



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OUKO, (P), KARANJA & OKWENGU, J.J.A)

CIVIL APPLICATION NO. 148 OF 2019

BETWEEN

B. N. KOTECHA & SONS LIMITED.....APPLICANT

AND

UNITED MILLERS LIMITED.....RESPONDENT

(Being an application to reinstate for determination on merit, the Notice

of Motion application dated 16th October, 2019 brought under Rule 5(2)

(b) of the Court of Appeal Rules dismissed on 20th October,

2019 under Rule 56(1) of the Court of Appeal Rules for Non-

Attendance in Kisumu High Court Insolvency Cause No. 1 of 2018)

RULING OF THE COURT

In an application brought pursuant to **Rule 5(2)(b)** of this Court's Rules, the applicant had prayed for stay of execution of the order made by the High Court (Ochieng', J) on 8th October, 2019. The application was scheduled for hearing on 20th November, 2019 but was dismissed under **Rule 56(1)** of the Court of Appeal Rules for non-attendance by the applicant.

Counsel for the applicant in the instant application now prays for a reinstatement of the application on the ground that on the morning the application was scheduled for hearing (20th November, 2019) he went to Jomo Kenyatta International Airport (JKIA) to board a scheduled flight to Kisumu to attend the hearing; that he had difficulty locating the correct terminal and unfortunately missed the flight; that by all means possible and at a great financial expense, he managed to secure an alternative flight scheduled to leave for Kisumu at 8.55 am so as to arrive at 10.15 am; that given the timing and having come to the realization that he would not make it to court on time, he communicated and instructed a fellow advocate to hold his brief by requesting the Court that the file be placed aside until 11.00 am when he expected to be present in court; that in a streak of bad luck, the second scheduled flight experienced some mechanical hitches and was delayed by 20 minutes; that eventually the plane touched down in Kisumu at 10.30 am, by which time he was already late for Court; and that by the time he arrived, the bench had already risen and his application dismissed.

Counsel submitted that the dismissal of the application has left the applicant in a precarious and prejudicial position as the respondent is keen to execute the impugned decision at any time in the absence of an order of stay; that should the respondent commence execution, the applicant will be compelled to continue paying illegal and colossal monthly amounts of money; that the appeal has high chances of success; and that the applicant deserves a chance for its application to be heard and determined on merit.

In a replying affidavit deposed by Mr. Stanley Ogejo, the respondent confirmed that indeed when the matter was called for hearing, the applicant's counsel was absent but Mr. E.O. Andego was holding his brief; that Mr. Andego requested the Court to place aside the file as explained above; and that the Court indulged counsel and placed the file aside until 11.00 am. However, when the matter was called out at 11.00am counsel for the applicant was still absent and there was no one representing him to explain to the Court what may have happened to him. Even with that background the respondent submitted that, this application is frivolous.

What we have to decide is whether the applicant has shown that counsel was prevented by any sufficient cause from appearing when the application was called on for hearing. That is the discretion donated to this Court by **Rule 56 (3)** of this Court's Rules, thus:

“(3)Where an application has been dismissed under sub-rule

(1) or allowed under sub-rule (2), the party in whose absence the application was determined may apply to the Court to restore the application for hearing or to re-hear it, as the case may be, if he can show that he was prevented by any sufficient cause from appearing when the application was called on for hearing.”

Counsel for the applicant has offered, what we respectfully think is plausible explanation; that he missed his first flight to Kisumu and that his subsequent flight was also delayed. He took all reasonable and diligent steps to attend Court and indeed got to Kisumu albeit after the application had been dismissed. We discern no prejudice to the respondent that cannot be compensated in costs.

Accordingly, the dismissed application deserves to be heard and decided on merit. In the result, we allow this application, set aside the orders issued on 20th October, 2019 and direct that the notice of motion dated 16th October, 2019 be restored for hearing on merit. The costs of this application is awarded to the respondent.

Dated and delivered at Nairobi this 9th day of October, 2020.

W. OUKO, (P)

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR