



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: M'INOTI, MURGOR & KANTAL, JJA

CIVIL APPEAL (APPLICATION) NO. 124 OF 2004

BETWEEN

HABO AGENCIES LIMITED.....APPELLANT

AND

WILFRED ODHIAMBO MUSINGO.....RESPONDENT

(Application for Reinstatement of Appeal dismissed under Rule 102(1) of the Court of Appeal Rules)

RULING OF THE COURT

Nineteen years from the date of the ruling that aggrieved the appellant leading to the filing of *Civil Appeal No. 124 of 2004* and six years after the Court dismissed the said appeal for non attendance by the applicant or its advocate, *the applicant, Habo Agencies Ltd* is before us seeking an order to reinstate the said appeal. There has been all manner of twists and turns in the matter which partly explain the delay.

By way of background, the applicant's defence in the High Court was struck out for failure to serve it within the prescribed time. The applicant's application to set aside the *ex parte* judgment that was entered after the defence was struck out was dismissed by *Khamoni, J.* vide a ruling dated 15th August 2001. Thereafter the applicant filed *Civil Appeal No. 285 of 2002* in this Court against the ruling by *Khamoni, J.*, but the same was struck out for failure to include a primary document. Next, the applicant successfully filed an application for extension of time to lodge a fresh appeal, leading to the filing of *Civil Appeal No. 124 of 2004*. That appeal was set down for hearing on 5th February 2013 when it was dismissed for the non-attendance.

On 10th June 2014, the applicant filed two applications in this Court, both dated the same day, one for extension of time to apply for reinstatement of the appeal, and the other a substantive motion for restatement of the appeal. This simultaneous filing of two different applications in the same matter bearing the same date significantly contributed to the confusion that later arose in the matter. Be that as it may, the motion for extension of time was heard by a single Judge, (*Waki, JA*) who dismissed it vide a ruling dated 16th January 2015. Undeterred the applicant made a reference to the full Court and the same was allowed vide a ruling dated 3rd July 2015. The stage was thus set for the hearing of the second application, namely for reinstatement of the appeal.

Arising from a clear mix-up as to which application was before it, the Court for a second time, considered the reference to the full court, which, as we have already stated, had already been heard and determined. The resulting ruling on the reference was subsequently set aside on 8th November 2019, ultimately leading to the hearing of the application now before us, for reinstatement of the appeal.

The grounds upon which the application for reinstatement of the appeal is made is that the applicant's failure to appear on 5th February 2013 was because of mistake of its counsel, which is excusable; that the appeal is arguable and with high chances of success; that the interests of justice demand that the appeal be heard on merit; that there was impeding danger of execution of the decree; and that the respondent stood to suffer no prejudice.

The Managing Director of the applicant, *Mr. Wilfred Oluga* swore an affidavit on 9th June 2014 in support of the application and set out the background we have sketched above and deposed further that the applicant's advocates, *M/s Asige Keverenge & Anyanzwa Advocates*, did not inform it of the hearing scheduled on 5th February 2013 and that the applicant first became aware of the dismissal of its appeal in March 2014. Even after seeking explanation from the advocates as to why they did not attend court, none was forthcoming other than a letter stating that the advocates were not served with a notice for the hearing on 5th February 2013. He added that the problems in the matter was as a result of a litany of mistakes by the applicant's former counsel, going all the way back to the High Court, and that the appeal had high chances of success. He concluded by stating that there was a danger of execution and that the respondent would suffer no prejudice because it had already been paid Kshs 647,527.70.

The application was canvassed by written submissions, in which *Mr Amuga*, the applicant's learned counsel rehashed the above arguments

and laid particular emphasis on the prospects of success of the appeal, contending that award of interest for a period before the filing of the suit must be specially pleaded, which the respondent did not do. He added that the High Court erred because commercial rates of interest cannot be awarded in the absence of a written agreement, custom or usage. He relied on *Barclays Bank of Kenya v. Jandy [2004] 1EA 8* in support of that proposition.

The respondent did not file a replying affidavit but relied on its written submission in which its advocates, *M/s Tiego & Company* contended that the applicant's advocates were indeed served with a hearing notice for 5th February 2014, acknowledged service, but failed to attend Court. He added that the applicant had not shown any sufficient cause as required by the Court of Appeal Rules to justify reinstatement of the appeal. The respondent also invited us to find that the applicant's application for reinstatement of the appeal was filed out of time contrary to **rule 102(3)** of the *Court of Appeal Rules*, which is mandatory. He relied on the rulings of this Court in *Charles Alexander Kiai v. Frasia Wangui Gicheru & 4 Others [2015] eKLR* and *John Mugambi & 21 Others v. Kenya National Assurance Co (2001) Ltd [2016] eKLR* in support of that proposition.

Before we turn to the merits of this application, we shall first dispose of the respondent's argument that the application is incompetent because it was filed more than 30 days from the date of dismissal of the appeal. It is true that **Rule 102 (3)** requires an application for reinstatement of an appeal to be made within 30 days from the date of dismissal and as this Court stated in *John Mugambi & 21 Others v. Kenya National Assurance Co (2001) Ltd (supra)*, that provision is mandatory. But **rule 4** of the *Court of Appeal Rules* allows this Court to extend any time set by the Rules and the applicant in fact applied and obtained extension of time vide the ruling of 3rd July 2015 in the successful reference to this Court. In the circumstances, there is no merit in the contention that the application is incompetent by reason of being filed out of time.

Turning to the merits of the application, the proviso to **rule 102(1)** obligates an applicant seeking reinstatement of a dismissed appeal to **"show that he was prevented by any sufficient cause from appearing when the appeal was called for hearing."** The main ground put forth by the applicant to explain why there was no appearance in Court on 5th February 2013 and to justify reinstatement of the appeal is that it was all because of mistake of counsel. We readily grant that the Court may excuse a genuine mistake on the part of counsel where it is satisfied that such mistake existed. (See *Belinda Murai & 9 Others v. Amos Wainaina, CA. No. Nai. 9 of 1978*).

But in this case, with respect, we are unable to fathom the alleged mistake of counsel. The record shows that on 5th February 2014, before the Court dismissed the appeal for non-attendance, it satisfied itself that the appellant's advocates had been duly notified of the scheduled hearing. This is how the Court expressed itself:

"This appeal was listed for hearing before us this morning. However, neither the appellant nor its advocates are present in court to prosecute it. The appellant's firm of advocates, Asige Keverenge & Anyanzwa were served with the hearing notice for today's hearing on 23rd January 2013 according to the hearing notice availed to us. All they stated at the back of it on receipt of the same is "without prejudice". Mr Tiego, learned counsel for the respondent is present and seeks its dismissal and costs of the appeal. In the circumstances, the appeal is marked as dismissed pursuant to rule 102(1) of this Court's rules. The appellant is to pay costs of the appeal to the respondent."

From the above, which is not disputed, the applicant's advocates had notice of the scheduled hearing of the appeal but elected not to attend court. At any rate, there is no explanation of the **nature** of mistake that the appellant alleges on the part of its advocate. If this Court is to exercise its discretion in favour of a party, the party is obliged to place before it some material to justify exercise of discretion, otherwise the exercise of discretion will be perceived as capricious or whimsical. Clearly what the applicant seeks to rely on is not mistake, but plain indolence and dilatoriness, which is not excusable. It has been accepted by this Court that sheer inaction by counsel does not constitute an excusable mistake. (See *Rajesh Rughani v. Fifty Investment Ltd. & Another (2005) eKLR*).

We are alive to the imperatives of **Article 159** of the Constitution and the overriding objective which decry undue regard to technicalities. However, it is equally an important principle of the Constitution that justice must be dispensed without undue delay. As the Supreme Court emphasised in *Raila Odinga and 5 Others v. IEBC & 3 Others [2013] eKLR* and in *Nicholas Kiptoo arap Korir Salat v. IEBC & 7 Others [2014] eKLR*, **Article 159** is not a panacea in each and every instance of breach of procedure. It avails only in deserving cases. Before us is a matter that has been in court for the last 20 years for what the applicant readily admits has been a litany of omissions by its legal advisers. The **"sufficient cause"** presented in this application is mistake of counsel. But the evidence on record shows that counsel were served and in fact endorsed the hearing notice with the words **"without prejudice"** whatever that was intended to mean. They however never bothered to attend court or to send a representative to seek adjournment of the appeal.

We are satisfied that in the circumstance of this application, there is no basis for restoring the appeal which was dismissed on 5th February 2014. The application is totally lacking in merit and the same is hereby dismissed with costs to the respondent. It is so ordered.

Dated and delivered at NAIROBI this 24th day of July, 2020

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR