



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A)**

**CIVIL APPLICATION NO. 28 OF 2015**

**KENYA MARINE CONTRACTOR**

**EPZ LIMITED.....APPLICANT**

**AND**

**KENYA ENGINEERING WORKERS UNION.....RESPONDENT**

*(An application for grant of leave to file/lodge appeal and extension of time to file/lodge appeal in the Supreme Court of Kenya against the judgment and order of the Court of Appeal delivered on 27<sup>th</sup> November, 2015 arising from appeal in **Civil Appeal No. 28 of 2015.**)*

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**RULING OF THE COURT**

Before the Court is an application dated 19<sup>th</sup> July, 2016 seeking the review of the order of 11<sup>th</sup> July, 2016 by which the applicant's application dated 27<sup>th</sup> April, 2016 was dismissed with costs for non-attendance on the part of the applicant and or its counsel. The application is predicated on grounds that the non-attendance by the applicant's counsel was occasioned by mechanical breakdown of the vehicle in which she was travelling, leading to her late arrival in court, by which time the application had been dismissed with costs. Five days later it lodged the instant application.

The application is opposed, vide the replying affidavit of **Charles Natili**, sworn on 14<sup>th</sup> September, 2016 in which he deposes that mechanical breakdown of a motor vehicle was a foreseeable event and that the applicant was simply engaging in delaying tactics in a bid to keep the respondents from enjoying the fruits of their judgment. That the applicant's counsel did not have the courtesy to call her counterpart and inform her of the mechanical hitches she was facing so that the court could indulge her and place the file aside awaiting her arrival. In any event, the respondent said, Mombasa - Malindi road is a busy road and the applicant's counsel could have easily secured alternative means of transport. In addition, that the applicant had so far failed to comply with orders made on 5<sup>th</sup> September, 2014 when the Employment and Labour Relations Court in Mombasa directed that it deposits Kshs.10,000,000/= as security. In the respondent's view, this was a conduct reflective of a party intent on delaying the matter rather than having it concluded and who should not benefit from the indulgence of the Court. The respondent invited us to look at the conduct of the applicant in its totality throughout the history of the appeal and come to the conclusion that the applicant is an indolent litigant who has no interest in seeing justice served but is only intent on keeping away the respondent's members from enjoying the fruits of their judgment.

At the hearing of the application, **Ms. Rajab** for the applicant and **Ms. Mawe**, who held brief for **Mr. Namasake** for the respondent basically reiterated the parties' respective positions as stated above.

Under **Rule 55(1)** of the **Court of Appeal Rules**, an application before this Court may be dismissed if the applicant fails to appear on the day the same is scheduled to be heard. That is what happened on 11<sup>th</sup> July, 2016. When the application was called out, the applicant and or its counsel, **Ms. Rajab** were absent, as a result of which the respondent's counsel, successfully sought for dismissal of the application for non-attendance. However, a lifeline is donated by **sub rule (3)** where an application dismissed under **sub-rule (1)** as above maybe reinstated upon an application if the applicant shows that he or she was prevented by any sufficient cause from appearing when the application was called out for hearing.

In the **Kasturi Limited v Nyeri Wholesalers Ltd [2014] eKLR** this Court held in an application to reinstate an appeal that had been dismissed for non-attendance that the issue for determination was whether the applicant had given satisfactory explanation for non-attendance. In allowing the application the Court held that **"It is always prudent for litigation to come to an end when all parties have been heard on merit and substantive justice administered."** Again in **Kitts Mbatu Mukonyole v Levi Ndombi Mukonyole [2013] eKLR** where the applicant applied to set aside or vary orders dismissing an appeal, this Court laid down the issue for consideration in an application of this nature as being whether the applicant had demonstrated sufficient reasons that prevented him from appearing when the appeal was called out. The Court in allowing the application relied upon the principles for setting aside an *ex parte* judgment and or order set out in the case of **Shah v Mbogo & Another [1967] E.A. 116** that-

**"---The court's discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."**

Did the breakdown of the counsel's mode of transport constitute sufficient reason and or excuse?

Justice and the rule of law are the cornerstones of the courts function. In addition, Article 159 of the Constitution encourages courts to dispense justice without undue regard to procedural technicalities. The breakdown of a motor vehicle is not something that one would wish upon oneself. It is not readily foreseeable. In the same spirit, counsel is expected in such circumstances, to mitigate against such ill-fortune. However, beyond making such bare statement that her means of transport broke down on her way to court, there was no supporting cast such as when and at what time she left Mombasa for Malindi, mode of transport, whether private or public, what time and where exactly along Mombasa-Malindi Road her means of transport developed mechanical problems, and when she was able to access the alternative means of transport. Without this evidence, it is hard to be sympathetic to the applicant's averments. Even if we were inclined to accept and give the benefit of doubt to the applicant regarding its counsel's inability to attend court on time, that benefit is easily outweighed by the applicant's conduct throughout the proceedings.

Sample this; the claim was determined by the Employment and Labour Relations Court on 23<sup>rd</sup> May, 2014. The applicant being dissatisfied with the judgment applied for stay of execution pending appeal which was granted on condition that the applicant deposits security in the sum of Kshs.10,000,000/- within 15 days. The applicant did not comply with this order. Thereafter, the applicant did not move with speed to file the appeal, which forced the respondent to file an application before this Court to compel the applicant to file the appeal without any further delay. When the application came up for hearing, a consent order was recorded requiring the applicant to file the appeal within 30 days. The appeal was subsequently filed, heard and dismissed on 27<sup>th</sup> November, 2015. The appeal having been dismissed it was expected that the applicant would endeavour to satisfy the decree. However, this was not to be because 5 months later the applicant filed an application seeking leave to file an appeal in the Supreme Court out of time. That is the application that was dismissed with costs for non-attendance and is the subject of the instant application. It is instructive that the applicant has not at all adverted to these averments in the respondent's replying affidavit.

The court has been moved to exercise its inherent jurisdiction. However, we cannot turn a blind eye to a litigant who comes to Court determined to obstruct and delay the cause of justice at every corner whilst expecting reprieve from the same Court. We have no doubt at all in our minds and as correctly observed by the respondent that the applicant's conduct throughout the proceedings leading to the instant application has been to delay by whatever means the finalization of the dispute. There is no good faith at all in the applicant's conduct and this Court should not be seen to aid the applicant in its intransigence by allowing the application.

We accordingly dismiss the application with costs to the respondent.

**Dated and delivered at Mombasa this 10<sup>th</sup> day of March, 2017**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**