IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, J. MOHAMMED & KANTAI JJ.A)

CIVIL APPEAL (APPLICATION) NO. 230 OF 2015

PROFESSOR BML ..... APPLICANT/APPELLANT

AND

DR. WM ..... RESPONDENT

(An application for restoration of an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (W. Musyoka, J.) dated 19th December, 2014

in

H.C Divorce Cause No. 179 of 2009)

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RULING OF THE COURT

This appeal was listed for hearing on 3rd July, 2019 together with Civil Appeal No. 353 of 2012. When called out, neither the applicant nor her counsel was in Court despite having been served with the hearing notices on 16th April, 2019. On the application of counsel for the respondent, both appeals were dismissed with costs under Rule 102(1) of the Court of Appeal Rules for non-attendance.

The applicant has now filed this notice of motion praying that time within which to seek orders for restoration of the two appeals be extended; that the two civil appeals be restored for hearing forthwith; and that upon such restoration appropriate orders be made concerning the hearing and determination of the said appeals.

The application is brought under Rules 4 and 102(1) of the Court of Appeal Rules and Sections 3, 3A and 3B of the Appellate Jurisdiction Act. It is premised on the grounds that: Civil Appeal Nos. 230 of 2015 and 353 of 2012 were dismissed on 3rd July, 2019 under Rule 102 (b) of this Court's Rules because when they were called out for hearing, neither the applicant nor her counsel were present in Court; the applicant came to learn of the dismissal of the appeals towards the end of November, 2019 upon her temporary return to Kenya from the USA; she was however unable to peruse the court file until 24th January, 2020 when the files were availed to her; she was not able to attend the hearing of the appeals as she was away in USA and her advocates then on record did not notify her of the hearing date, the said advocates also failed to inform her that if she did not pay them money on account of their fees, they would not attend the hearing of the appeals to enable her appoint another advocate, and in any event, had she even been aware of the hearing date, she would not have attended court because she was unwell and was receiving urgent medical treatment from her doctors in the USA; that by the time the court files were retrieved from the archives on 24th January, 2020 the period within which she was allowed to file an application for restoration of the appeals had lapsed; she is keen to have the appeals heard fully and determined as they relate to divorce proceedings and are very personal and affect her emotionally; and that she should not be punished simply because her advocates failed to attend court. The application was further supported by the applicant's supporting affidavit in which she reiterated and expounded on the grounds aforesaid.

In opposing the application, the respondent in a replying affidavit dated 9th March 2020 deponed that he commenced divorce proceedings against the applicant in the High Court Divorce Cause No. 179 of 2009 to which the applicant filed an answer and a cross-petition. On 26th July, 2012 judgment dissolving the marriage was delivered and a Decree nisi issued. Aggrieved, the applicant lodged an appeal on 18th September, 2015. That the appeal was fixed for hearing on a number of occasions but did not proceed on account of the applicant employing delaying tactics. For instance, when the appeal came up for hearing on 18th November, 2015 the applicant sought the recusal of **Mwilu, JA** (as she then was). That on 13th November 2018, the applicant was granted leave to adduce further evidence and file a supplementary record of appeal within 14 days and thereafter file written submissions. The supplementary record was filed on 18th December, 2018 way after the 14 days' time limit. When the appeal came up for hearing again on 3rd July, 2019 the applicant had not filed written submissions as directed

and upon the matter being called out, there was no attendance by either the applicant or her counsel hence the appeal was dismissed under Rule 102(1) of the Court of Appeal Rules. That upon the said dismissal, the respondent applied for and obtained a Decree absolute from the High Court. That while the appeal was pending, the applicant filed proceedings in the San Mateo County Court in the USA seeking to dissolve the marriage the subject of the appeals.

That the reasons advanced by the applicant for the grant of the orders sought do not meet the threshold upon which this Court would grant them and if anything, the present application was an abuse of the court process.

At the plenary hearing of the application, the applicant was represented by **Messrs. Njiru Boniface & Company Advocates** whereas the respondent was represented by **Messrs. Oraro & Company advocates.** They all relied on their written submissions.

We have carefully considered the application, grounds in support thereof, the rival affidavits and the law. The main issue for determination is whether the application has met the threshold for grant of the orders sought therein.

Rule 102 (1) gives this Court discretion to reinstate an appeal that has been dismissed for non-appearance. It provides as follows:

> **"If on any day fixed for the hearing of an appeal the appellant does not appear, the appeal may be dismissed and any cross-appeal may proceed, unless the Court sees fit to adjourn the hearing:**
>
> **Provided that where an appeal has been so dismissed or any cross-appeal so heard has been allowed, the appellant may apply to the Court to restore the appeal for hearing or to re-hear the cross-appeal, if he can show that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing."**

Rule 102 (2) goes further to state that:

> **"An application for restoration under the proviso to sub-rule (1) or the proviso to sub-rule (2) shall be made within thirty days of the decision of the Court, or in the case of a party who should have been served with notice of the hearing but was not so served, within thirty days of his first hearing of that decision"**.

