IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: F. SICHALE, ODEK & KANTAI, JJA)

CIVIL APPEAL (APPLICATION) No. 15 of 2017

BETWEEN

GRACE NJERI MBUGUA .....APPELLANT

AND

HANNAH WANJIKU THONG'OTE.....RESPONDENT/APPLICANT

(Being an application to re-hear an appeal after delivery of the judgment of this Court (G.B.M. Kariuki, F. Sichale & Kantai JJA) dated 24th November, 2017under Rules 102(2) of the Court of Appeal Rules and inherent power of the Court under Section 1 (2) of the Court of Appeal Act)

RULING OF THE COURT

1. On 24th November 2017, this Court delivered judgment in Civil Appeal No. 15 of 2017. The appeal was allowed and the judgment of the High Court was set aside. This Court remitted the matter to the High Court for re-hearing.

2. Aggrieved by the judgment of this Court, the applicant (who was the respondent in the appeal) has filed the instant Notice of Motion dated 13th November 2017 seeking an order for re-hearing of the appeal. The ground in support of the Motion is that the appeal was heard *ex-parte* on 2nd October 2017 when counsel for the applicant mistakenly noted the hearing date as 23rd October 2017 instead of 2nd October 2017. The respondent to the instant application was the appellant before this Court. She opposes the instant application.

3. Two affidavits were filed in support of the application for re-hearing. The first is by learned counsel ***Mr. Njoroge Wachira*** and the second is by ***Mr. Lawrence Njuguna Mbugua.***

4. The ground in support of the application is that the appeal was heard *ex-parte* on 2nd October 2017 without hearing being accorded to the applicant; that there was mistake on the part of the counsel for the applicant in diarizing the hearing date; that counsel mistakenly diarized the hearing date for the appeal as 23rd October 2017 instead of 2nd October 2017; that due to this mistake, neither the applicant nor his counsel attended Court on 2nd October 2017 when the appeal was heard.

5. Vide the supporting affidavits, the applicant has given her version as to how the hearing date of the appeal was arrived at. It is deposed that on 21st March 2017, the Deputy Registrar fixed the appeal for Case Management; that the applicant's advocate attended the Case Management session; that at the Case Management, directions were given and the appeal was fixed for hearing on 2nd October 2017; that mistakenly, counsel for the applicant heard that the appeal had been scheduled for hearing for 23rd October 2017; that on 19th October 2017, the applicant filed her written submissions in the appeal and mistakenly, this was after the appeal had been heard on 2nd October 2017; that on 23rd October 2017, counsel for the applicant accompanied by his clients came to this Court ready for hearing; that on arrival at the Court Registry, they were informed that the Court was not sitting and all matters scheduled for that day had been taken out of the cause list; that the applicant's counsel left the Registry awaiting a fresh hearing notice; that on 23rd November 2017, the applicant's counsel was served with a Notice of judgment to be delivered on 24th November 2017; that on the said 24th November 2017, judgment was delivered in presence of both counsel.

6. For the foregoing reasons, the applicant has moved this Court seeking an order for re-hearing of the appeal on the basis that the appeal was heard ex-parte; that there is an excusable mistake on part of counsel; that this Court delivered its judgment without taking into account the written submissions filed by the applicant; that sufficient cause has been shown why the applicant did not attend the hearing on 2nd October 2017.

7. The respondent to the instant application (the appellant in the appeal) filed three replying affidavits opposing the application for re-

hearing. The affidavits are deposed by ***Mr. Evans Mungai Mbugua***; ***Mr. Joseph Karanja Mbugua*** and ***Mr. Francis Ndathe Kimani***.

8. A common averment in the replying affidavits is that the hearing date of 2nd October 2017 was taken by consent of all parties on 21st March 2017 during Case Management. That during Case Management, the Deputy Registrar was audible; that by consent of all parties, the hearing date for the appeal was set down for 2nd October 2017; that directions were also given where the respondent in this application (appellant in the appeal) was given thirty (30) days within which to file her written submissions; that the applicant (respondent in the appeal) herein was also given thirty (30) days within which to file her written submissions; that the applicant failed to file her written submissions as directed; that it is highly unlikely and disbelieving that only counsel for the applicant (and his clients) heard the date of 23rd October 2017 while counsel for the respondent (and his clients) heard the date of 2nd October 2017.

9. At the hearing of the instant application, learned counsel ***Mr. F. N. Kimani*** appeared for the applicant while learned counsel ***Mr. Njoroge Wachira*** appeared for the respondent.

