REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL APPEAL NO 30 OF 2016

JOYCE KICHORO KURWA……..…..……..APPELLANT

VERSUS

PETERSON MBAUNI KINYUTHO…..…….……..RESPONDENT

RULING

1. By Notice of Motion dated 3rd November 2016 made under Order 12 Rule 7, Order 42 Rule 6 (1) and (2), Order 45 and Order 51 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 80 of the Civil Procedure Act, the Appellant seeks orders:

> **1) That this matter be certified as urgent and the service of the same be dispensed with in the first instance.**
>
> **2) That there be temporary stay of execution pending the hearing and determination of this Application.**
>
> **3) That this Honourable Court be pleased to set aside review and or vary the order made the 24th day of October 2016 dismissing the Appellant's appeal herein and be pleased to reinstate the said Appellant's appeal.**
>
> **4) That there be stay of execution pending the hearing and determination of the Appellant's appeal herein.**
>
> **5) That the costs of this Application be proved for.**

2. The Application is made on the grounds on the face of the Motion namely:

> **i. That the unfortunate circumstances leading to the dismissal of the Appeal on 24th October 2016 prove that the Appellant was not to blame.**
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> **ii. That the Appellant was in fact in court when the ruling dismissing the appeal was being read but unfortunately she had arrived a little late.**
>
> **iii. That the Appellant's appeal is not frivolous and ought to be heard and decided on its merits.**
>
> **iv. That the Respondent stands to suffer no prejudice if the orders sought herein are granted and the Appellant's appeal will be heard and determined on its merits.**

v. That the Appellant is keen to have her appeal heard and determined and the mistakes of her counsel should not be visited on her.

vi .That the counsel for the Appellant had instructed another advocate to hold his brief and did not expect his colleague to let him down in so serious a manner.

vii. That the justice of the case demands that the Appellant be afforded a chance to be heard.

viii. That unless the orders prayed for hearing are granted, the Appellant stands to suffer irreparable loss and damage and the Appellant ought to be given a chance to be heard.

3. The Application is supported by the Affidavit of Fredrick M. Mwawasi advocate sworn on 31st October 2016. Mr. Mwawasi depones that on 22nd October 2016 he contacted Mr. Mwanyumba Advocate who agreed to hold his brief at the mention of the case on 24th October 2016, a fact he states that he communicated to the Appellant. He further depones that on the morning of 24th October 2016, his calls to the said Mr. Mwanyumba went unanswered and he got alarmed and contacted a court clerk and process server by the name Nicholas Muchanji to whom he gave the Appellant's telephone number and instructed him to rush to court to get an Advocate to hold his brief for the mention of the case which according to him, he was certain was to confirm the typing of the lower court's proceedings but has by now learnt that the proceedings had been typed as early as 20th May 2016. Mr. Mwawasi further depones that it is unfortunate and not the intention of the Appellant or his firm to delay this matter and has undertaken to prepare and complete the Record of Appeal with the requisite dispatch and have the matter heard and determined without undue delay. He depones further that the Appellant was in Court when the ruling dismissing the appeal was being read together with Nicholas Muchanji and that her slight delay in getting into Court was entirely due to the fact that she was unfamiliar with the Court set up and surroundings and was not in any way to blame for the delay. He has attached an Affidavit sworn by the Appellant in which she avers that she came to Court very early on 24th October 2016 to attend the mention of the appeal as instructed by her Advocate and upon reaching, she waited outside Court not knowing where the High Court was sitting on that particular day until when she met one Nicholas who went with her inside the Court where she found the Court in session and the Judge was writing. She further states that when the Judge started reading a certain ruling while communicating with the Respondent that it dawned on her that it was her case that was being dismissed for want of prosecution while she was present. That she was afraid to interrupt the Judge while she was reading the ruling but instead reported to her lawyer what transpired.

4. The Application is opposed by the Respondent who filed a Replying Affidavit sworn on 8th November 2016. The Respondent deposes that the Appellant filed the suit way back in December 2015. The Respondent states that he resides in Taveta and would always travel overnight to Voi in order to attend to Court sessions in time whenever the case was due for hearing. He depones that in all sessions when the matter came up for hearing, he would attend Court and on several occasions the Appellant's counsel was absent. He further depones that on 24th October 2016, he attended Court and made his submissions leading to the dismissal of the appeal. It was his contention that there was no evidence that the Appellant's Counsel called someone to hold his brief on that day and that the assertion that they thought the matter was for mention to confirm the typing of proceedings of the lower Court are lame excuses as it was their duty to know the position and wondered how the appeal was filed without the certified copies of the proceedings and judgment. According to the Respondent, the Appellant's Application is a waste of Court's time, bad in law and is an abuse of the process of Court and urged the Court to dismiss it with costs.

5. Both parties agreed to canvass the Application by way of Written Submissions.Inher submissions, the Appellant reiterated that she has given a sufficient grounds and reasons why the Appellant's Advocate was not present in Court on 24th October 2016. It was submitted that it has been a principle of law that dismissal is a drastic measure that should be resorted to only in the most of extreme cases and that the temples of justice should not be slammed shut in the face of any litigant. The Appellant relied on the case of ***RICHARD NCHANGI LEIYAGU –V- IEBC AND 2 OTHERS (2013)eKLR*** *and the case of* ***LUCY***

The Appellant submitted that the Respondent will not suffer any prejudice if the Application is allowed and the appeal is heard and determined on merit.

6. In his submissions, the Respondent gave instances when the Appellant has not been keen to prosecute previous Applications in the matter. He submitted that the Court took note of the Appellant's lack of interest in the Appeal and dismissed it for Want of Prosecution. The Respondent submitted that the Appellant is not entitled to the orders sought and relied on several decided cases.

7. I have considered the Application together with the Affidavit in support and against as well as the submissions made. The record shows that the matter came up before the Court on 28th September 2016 when the Honourable Judge fixed it for mention on 24th October 2106 with the view of the Court to give further orders and or directions. The Court further ordered that the firm of F. M Mwawasi & Co Advocates who are representing the Appellant and who were not present in Court be served with a mention notice. The record further shows that the said firm of Advocates was duly served with a mention notice via EMS. However, on 24th October 2016 when the matter came up in Court, the Appellant and her Counsel were absent. The Respondent was present and the Court, after hearing the Respondent dismissed the appeal for Want of Prosecution.

8. The principle guiding the setting said of ex parte orders are trite that the Court has wide powers to set aside such ex parte orders save that where the discretion is exercised, the Court will do so on terms that are just. In ***PATEL –V- EA CARGO HANDLING SERVICES LTD (1974)EA*** at page 76, DuffusP stated thus:

> *"There is no limit or restrictions on the Judge's discretion except that if he does vary the judgment he does so on such terms as may be just…. The main concern of the Court is to do justice to the parties, and the Court will not impose conditions on itself to fetter the wide discretion given it by the rules"*
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> In ***SHAH V- MBOGO (1967) EA 116*** at page 123 Harris J stated:
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> *"This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, in advertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice".*
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> *In* ***CMC HOLDINGS LIMITED –V- NZIOKI (2004) IKLR 173***, it was held as follows:
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> *"That discretion must be exercised upon reasons and must be exercised judiciously…."*
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> In ***BRANCO ARABE ESPANOL –V- BANK OF UGUNDA (1999) 2 EA 22, ODER, JSC*** stated:
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> "*The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and the errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered*"

9. In this case, the appeal was slated for mention on 24th October 2016 when the Appellant and her Counsel failed to attend Court and the Appeal was dismissed for want of prosecution. The Appellant and her Counsel have given an explanation as to why they were not present in Court when the matter was called out. From the Supporting Affidavit, the Appellant has in my view given sufficient reason to persuade this Court to exercise its discretion in her favour. As I have already pointed out, the matter was slated for mention on 24th October 2016 and was not for hearing. The Respondent will not suffer any

prejudice if the Application is allowed as its effect would be to reinstate the appeal for hearing and determination on merit.

10. In the result, having considered the foregoing and the reasons advanced for non-attendance on behalf of the Applicant, I find merit in the Application dated 3rd November 2016 which I hereby allow and set aside the orders of 24th October 2016 dismissing the Appeal. The Appeal is hereby reinstated.

There shall be no order as to costs.

Ruling delivered, dated and signed at Mombasa this 27th day of July 2017

C. YANO

JUDGE