From the foregoing, the applicant must therefore satisfy two (2) conditions before this Court can exercise its discretion in her favour. That is; the application for reinstatement should be made within 30 days of the dismissal and the applicant must show that she was prevented by sufficient cause from attending the hearing. In the present case, the application was lodged on 30th January, 2020 which was almost six (6) months from the date of dismissal of the appeal, hence, though the applicant has applied for extension of time, but as we shall demonstrate later in this ruling, this prayer is not available to her. Accordingly, the applicant has failed to satisfy the first test. This proviso is couched in mandatory terms.

Secondly, the applicant is required to show 'sufficient cause' that prevented her from attending court on the hearing date. What amounts to sufficient cause depends on the circumstances of each case and the court is called upon to exercise its discretion depending on the said circumstances. **Musinga, JA** in the case of **The Hon. Attorney General v the Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of 2011 (ur)** defined sufficient cause to be:

> ***"Sufficient cause" or "good cause" in law means: …..the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused". See BLACK'S LAW DICTIONARY, 9th Edition, page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."*** Emphasis ours.

Similarly, the Supreme Court of India in the case of **Parimal v Veena [2011] 3 SCC 545** observed that:

> ***"Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously."***

The applicant advanced four reasons why she did not attend court on 3rd July, 2019. She explained that she was not aware of the hearing date as her advocates did not notify her of the same. She also alleged that it was the mistake of her advocates who failed to attend the hearing or inform her that they would not attend court despite pestering her for payment of their fees; that in any event she would still not have attended court as she was undergoing treatment in the USA; and finally, that she should not be punished for the sins of her advocates.

There is no doubt that the applicant was in constant communication with her counsel who were irksome in demanding their legal fees and we therefore find it difficult to believe that she was not informed of the hearing date. Whereas we doubt the candidness of the applicant's assertion, it is true that in general the mistake of counsel should not be visited upon a client but it is likewise true that when counsel as an agent is vested with authority to perform some duties and does not perform the same as directed by the principal, such principal should bear the consequences. This Court in the case of **Rajesh Rughani v Fifty Investments Limited & Another [2005] eKLR** held that:

> ***"It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy".***

This position was echoed in **Bains Constructions Co. Limited v John Mzare Ogowe [2011] eKLR** where the Court stated thus:

> ***"It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties and does not perform as principal and does not perform it, surely such principal should bear the consequences".***

In the instant case, the applicant lays blame on her previous advocates on record. To our mind, the advocates' inaction may perhaps be attributed to the applicant's failure to pay them the requested legal fees. We doubt that the said advocates would pester the applicant for payment of their fees without notifying her of the hearing date of the appeals. The record also shows that the applicant was not diligent enough in pursuing the appeals. The applicant failed to file her supplementary record of appeal within the 14 days ordered by court. Even at the time of hearing, she had also not filed her written submissions directed by the court. These are not actions of a party keen to pursue the appeals.

The applicant also intimated that she was sick and was receiving treatment at the time of the scheduled hearing of the appeals. That even if she had been notified of the hearing date, she would still not have attended court because of her sickly condition. We have perused the medical documents presented and note that the applicant was in hospital in February and August 2019 and had another appointment in February, 2020. The hearing of the appeals was in July, a month before she would go back to hospital. Had she been keen on prosecuting the appeals, she would have definitely done so or made arrangements with her advocates to prosecute the appeals, her absence notwithstanding as we believe the applicant was aware of the hearing date.

As regards delay in filing the application, the applicant claimed that this was due to delay in retrieving the court files from the archives. However, she did not annex a single communication to the Registrar, Court of Appeal requesting to be availed the files for perusal and the Registrar's response. We also note and it has not been discounted by the applicant that whilst these appeals were pending, she initiated divorce proceedings to dissolve the same marriage in San Mateo County Court in USA. We cannot fathom the reason(s) for this action. Be that as it may, it does again point to the applicant as a person without candour. What the applicant is seeking from this Court is really the exercise of discretion. That exercise is not undertaken in a vacuum. The conduct of the applicant before, during and after the order sought to be overturned is relevant. In this case, the applicant's conduct militates against the exercise of the discretion in her favour. We also note that the respondent has since obtained the decree absolute and this application may as well have been overtaken by events.

The delay of six (6) months in bringing the application was inordinate. The Privy Council stated in the case of **Ratnam v Cumarasamy [1964] 3 ALL E R 933** that:

> ***"The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."***

Similarly, in **Savill v Southend Health Authority [1995] 1 WLR 1254**,

Balcombe LJ stated as follows at 1259:

> ***"I have to say that the authorities are not all entirely easy to reconcile. I prefer to go back to first principles and to the statement made by Lord Guest in the Ratnam case.... that in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. He went on to say, and it is worth repeating: "If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules, which is to provide a timetable for the conduct of litigation."..... Nevertheless, there must be some material on which the court can exercise its discretion."***

We do not believe at all in the reasons proffered by the applicant for the delay in bringing this application. All said and done, we are of the view that the basis for the exercise of our discretion in favour of the applicant to extend time and restore the two appeals have not been properly laid out and we decline to do so. Accordingly, the application dated 30th January, 2020 is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 20th day of November, 2020.

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

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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