



REPUBLIC OF KENYA
IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK JJA)

CIVIL APPEAL (APPLICATION) NO. 248 OF 2012

BETWEEN

KASTURI LIMITEDAPPLICANT

VERSUS

NYERI WHOLESALERS LIMITED RESPONDENT

(An application for reinstatement of Civil Appeal No.248 of 2012 which was dismissed for non-attendance on 2nd April, 2014, by

Hon. Justices Visram, Koome & Odek JJ.A.)

RULING OF THE COURT

1. By Notice of Motion dated 4th April, 2014, the applicant is seeking orders to reinstate its appeal that had been dismissed for non-attendance on 2nd April, 2014. The application is brought under **rules 4 and 102 (1), (3)** of the **Rules of this Court**. A period of 2 days elapsed since delivery of the ruling dismissing the appeal for non-attendance and the filing of the current application.
2. The issue in this application is whether the applicant has given a satisfactory explanation for non-attendance on 2nd April, 2014. The affidavit in support of the motion is sworn by counsel for the applicant Messrs George Gori. It is explained that non-attendance was occasioned by an inadvertent mistake in diarizing the hearing date; that the application to restore the appeal was filed within 2 days which is not an inordinate delay. In the supporting affidavit, learned counsel Mr. Gori deposes that his office was served with a hearing notice but due to inadvertence, the hearing date was not diarized by his secretary. That mistake of counsel should not be visited upon a client.
3. A replying affidavit sworn by Mr. Pravin Shah, a director of the respondent company, was filed in opposition to the application. It is stated that the hearing notice was served on 26th March, 2014 and the applicant had at least seven clear days until 1st April, 2014 to diarize the case; that it is surprising that the applicant and or its advocate had not made provision for bringing up their file at least for preparation

before the hearing date; that the applicant was given an opportunity to be heard on 2nd April, 2014 and failed to utilize it; that the applicant's appeal has no substance; that the applicant has always halted proceedings before the High Court in the guise that there is a pending appeal; that if the applicant failed to prosecute its appeal due to the negligence of its counsel, there is always a remedy against the advocate. It is stated that the respondent will suffer prejudice and traveling costs of Ksh. 20,000/= was incurred to ensure court attendance on 2nd April, 2014.

4. During the hearing of the present application, learned counsel Mr. George Gori appeared for the applicant while learned counsel Mr. Gaithara Mahinda appeared for the respondent.

5. Counsel for the applicant reiterated the grounds in support of the application and urged this Court to note that the application to restore the appeal was made without inordinate delay; that the failure to diarize the hearing date was inadvertent and mistake of counsel should not be visited upon the client. It was submitted that the respondent had not attached any receipt to show that travelling costs of Ksh. 20,000/= was incurred during the hearing scheduled for 2nd April, 2014.

6. Counsel for the respondent in opposing the application relied on the replying affidavit emphasizing that a law office should have a master diary in which all court dates should be entered. It was submitted that the application to restore the appeal is calculated to delay prosecution of this case; that the applicant is aware that it will take a few more months before another hearing date is granted and the appeal heard and determined and during the period, the applicant intends continue to enjoy the suit premises since a stay order is in existence.

7. We have considered the motion and the grounds cited in support thereof; the supporting and replying affidavits and submission by counsel. What is before us is an application to restore the appeal that was dismissed for non attendance. The explanation given by the applicant for non-attendance is that there was inadvertence in diarizing the hearing date at his office. Under rule 102 of the rules of this Court, an application to restore an appeal dismissed for non-attendance should be made within 30 days of the dismissal. In the instant case, the applicant lodged the application within 2 days and there is no inordinate delay.

8. The replying affidavit states that there must be an end to litigation and we agree with this submission. It is always prudent for litigation to come to an end when all parties have been heard on merit and substantive justice administered. Whereas **rule 102 (2) and (3)** of the **rules of this Court** provide for a 30 day period within which to make an application for restoration, the rules of this Court allow us to exercise discretion and extend time. **Article 159** of the **Constitution** enjoins this Court to administer substantive justice. We are cognisant that **Sections 3A and 3B** of the **Appellate Jurisdiction Act**, through the overriding objective principles mandate this Court to act justly and fairly. The overriding objective principle is not aimed at giving justice to one party at the expense of another.

9. Considering that there was no delay in bringing this application and being satisfied with the explanation for non-attendance as deposed in the supporting affidavit, we allow the Notice of Motion dated 4th April, 2014, and hereby restore **Civil Appeal No. 248 of 2012**, to be heard on merit. The registry is hereby directed to list the appeal for hearing on priority basis. Costs of this application shall be borne by the applicant.

Dated and delivered at Nyeri this 3rd day of June, 2014.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR