



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: GATEMBU, MURGOR & J. MOHAMMED, JJ.A)**

**CIVIL APPEAL (APPLICATION) NO. 19 OF 2016**

**BETWEEN**

**P.N. MASHRU LTD.....APPLICANT**

**AND**

**GILBERT WANJALA FWAMBA**

***(Suing as the Administrator of the Estate of***

**ELIAS WANJALA (DECEASED).....RESPONDENT**

***(Being an application for stay of execution of the Judgment***

***and Decree of the High Court of Kenya at Bungoma in High***

***Court Civil Appeal No. 68 of 2013 pending the hearing and determination of this appeal)***

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**RULING OF THE COURT**

1. By its application dated 25<sup>th</sup> November 2019, the applicant, P.N. Mashru Ltd, which is the appellant in the appeal, has applied to the Court to set aside its order made on 28<sup>th</sup> October 2019 dismissing its appeal for non-appearance and for orders that the appeal be restored for hearing and determination. The grounds on which the application is made are set out in the supporting affidavit of Dorothy A. Odhiambo advocate buttressed by written submissions.

2. **Ms. Odhiambo** deposes that whereas the hearing of the appeal was correctly fixed for 28<sup>th</sup> October 2019, she inadvertently and incorrectly recorded the date in her diary as 29<sup>th</sup> October 2019. She has exhibited to her affidavit an extract of her diary for 28<sup>th</sup> and 29<sup>th</sup> October 2019 in support.

3. Furthermore, it was urged for the applicant, that both parties had prior to the hearing on 28<sup>th</sup> October 2019 filed their respective written submissions on the appeal which the Court ought to have considered notwithstanding the absence of counsel at the hearing.

4. Rule 102(1) of the Court of Appeal Rules provides that if the appellant does not appear on any day fixed for hearing of an appeal, the Court may dismiss the appeal. That is what happened on 28<sup>th</sup> October 2019. There is a proviso to that rule to the effect that where, as here, an appeal has been dismissed for non-appearance, the appellant may apply to the Court to restore the appeal for hearing if it can be shown that he was prevented by any sufficient cause from appearing when the appeal was called out for hearing. Rule 102(3) requires that such an application for restoration shall be made within thirty days of the decision of the Court.

5. The Court is clothed with discretion under the proviso to Rule 102(1) in determining an application of this nature. It is incumbent on the applicant to demonstrate that it was prevented, by sufficient cause, from appearing when the appeal was called out for hearing. In this case counsel for the appellant states that she made a mistake in entering the hearing date for the appeal in her diary.

6. As Madan JA stated in ***Belinda Murai & 9 others vs. Amos Wainaina [1979] eKLR:***

***“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of the years since the decision was delivered so requires. It is all done in the interests of justice. A static system of justice cannot be efficient. Benjamin Disraeli said change is inevitable. In a progressive country change is constant. Justice is a living, moving force. The role of the judiciary is to keep the law marching in time with the trumpets of progress.”***

7. Counsel was candid in conceding that the mistake was hers in entering the wrong date in her diary. Moreover, and as pointed out by counsel, both parties had prior to the hearing on 28<sup>th</sup> October 2019 filed their respective written submissions on the appeal. The Court’s attention does not appear to have been drawn to that fact.

8. We are satisfied that sufficient cause has been shown to warrant the restoration of the appeal for hearing. It has not been demonstrated that any prejudice will be occasioned to any party by the restoration of the appeal.

9. The appellant avers that prior to the dismissal of the appeal, there were interim orders of stay of execution of the judgment appealed from but has not exhibited the ruling or orders of the Court in that regard. Suffice to state that any orders that may have been granted by the Court staying the judgment of the lower court stand reinstated by the order restoring this appeal for hearing.

10. In conclusion, we allow prayers 3 and 4 of the application dated 25<sup>th</sup> November 2019 with the result that the appeal is hereby restored for hearing. Given that this is an old appeal, we direct that the same be fixed for hearing on basis of priority.

We make no orders as to costs.

***Dated and delivered at Nairobi this 19<sup>th</sup> day of February, 2021.***

**S. GATEMBU KAIRU, (FCIArb)**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**