



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, G.B.M KARIUKI & OTIENO-ODEK JJ.A)**

**CIVIL APPEAL (APPLICATION) NO. 124 of 2004 BETWEEN**

**HABO AGENCIES LIMITED ..... APPLICANT**

**AND**

**WILFRED ODHIAMBO MUSINGO..... RESPONDENT**

*(Being an application for restoration of the appeal from the ruling/order of the High Court of Kenya at Nairobi (Hon. Michael Khamoni dated 15<sup>th</sup> August 2001*

**in**

**Nairobi High Court Civil Case No. 2047 of 2000**

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**RULING OF THE COURT**

1. This is a reference to a three judge bench of this Court against a decision of a single judge of the Court declining an application for restoration of an appeal dismissed for non-attendance. On 5<sup>th</sup> February 2013, a three judge bench of this Court made the following Order in relation to Civil Appeal No. 124 of 2004.

**“This appeal was listed for hearing before us this morning. However, neither the appellant nor its advocates are present in court to prosecute it. The appellant’s firm of advocates Asige Keverenget & Anyanzwa were served with the hearing notice for today’s hearing on 23<sup>rd</sup> January 2013 according to the Hearing Notice availed to us. All they stated at the back of it on receipt of the same is “without prejudice”. Mr. Tiego, learned counsel for the respondent is present and seeks its dismissal and costs of the appeal. In the circumstances, the appeal is marked as dismissed pursuant to Rule 102 (1) of this Court’s rules. The appellant is to pay costs of the appeal to the respondent.”**

2. Aggrieved by the Order of 5<sup>th</sup> February 2013, the applicant filed a Notice of Motion dated 9<sup>th</sup> June 2014 seeking review and setting aside of the Order made dismissing the Civil Appeal No. 124 of 2004 for non-attendance. The application was placed before a single judge of this Court (Waki, J.A.) who delivered a ruling dated 16<sup>th</sup> January 2015 dismissing the Motion.
3. Upon dismissal of the Motion by the single judge, the applicant applied for Reference to a three

judge bench of this Court under Rule 55 of the Rules of this Court. This ruling is in regard to the mode in Reference before a three judge bench of this Court. In this Reference, the parties have argued the Notice of Motion dated 9<sup>th</sup> June 2014 being an application to set aside the Order of this Court made on 5<sup>th</sup> February 2013.

4. The Motion is supported by an affidavit deposed by Mr. Wilfred Oluga. In the Motion, the applicant proffers reasons for non-attendance in court on 5<sup>th</sup> February 2013 when its appeal was dismissed. It is deposed that failure to appear in court on 5<sup>th</sup> February 2013 was due to mistake on the part of the then counsel for the applicant; that the appeal is arguable and has high chances of success and the applicant should be given the opportunity to canvass and urge its appeal. That the respondent is presently seeking to execute the decree of the High Court against the applicant to recover a whopping sum of Ksh.3,027,712/= in relation to an initial claim of Ksh.532,840/=; the respondent stands to suffer no prejudice if the instant application is allowed because he has already received Ksh. 647,527.70 from the fixed deposit escrow account which had been opened in the joint names of the parties advocates as a condition for grant of stay orders by the High Court; the applicant stands to suffer irreparable loss if the orders sought are not granted; that the applicant's former advocate on record never informed it that the appeal had been set down for hearing on 5<sup>th</sup> February 2013; by the time the applicant became aware that its appeal had been dismissed, the 30 day period stipulated under **Rule 102 (1)** for making an application for restoration of the appeal had lapsed; even after the applicant became aware that the appeal had been dismissed and sought an explanation from its former advocate, no explanation has been given to this day as to why the advocate did not attend court; that the applicant has not been able to obtain its record of appeal from its former advocate; that in the interest of justice, mistake of counsel should not be visited upon a client.
5. At the hearing of this Reference Application, learned counsel Mr. P. R. Amuga appeared for the applicant while learned counsel Mr. T. T. Tiego appeared for the respondent.
6. Counsel for the applicant reiterated the grounds in support of the application emphasizing that when the appeal came up for hearing on 5<sup>th</sup> February 2013, the applicant was not aware that the same was scheduled for hearing; that the applicant only became aware that its appeal had been dismissed in March 2014; that on making inquiry, its former advocate expressed ignorance of the dismissal order; that the applicant's former advocate let down his client; that there are high chances of the appeal succeeding; we were urged to restore the appeal and let the applicant have his day in court. The applicant filed a list of authorities and cited the decisions in **Joseph Njuguna Muniu -v- Medicino Giovanni (1998) eKLR; African Airlines International Limited -v- Eastern & Southern African Trade & Development Bank (PTA) (2003) eKLR; Kenya Industrial Estates Limited -v-Transland Shoe Manufacturers Limited & 2 others (2000) eKLR.**
7. Counsel for the respondent in opposing the Reference Motion submitted that the applicant was beseeching this Court to exercise its discretionary powers and set aside the order dismissing the appeal for non-attendance; that there is no sufficient material before this Court to enable it exercise its discretion in favour of the applicant; that the applicant has not placed any material to show that it was diligent in prosecuting its appeal; that there is no letter or any inquiry by the applicant as to the status of its appeal from 1<sup>st</sup> August 2002 to 23<sup>rd</sup> January 2013 when the hearing notice was served; that there is nothing to show that the applicant was following up on his appeal; that the applicant is heaping blame on its previous advocates yet the hearing notice was served; that there is no explanation for non-attendance by the previous advocate; there is no evidence of mistake, accident or inadvertence on the part of the applicant's former advocates; that an inference must be drawn that both the former counsel and the applicant deliberately failed to attend court; that the general principle that errors on the part of counsel should not be visited upon a client has exceptions and the instant case does not fit within the general principle; that the record reveals a series of delays on the part of the applicant and the instant case is not one in which it is proper for this Court to exercise its discretion in favour of the applicant.

