REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Appeal (Application) 300 of 2006

BETWEEN

TWIGA CHEMICALS INDUSTRIES.....APPELLANT

AND

ALLAN STEPHEN REYNOLDS.....RESPONDENT

(Being an application to reinstate an appeal dismissed by this Court (Visram, Koome & Nambuye, JJ.A) on 19th November 2012 in an appeal from the Judgment of the High Court of Kenya at Nairobi (Githinji J) dated 12th November 2004

in

H.C.C. No. 2772 of 1997)
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RULING OF THE COURT

1. This is an application (by Notice of Motion dated 21st November 2012) under ***Section 3A*** and ***3B*** of the Appellate Jurisdiction Act and ***Rule 102 (1)*** of the Court of Appeal Rules 2010, for an order that this court be pleased to set aside its orders made on 19th November 2012 dismissing the appeal and order that the appeal be re-instated for hearing. The motion to re-instate the appeal is supported by two affidavit's sworn by *Messrs Peter Gichuki King'ara advocate* and *Lucas Maingi* on behalf of the Appellant which affidavits explain why the appellant and his advocate did not attend the hearing scheduled for 19th November 2012.

2. The grounds in support of the application for reinstatement of appeal are summarized as:-

Failure to attend court on 19th November 2012 was by reason that the appellant's advocate's clerk forgot to diarize the hearing date. This was an inadvertent mistake which is highly regretted and the appellant is seeking the exercise of the discretion of this court in setting aside it's orders of 19th November 2012 and allowing the appeal to be heard on merit.

*That the sum of **Kshs 12,203,040.50** deposited in a joint account in the names of the Advocates on record for both the parties will be released to the respondent without giving the appellants an opportunity to address the court on the same yet the appellant contends that the respondent has not laid out a case for the release of the said sum thereby exposing the appellant to the risk of losing the said sum.*

3. During the hearing of this application, counsel for the applicant urged this court to set aside the order dismissing the appeal and re-instate the appeal to be heard on merit. It was submitted before us that the inadvertent error by the clerk not to diarize the hearing date in the master diary of the appellant's advocate was highly regretted.

4. Counsel for the respondent vehemently opposed the application to re-instate the appeal. He submitted that the advocate for the appellant was aware that the appeal had been set down for hearing on 19th November 2012. A replying affidavit sworn by *Mr. Muriuki Mugambi* advocate for the respondent was filed. He deposes at paragraph 3 (a) thereof that the hearing date of 19th November 2012 was fixed by consent. At paragraph 3 (d), the deponent states that on the morning of 19th November 2012 which was the hearing date, at 8.45 am, he personally called counsel for the appellant followed by a text message stating that the appeal was due to be called out. At paragraph 7, it is deposed that the appellant's counsel was fully aware that the appeal was coming for hearing on 19th November 2012. We note that the contents of the replying affidavit the appellant's counsel was aware of the hearing date has not been controverted.

5. We have read the respondent's replying and affidavit and the supporting affidavits. We note that the contents of the replying affidavit that the appellant's counsel was aware of the hearing date has not been controverted as well as perused the court record. We have also given due consideration to the submissions by learned counsel. Both counsel appreciated that the court is being asked to exercise judicial discretion in this application. The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or otherwise to obstruct or delay the cause of justice. (See ***SHAH V MBOGO [1969] E.A. 116.)*** In exercising the discretion, the court considers *inter alia*the facts and circumstances both prior and subsequent and the merits of either side. The court also considers whether or not the affected party can reasonably be compensated by costs for the delay, always remembering that to deny a party a hearing based on merits should be the last resort of the court.

6. Applying the above principles to the present case, we have found that the failure to attend the scheduled hearing by the appellant's advocate is reprehensible on account that numerous attempts were made by the respondent's counsel to communicate to the applicant's counsel that the appeal was up for hearing on the 19th of November 2012. In addition, the hearing date was fixed by consent and the contents of the replying affidavit have not been controverted. We note that if this application is not allowed the appellant will be shut out from the judgment seat without being heard on account of mistake of its counsel. *Apaloo J.A*., as he then was, said in ***PHILLIP CHEMWOLO & ANOTHER VS AUGUSTINE KUBENDE [1982-88] KAR 103 at page 1042:-***

"Blunders 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 merits. 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 the parties and not for the purpose of imposing discipline."

7. Considering all the circumstances of this case, it cannot be said that the applicant deliberately sought to obstruct or delay the course of justice. We have also not detected any fraud or intention to overreach on the part of the applicant. We have also come to the conclusion that the delay that will be caused by allowing the application can be compensated for by costs. In the premise, we are inclined to exercise our discretion in favour of the applicant. We also wish to clarify The only issue before this court was setting aside the order made on 19th November 2012 dismissing the appeal. There is no application for stay of any consequential or administrative action to be taken for release of the monies deposited in the joint account pursuant to the dismissal orders made on 19th November 2012. There is no application before this Court to re-instate any orders that existed prior to the dismissal orders made on 19th November, 2012 and we make no orders regarding the stay of execution. Consequently, the orders of this Court are to allow reinstatement of the appeal with costs to the respondent. Accordingly, the application in the Notice of Motion dated 21st November 2012 is allowed re-instating the appeal. New dates for hearing of the appeal to be taken at the registry on properly considering that the matter is extremely old.

Dated and delivered at Nairobi this 1st day of March 2013

R.N. NAMBUYE

….....
JUDGE OF APPEAL

MARTHA KOOME

….....
JUDGE OF APPEAL

J. OTIENO-ODEK

….....

JUDGE OF APPEAL

I certify this is a true copy of the original.

DEPUTY REGISTRAR