10. Counsel for the applicant rehashed the contents of the affidavits filed in support of the application. Similarly, counsel for the respondent repeated the contents of the affidavits filed opposing the application. The applicant urged us to empathize that the error in taking note of the hearing date was an innocent and excusable mistake on part of counsel. He submitted that it was not possible for the applicant who had won the case at the High Court to intentionally fail to attend Court on the hearing of the appeal.

11. Conversely, counsel for the respondent to the instant application reiterated that the hearing date of the appeal was taken by consent and no good reason has been given for this Court to order a re-hearing of the appeal. It was further submitted that the applicant nonchalantly did not comply with any directions given during Case Management including the direction to file her written submissions within thirty (3) days. That it was highly improbable it is only the applicant and his client who heard the date of 23rd October 2017; that counsel for the applicant signed the Case Management Check List which clearly shows the hearing date for the appeal was 2nd October 2017.

ANALYSIS and DETERMINATION

12. We have considered the instant application and the prayer for re-hearing of the appeal. We have taken into account submissions by both counsel and the grounds in support of and opposition to the application.

13. **Rule 102 (2)** of the **Rules of this Court** regulates appearances at hearing and procedure for non-appearance. The Rule provides:

> "**If the appellant appears and the respondent fails to appear the appeal shall proceed in the absence of the respondent and any cross-appeal may be dismissed, unless the Court sees fit to adjourn the hearing.**
>
> **Provided that where an appeal has been allowed or cross-appeal dismissed in the absence of the respondent, he may apply to the Court to re-hear the appeal or to restore the cross-appeal for hearing, if he can show that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing.**"(Emphasis ours)

14. At the outset, we remind ourselves that procedural rules are the backbone of justice. As was reiterated by Maraga, J. (as he then was) in **Shashikant C. Patel v Oriental Commercial Bank [2005] eKLR** it was stated *inter alia*;

> **"…we should never lose sight of the fact that rules of procedure, though they may be followed are the handmaids of justice. They should not be given a pedantic interpretation which at the end of the day denies parties justice."**

15. The thrust of the instant application is that the appeal was conducted *ex-parte*; that the applicant was not heard; that the written submissions filed by the applicant was not taken into account by this Court; that whereas the hearing of the appeal took place on 2nd October 2017, the applicant's counsel mistakenly recorded the hearing date as 23rd October 2017.

16. The rules of natural justice dictate that a party should not be condemned unheard. This Court in **JMK -v- MWM and another**, **Civil Appeal No. 15 of 2015** stressed the importance of observing the right to be heard, particularly if one stands to suffer adversely if not heard. In **ET Monks & Company Ltd -v- Evans [1985] 584** the court made it clear that public policy interest demands that the business of the court be conducted with expedition. The flipside of it was as held in **Agip (K) Ltd -v- Highlands Tyres Ltd [2001] KLR 630** where Visram, J. (as he then was) stated:

> ***"It is clear that the process of the judicial system requires that all parties before the court should be given an opportunity to present their cases before a decision is given.***

17. We are also cognizant of the words of Madan, JA in **Belinda Murai & others -v- Amos Wainaina (1978) LLR 2784** where he stated:

> ***"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…. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate…"***

18. We note that if a case is disposed of in the absence of a party, and the party (i) has not attended for good reasons, (ii) has an arguable case on the merits, and (iii) has applied to set aside promptly, it would require very unusual circumstances indeed before the court would not

set aside the order. It is incumbent upon the person applying for re-hearing or the setting aside such a judgment to establish and prove that he/she had good reason for not attending court.

19. Bearing in mind the foregoing legal principles, in the instant matter we have examined the judgment of this Court delivered on 24th November 2017. In the judgment, this Court was conscious that the applicant was not present at the hearing of the appeal and stated as follows:

> **"The appeal came up for hearing before us on 2nd October 2017. The appellant had filed written submissions as directed during the Case Management on 21st March 2017 but the respondent had not. Learned counsel Mr. C. N. Kihara assisted by Mr. F. N. Kimani appeared for the appellant. There was no appearance for the respondent who was aware of the hearing as the date was taken by consent…"..**

20. In this matter, we have examined the record and proceedings of Case Management held on 21st March 2017. The record shows that learned counsel ***Mr. Njoroge Wachira*** was present for the respondent who is the applicant in this matter. Learned counsel ***Mr. F. N. Kimani*** was also present for the appellant. The Case Management Checklist shows that the hearing date was taken by consent as 2nd October 2017. Both counsels for the appellant and respondent duly signed the Check List confirming the contents thereof.

21. One of the objectives of Case Management is to ensure orderly, effective and expeditious disposal of cases when listed for hearing. The purpose is to confirm that all preliminary issues that may lead to adjournment of the case have been dealt with. An opportunity is given to all parties to confirm that the case is ripe for hearing. Directions are then given during Case Management to ensure the expeditious disposal of the appeal at the main hearing. A date is then set for the hearing. Directions given at Case Management are not cursory; they are a tool for efficacious administration of justice and should not be ignored perfunctorily.

22. With the foregoing in mind, we now consider the merits of the instant application. In any dispute, it is imperative for a court to hear all parties. This is a requirement of the rules of natural justice as captured in the latin phrase *audi alterm partem*. In the instant matter, it is not in dispute that Case Management was done on 21st March 2017; it is also not in dispute that the Case Management Checklist shows the hearing date of 2nd October 2017 was taken by consent of the parties. It is also not in dispute the Check List was signed by all counsel present. We are further cognizant of the principle that ordinarily, mistake of counsel should not be visited upon a client.

23. Bearing in mind the foregoing legal principles, the applicant in this matter has urged us to believe that during the Case Management held on 21st March 2017, he heard that the hearing of the appeal was scheduled for 23rd October 2017.

We have pondered whether the applicant's assertion is plausible in view of the applicant's counsel signature on the Case Management Check List confirming the accuracy of the contents thereof. We also marvel why it is only the applicant and his clients who heard the date of 23rd October 2017 while the appellant and his client heard the hearing date to be 2nd October 2017. Further, in the replying affidavit deposed by ***Mr. Joseph Karanja Mbugua***, it is averred that during Case Management on 21st March 2017, he saw Mr. ***Lawrence Njuguna Mbugua*** (who attended on the applicant's side) record in his pocket diary that the hearing date was 2nd October 2017. From the Case Management Checklist, we further note that direction was given for the parties to file their respective written submissions within thirty (30) days. The applicant did not comply with the directions and failed to file her written submissions as directed. From the foregoing, it is manifest the applicant did not heed and pay due regard to the directions given during Case Management.

24. We have weighted the applicant's counsel's assertion that he heard the hearing date to be 23rd October 2017 against the applicant's counsel signature on the

Case Management Check List. We have also taken into account the fact that only parties representing the applicant contend to have heard the hearing date to be 23rd October 2017.

25. The Case Management Check List is a record of this Court. There is a presumption of accuracy, sanctity and integrity of the court records. In addition, the Check List is a document. Under ***Section 100*** of the **Evidence Act (Cap 80 of the Laws of Kenya)**, no oral evidence is admissible to vary or contradict the contents of a written document. The Section provides that:

> **"When language used in a document is plain, and it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts."**

In this matter, the Checklist plainly states the hearing date of 2nd October 2017 was taken by consent of the parties. Counsel for both parties signed the Checklist.

26. Guided by the sanctity of court records and ***Section 100*** of the **Evidence Act**, we are satisfied that on 2nd October 2017, this Court was properly and duly satisfied that the hearing date for the appeal was taken by consent; and that the applicant being aware of the hearing date did not attend court.

27. We are minded that pursuant to ***Rule 102 (2***) of the **rules of this Court**, if on the hearing date of an appeal, a respondent who has been served with a hearing notice fails to attend, the Court can proceed and hear the appeal. Based on this rule, we find that this Court having been satisfied that the applicant had knowledge of the hearing date properly proceeded to hear the appeal.

28. Having considered the grounds in support of the instant application, the record of Case Management and the duly signed Case Management Check List, we find that the applicant has not shown to our satisfaction that he was prevented by any sufficient cause from

appearing when the appeal was called on for hearing on 2nd October 2017. The averment that the applicant's counsel (and his clients) heard the date to be 23rd October 2017 is not believable and thus the applicant has not shown a good reason for not attending Court on 2nd

October 2017.

29. In arriving at our decision, we re-affirm the dicta by this Court in **Tana**

Teachers' Cooperative and Credit Society Limited -v- Andriano Muchiri [2018] eKLR where it was stated:

> **"A party cannot egregiously fail or refuse to comply with directions of the court claiming that the said directions were salutary and not accompanied by any sanctions and hope to seek refuge in the overriding principle. That in our view amounts to gross abuse of court process. There must be an end to litigation and it behooves this Court to tell the appellant that its journey ends at this point."** (Emphasis ours)

30. The upshot is that we find the instant application has no merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 19th day of July, 2019

F. SICHALE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

S. ole KANTAI

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR