



IN THE COURT OF APPEAL

AT NYERI

CORAM: (MUSINGA, SICHALE & KANTAI, JJ.A.)

CIVIL APPLICATION NO. SUP. 2 OF 2017

BETWEEN

SIMON NYAMU MIGWI APPLICANT

AND

PETER MUNENE MIGWI1ST RESPONDENT

PURITY WAWIRA WANJIKU.....2ND RESPONDENT

room and that the advocate had tried to reach counsel for the respondent in vain. Those grounds were repeated in a supporting affidavit of Miss Claire Kioko, an Advocate, who deponed that she had left Nairobi that morning at 5.30 a.m. and travelled to Nyeri ready to proceed with the hearing of the motion but that there were inconveniences on the road that made the journey long. She deponed that she arrived at the court at 9.00 a.m.; that the matter was called as she was looking for a room to robe and that she was informed that the matter was called out and dismissed for want of prosecution.

The advocate further deponed at paragraphs 12 – 14 of the affidavit:

“12. That were it not for the many inconveniences on the road from Nairobi and the few minutes lost looking for a robbing (sic) room in the court precincts, I would have been in time for the hearing bearing in mind that I was in court at around 9.05 a.m. immediately after the Court dismissed the matter for want of prosecution.

13. That the applicant and I have been religiously and timely attending court and the lateness is highly regrettable.

14. That it is in the interest of justice and fairness that this Honourable Court grant us the orders being sought in this application”.

The respondents, Patrick Munene Migwi and Purity Wawira Wanjiku, filed a document dated 12th October, 2017 titled **“GROUNDS OF OBJECTION”**. We do not have provision in our Rules for this kind of document. If we were to consider it for what it is worth, it says that the application is frivolous, vexatious and an abuse of the court process and that no reason had been given why the appellant was not present in court when the matter was called out; that the court had not started sitting at 9.05 a.m. on the material day and, further, that the reasons given for lateness are not convincing. There is also a replying affidavit of the 1st respondent, Patrick Munene Migwi, which seems to discuss the merits of the application which we dismissed for want of prosecution.

The motion came up for hearing before us on 17th January, 2018 when learned Counsel Miss Claire Kioko appeared for the applicant and learned counsel Miss Nyangati appeared for the respondents. Learned counsel for the applicant in giving a history of the matter submitted that her law firm had been instructed to appeal a judgment of this court and that they filed the application for leave to move to the Supreme Court. Counsel explained that she left Nairobi early in the morning at 5.30 a.m. and arrived in Nyeri in good time for the hearing but that while looking for a robing room, the matter was called and the application dismissed. Learned counsel asked us to exercise our discretion to reinstate the dismissed motion pointing out that she had moved with speed to file the present application.

Miss Nyangati, learned counsel for the respondents, in opposing the motion submitted that no proper reasons had been advanced why the applicant or his advocate were not in court when the motion was called out for hearing.

We have looked at the record and have considered the submissions of learned counsel before us. We have also looked at the Coram Sheet on 19th September, 2017 which shows that the court started at 9.00 a.m. Learned counsel for the applicant says that she left Nairobi early in the morning at 5.30 a.m. to travel to Nyeri and that she arrived in court on time but as she was trying to get a room to wear the robes necessary for advocates who appear before us, the matter was called out and dismissed in her absence. She entered the court room at 9.05 a.m. and found that the matter had already been dealt with.

We are prepared upon consideration of those facts to accept as reasonable the explanation given by counsel for the applicant why she was not in court at 9.00 a.m. when the motion was called for hearing and dismissed. Those facts have not, indeed, been seriously challenged in any serious manner by the respondents. It appears to us that the learned counsel for the applicant took necessary steps to attend court in Nyeri by leaving Nairobi early in the morning to attend court at Nyeri and prosecute the motion that was listed for hearing that day. There were inconveniences that beset the learned counsel for the applicant including looking for an appropriate room to robe so as to appear before us. In an application

such as the one before us it is our duty to examine the reason or reasons advanced by counsel or the party on why there was failure to attend court. That party or the advocate has a responsibility to give a reasonable explanation.

We find the reasons advanced by learned counsel for the applicant for not being in court to be not only plausible but reasonable. The lawyer left Nairobi early in the morning and encountered some difficulties on the way to Nyeri while travelling by public means. She arrived in Nyeri in good time but could not immediately find an appropriate room to change her clothes to wear the appropriate apparel necessary of counsel who appear before us. Learned counsel took all reasonable steps to appear before us but was a victim of certain inconveniences which she has ably been able to explain.

In the premises we are entitled, as we hereby do, to exercise our discretion in favour of the applicant. We do so and we now set aside the orders we made on 17th September, 2017 and substitute thereof an order reinstating the motion dated 2nd August, 2017 filed in court on 3rd August, 2017 which shall be set down for hearing by the Court Registry with appropriate service of hearing notices to the counsel for the parties.

In the circumstances the respondents are entitled to costs, which we hereby grant.

Dated and delivered at Nyeri this 21st day of February, 2018.

D. K. MUSINGA

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JUDGE OF APPEAL

F. SICHALE

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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.

DEPUTY REGISTRAR