8. In his replying submissions, counsel for the applicant urged this Court to allow the present application and give the applicant an opportunity to be heard in his appeal.
9. We have considered the Reference Motion, submissions by counsel and the authorities cited. This is an application seeking the exercise of this Court’s discretion to set aside the order dismissing the applicant’s appeal for non-attendance. The exercise of discretion by this Court should be judicious and not arbitrary. In an application to restore an appeal that has been dismissed for non-attendance, the duty is on the applicant to give convincing and satisfactory reasons to explain the non-attendance. In the present case, two reasons have been given to explain non-attendance in Court on 5<sup>th</sup> February 2013. The first is that despite service of the hearing notice upon the then counsel for the applicant, the applicant was not aware of the hearing date; second, it was urged that the then counsel for the applicant did not inform the applicant that its appeal had been dismissed for non-attendance.
10. We are cognizant of numerous decisions of this Court and persuasive decisions from other jurisdictions that mistake of counsel should not be visited upon a client. In the Ugandan case of **Edith Nantumbwe Kizito & 3 O’rs vs. Mariam Kutesa, CA Civ. Ref. No. 98 of 2008**, it was held, *inter alia*, that mistake of counsel should not be visited on an innocent litigant. In the Kenyan case of **Rajesh Rughani -v- Fifty Investments Limited & Another (2005) eKLR**, this Court expressed that “***it is not simply enough to accuse the advocate for failure to inform as if there is no duty on the client to pursue his matter.***” Whereas it is true that in general, mistake of counsel should not be visited upon a client it is equally true that when counsel as agent is vested with authority to perform some duties and does not perform the duty as directed by the principal, such principal should bear the consequences. (See **Bains Constructions Co. Limited -v- John Mzare Ogowe (2011) eKLR**).
11. In **Gatti -v- Shoosmith (1), [1993] 3 All E.R. 916**, it was observed that there is nothing in the nature of mistake to exclude it from being a proper ground for not allowing it as an effective ground to grant leave to appeal. Whether a mistake should be treated as good ground must depend on the facts of each individual case and there may be facts in a case which would make it unjust to allow a party to succeed on the ground of mistake of counsel. (See also **Venonah Margaret Bray -v- Raymond Jack Bray, (1957) EA 302**).
12. In the instant case, the applicant’s submission lays blame on its previous counsel on record; there is nothing on record to show that the applicant was diligent in pursuing its appeal; the applicant has not shown that it was actively taking action to follow its appeal and ensure that it is heard and determined. It is the applicant’s submission that the appeal was not heard as a result of mistake on the part of its counsel. As we have stated, there is nothing on record to show that the applicant actively or at all pursued its appeal. In the absence of such evidence, we are not persuaded that the single judge erred in his findings and determination in the ruling dated 16th January 2015. Accordingly, we dismiss the Reference to the full bench of this Court and uphold the ruling by the single judge dated 16th January 2015. The Notice of Motion dated 9<sup>th</sup> June 2014 is hereby dismissed with costs.

***Dated and delivered at Nairobi this 24<sup>th</sup> day of June, 2016***

**M.K. KOOME**

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**JUDGE OF APPEAL**

**G.B.M. KARIUKI**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**