



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 48 OF 2015

TOM OYIEYO ODUOR.....APPELLANT/APPLICANT

SWAN INDUSTRIES LIMITED.....RESPONDENT

RULING

1. By a notice of motion dated 10.3.17 brought Order 17 rule 4, Order 51 rule 15 of the Civil Procedure Rules and Sections 1A, 1B, and 3A of the Civil Procedure Act, the applicant prays for orders **THAT**: -

1) This court be pleased to set aside or vary orders of dismissal of appeal issued on 14.2.17 and the appeal be reinstated for hearing

2) Costs be in the cause

2. The application is based on the grounds among others that applicant's advocate took the date in court but mistakenly heard that the appeal was fixed for hearing on 24.2.17 and not 14.2.14. The application is also supported by an affidavit sworn on 10.3.17 by Rodgers Otieno, advocate for the applicant who reiterates the grounds on the face of the application. He further avers that he attended court on 24.2.17 for the hearing but discovered that the appeal was listed for hearing on 14.2.17 and had been dismissed.

3. The application is opposed by way of grounds of opposition dated 8.8.18 and filed on 27.8.18 in which it is contended that there was negligence on the part of the applicant's counsel and that the application offends Article 159 of the Constitution.

4. I have considered the notice of motion in the light of the supporting affidavit and grounds of opposition on record.

5. This application was filed 34 days after the dismissal order. The delay in filing this application is in my view not inordinate.

6. 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.

7. 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 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 court were to punish litigants for mistakes of counsel. The applicant's counsel has in my considered view explained, to the satisfaction of the court, the circumstances that led to the dismissal of the appeal.

8. Consequently, the notice of motion dated 10.3.17 is allowed in the following terms:-

a) The order of dismissal of the appeal issued on 14.2.17 is hereby set aside and the appeal be reinstated for hearing

b) The applicant is 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 - Felix

For the Petitioner - N/A

For the Respondent - Mrs Barasa/Nyamweya