

DATED AND DELIVERED IN KISUMU THIS 18TH DAY OF OCTOBER 2018

T.W. CHERERE

JUDGE

Delivered in open court in the presence of-

Court Assistant - Mr Arua

For the appellants/Applicants - N/A

For the Respondent - Mr Barasa/Nyamweya