



Omar v Patrick M. Nyamu t/a Global Woods and Agro Hardware (Civil Application 19 of 2019) [2022] KECA 8 (KLR) (21 January 2022) (Ruling)

Neutral citation: [2022] KECA 8 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 19 OF 2019
SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA
JANUARY 21, 2022**

BETWEEN

ABDULRAZAK HUSSEIN OMAR APPLICANT

AND

**PATRICK M. NYAMU T/A GLOBAL WOODS AND AGRO
HARDWARE RESPONDENT**

(An application to set aside and/or vary this Honourable Court's Ruling/Order dated 5th March 2019 dismissing the appellant's Civil Appeal No. 116 for want of prosecution pursuant to the provisions of Section 102 of the Appellate Court Rules arising from an appeal from the orders of the High Court of Kenya at Voi (Kamau, J.) dated the 18th of January 2018 in H.C. Civil Appeal No. 18 of 2016)

RULING

1. The application that is the subject matter of this ruling was filed on 1st April 2019. The applicant seeks orders that this Court reviews and/or sets aside its ruling and orders delivered on 5th March 2019 in Civil Appeal No. 116 of 2018 dismissing the appeal for non-attendance; that this Court reinstate the consent order entered between the parties herein in Civil Application No. 28 of 2018 dated 11th October 2018 pending the hearing and determination of the appeal; and that the costs of this application do abide by the outcome of the appeal.
2. The application is premised on the following grounds: That the parties consented to a stay pending the hearing and determination of Civil Appeal No.116 of 2018 in Civil Application No. 28 of 2018. Subsequently on 10th December 2018, the applicant attended court before the Deputy Registrar and fixed the appeal for hearing on 5th March 2019, and the parties were ordered to file written submissions.



3. The appellant's advocate had instructed an advocate Mr Lutta to hold the firm's brief when the hearing date was fixed. That there was a miscommunication between Mr Lutta and the advocate's clerk and when the file was returned to their Nairobi office, the hearing date was inadvertently listed in the advocate's records as coming up on 6th March 2019.
4. The appellant filed written submissions on 18th February 2019 and served the same upon the respondent on 20th February 2019. While serving the written submissions, the advocate's clerk further inadvertently informed the respondent that the hearing was scheduled for 6th March 2019. Since the mistake was due to an inadvertent mistake of the advocate, the same should not be visited upon the appellant.
5. The applicant avers that the appeal raises serious issues and should be heard on its merits, and that he will suffer irreparable loss and damage unless this Court stays the High Court's judgment/order pending the hearing and determination of the appeal. That the applicant has an arguable appeal as stated in the memorandum of appeal in Civil Appeal No. 116 of 2018, and stands to suffer irreparable harm and damage not capable of compensation in monetary terms.
6. Reynard Brian Ochieng Advocate, filed a supporting affidavit reiterating the grounds on the face of the application. He stated that he arrived in court on 6th March 2019 to prosecute the appeal only to be informed by the court clerk that, the appeal had been heard the previous day on 5th March 2019 and thereafter dismissed for non-attendance.
7. The respondent did not participate in the application despite service.
8. Counsel for the applicant submitted that there are two requirements to be satisfied to enable this Court exercise its discretion under Rule 102 of the Court of Appeal Rules. The application has to be brought or filed within 30 days, and that the applicant has to establish sufficient or good reasons as to why he or she did not attend court. Counsel relied on the case of *Savings & Loan Kenya Ltd v Onyancha Bwomote* [2014] eKLR for the proposition that, "sufficient reason" means no more than reason enough that explains or excuses the applicant's default, and that the court's discretion in deciding whether or not to set aside an ex parte order is meant to ensure that a litigant does not suffer injustice or hardship as a result of, among other things, an excusable mistake or error. Counsel also cited *Wilson Cheboi Yego v Samuel Kipsang Cheboi* [2019] eKLR for the proposition that, sufficient cause must be rational, plausible, logical, convincing, reasonable and truthful; that it should not be an explanation that leaves unexplained gaps in the sequence of events.
9. The applicant's reasons for non-attendance are indicated as the inadvertent miscommunication between an advocate and the clerk who carried the file to the court. The applicant also annexed copies of the official diary showing the diarised miscommunicated date, and the air ticket showing that the advocate handling the matter travelled for the hearing, which was a day earlier. Further that the applicant also served the respondent a hearing notice with the wrong date, which is why both parties failed to attend.
10. Counsel submitted that the courts have held that, if sufficient or good reason is established, they will always exercise its discretion and set aside such orders, citing *Musa Musyimi & 2 others v Martin Mati Mulinge & another* [2021] eKLR.
11. Under Rule 102 (1) of the *Court of Appeal Rules*, this Court is clothed with the discretion of reinstating an appeal dismissed for non-attendance of the appellant, on application by the appellant, if the appellant can demonstrate a sufficient cause for the failure to appear at the hearing of the appeal. Rule 102 (3) provides that such an application shall be made within 30 days of the decision of the Court.



12. In *Kitts Mbatu Mukonyole v Levi Ndombi Mukonyole* [2013] eKLR, this Court, citing the case of *Philip Keipto Chemwolo and Mumias Sugar Co. Ltd v Augustine Kubende* (1982) 1 KAR, held that, the principles informing the discretion of this Court to set aside or vary a judgment entered in default of appearance, would equally apply where an appeal is dismissed for non-appearance and an appellant seeks to set aside the dismissal and reinstate the appeal. In so doing, the court shall take into consideration circumstances both prior and subsequent to the issues sought to be addressed.
13. In the present case, the applicant filed this application within the 30-day window prescribed by Rule 102 (3), and has sufficiently explained why both parties did not attend court during the hearing on 5th March 2019. The inadvertent mix up in communication between the advocate and the clerk who carried the file to court ought not be visited upon the applicant.
14. We are satisfied that this application should be, and is hereby allowed for these reasons. This Court's order of 5th March 2019 is accordingly set aside, with the result that Civil Appeal No. 116 of 2018 is restored for hearing and the Consent dated 11th October 2018 in Civil Application No 28 of 2018 is hereby also reinstated.
15. Costs shall abide by the outcome of the appeal.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF JANUARY 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

*I certify that this is a
true copy of the original.*

Signed

DEPUTY REGISTRAR

