



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT MOMBASA**  
**(CORAM: VISRAM, OKWENGU & SICHALE, JJ.A.)**  
**CIVIL APPEAL NO.9 OF 2014**

**BETWEEN**

**WANGULU ENTERPRISES LIMITED ..... APPELLANT**

**AND**

**ABDALLA SAID KUGOTWA .....1<sup>ST</sup> RESPONDENT**

**THADDES KIMINZA MUTISO .....2<sup>ND</sup> RESPONDENT**

**JANE NJERI MUTISO .....3<sup>RD</sup> RESPONDENT**

**MWICIGI KANIU .....4<sup>TH</sup> RESPONDENT**

**JANE GATHONI MWICIGI .....5<sup>TH</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR KWALE .....6<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 7<sup>TH</sup> RESPONDENT**

*(Being an appeal from the ruling and order of the High Court of Kenya at Mombasa (Mukunya, J.) dated 23<sup>rd</sup> August, 2013*

*in*

*H.C.C.S. No.345 of 2009)*

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**JUDGMENT OF THE COURT**

The appellant, **Wangulu Enterprises Limited** filed an appeal arising from the ruling and order of **Mukunya J.** dated 23<sup>rd</sup> August 2013. The learned Judge’s ruling was in respect of a Notice of Motion application dated 18<sup>th</sup> June 2013 and filed in Court on 19<sup>th</sup> June 2013. In the motion, the appellant, the then plaintiff sought that the order of 6<sup>th</sup> June 2013 dismissing its suit be set aside and that the suit be

revived and be reinstated to hearing. The background to the Notice of Motion was that the trial court had dismissed the applicant's plaint on 6<sup>th</sup> June 2013 for non-appearance of the appellant's counsel. The Notice of motion was supported by the affidavit of Eunice W. KIBE, the then advocate for the appellant who deponed that on 4<sup>th</sup> June 2013 she was taken ill and was out of the office till 8<sup>th</sup> June, 2013; that on 17<sup>th</sup> June 2013 she learnt that the appellant's suit had been dismissed; that she had instructed her clerk to pass over the file to an advocate to hold her brief and which instructions were not followed. There was a supplementary affidavit sworn on 29<sup>th</sup> June 2013 by **David Hussein K. Sang**, the appellant's General Manager who deponed that the appellant had been keen to have the matter heard and determined and that it was not aware of the hearing date of 6<sup>th</sup> June, 2013.

The application was opposed by the respondents. The 2<sup>nd</sup> respondent **Thaddeus Kiminza Mutiso** in a lengthy affidavit of 27<sup>th</sup> June 2013 gave a narration of the history of the case and deposed that the "*application has no merit and should be dismissed with costs.*" On his part, **Abdalla Said Kugotwa** the 1<sup>st</sup> respondent filed grounds of opposition dated 27<sup>th</sup> June 2013 and objected to the application on the basis that the recourse available to the appellant was "*to appeal*" and "*to file a fresh suit.*" The application came up for hearing on 1<sup>st</sup> July 2013 and ruling was delivered on 23<sup>rd</sup> August, 2013. It is the said ruling that precipitated this appeal.

During the plenary hearing of the appeal before us, **Mr Karega** learned counsel for the appellant urged us to find that the trial Judge misdirected himself in failing to set aside the order for dismissal of the appellant's suit; that the learned judge erred in holding that the appellants failed to inquire from their advocate of the hearing date; and finally that the 2010 Constitution does not support technical judgments. He relied on the following authorities: **Shah vs Mbogo [1967] E.A. 116**, **Harrison Wanjohi Wambugu vs Felista Wairimu Chege & another [2013 eKLR]**, **Richard Ncharpi Leiyagu vs Independent Electoral Boundaries Commission & 2 others [2013] eKLR**, **Kasturi Limited vs Nyeri Wholesalers Limited [2014] eKLR**.

**Mr Aboubakar** for the 1<sup>st</sup> respondent in opposing the appeal submitted that there is a clear admission of negligence and that the appellant sought to deliberately subvert justice. He relied on the following authorities: **HCCC NO.195 OF 2005 [NKR] Gateway Insurance Co. Ltd vs Simon W. Gakuru**, **HCCC NO.119 OF 2012 [NKR] Jurgen Paul Flach vs Jane Akoth Flach**, **HCCC NO.657 OF 1989 [NBI] Sagoo v Bharij**.

**Mr Mwakireti** who held brief for **Mr Asige** for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents too opposed the appeal. He submitted that the judge exercised his discretion properly and further that the appellant failed to exercise due diligence and simply went to sleep! He relied on the following authorities: **Abdishukri Maalim Ahmed & Another vs The Commissioner of Customs and Excise & Anor [2000] eKLR**, **Abok James Odera T/A A. J Odera & Associates vs John Patrick Machira & Co. Advocates [2013] eKLR**.

**Mr Ngari** for the 6<sup>th</sup> and 7<sup>th</sup> respondents associated himself with the submissions of the other respondents.

The facts of this appeal are fairly straightforward. The appellant's suit filed on 5<sup>th</sup> October 2009 was dismissed on 6<sup>th</sup> June, 2013 due to failure of the then appellant's counsel to attend Court. The explanation by the appellants then counsel was that she was taken ill on 4<sup>th</sup> June 2013 and it was not until 17<sup>th</sup> June 2013 that she got to know of the dismissal. This according to her was that in spite of reporting to her office on 8<sup>th</sup> June, 2003 she did not know of the outcome of the case as she could not get hold of the file in her office. Like the learned judge, we too find that the counsel exercised her discretion in a dilatory manner. If indeed she had instructed her clerk to ask another counsel to hold the brief, one would expect her to find out the outcome of the case upon resumption of duty on 8<sup>th</sup> June, 2013. She did not do so but she purports to know of this when she lay her hands on the file on 17<sup>th</sup> June 2003. What were the findings on 17<sup>th</sup> June, 2013 as clearly there were no proceedings recorded in her file on the said date.

However, it is trite law that this Court is called upon not to interfere with the trial Court's discretion unless he/she has misdirected himself/herself. In **Mbogo & another v Shah (1968) EA 93** at page 95, Sir Charles Newbold P. held:

*“... a Court of Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice ...”*

The question that we must inevitably ask ourselves is whether the failure on the part of the appellants counsel on 6<sup>th</sup> June 2013 to attend court constituted an excusable mistake or whether it was meant to deliberately delay the course of justice. In the supplementary affidavit of Hussein he deponed that the appellant had been keenly following up the case. He further deponed that it was unaware of the hearing date of 6<sup>th</sup> June, 2013. It would again appear that counsel failed to inform his client of the hearing date and hence the appellant's non-attendance on the hearing date. This was one more blunder by the appellant's counsel. In **Philip ... & Another vs Augustine Kukede [1982-88] KAR 103** at 1040 Apaloo J.A. (as he then was) held:-

*“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of parties and not the purpose of imposing discipline.”*

And in **Richard Nchapi Leiyegu vs IEBC & 2 others Civil Appeal No.18 of 2013**. This Court rendered itself thus:-

*“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”*

Besides the 2010 Constitution as well as the Oxygen Principles pay homage to substantive justice as opposed to technical judgments. In **Richard Nchapi Leiyegu vs IEBC & 2 others** (supra) this Court expressed itself as follows:-

*“We agree with the noble principles which go further to establish that the court's discretion to set aside an ex pate judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.”*

From the foregoing we find that the learned Judge misdirected himself in exercising his discretion by declining to reinstate the appellant's suit thereby denying the appellant the right to be heard. Further, disallowing this appeal would go against the spirit of the overriding objectives and also the provision of **Article 159** of the Constitution. Accordingly we allow the appeal herein, set aside the ruling of 23<sup>rd</sup> August 2013 dismissing the appellant's notice of motion and substitute thereto an order allowing the appellant's application dated 18<sup>th</sup> June 2013, setting aside the order of dismissal of 6<sup>th</sup> June 2013 and reinstating the appellant's suit. We further decree that the suit in the High Court be heard on its merits. We however award costs to the respondents for the Notice of Motion application for reinstatement of the suit filed on 19<sup>th</sup> June, 2009. Each party to bear his own.

**Dated and delivered at Mombasa this 12<sup>th</sup> day of March, 2015.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**