



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: O'KUBASU, GITHINJI & DEVERELL, J.J.A.)

Civil Appli NAI 49 of 2005

BETWEEN

THREE WAYS SHIPPING SERVICES

(GROUP) LTD.APPLICANT

AND

MITCHELL COTTS FREIGHTERS (K) LTD.RESPONDENT

*(An application to restore Civil Appeal No. 313 of 2003
dismissed for non-appearance of the Applicant/Appellant on
23rd July, 2003*

in

H.C.C.C. No. 222 of 2002)

RULING OF THE COURT

We have before us an application by way of Notice of Motion brought under Rule 99(3) of this Court's Rules in which the applicant, **Three Way Shipping Services** (Group) Ltd., is seeking an order that the Civil Appeal No. 313 of 2003 which was dismissed for non-appearance on 23rd July, 2003 be restored for hearing. The application is brought on the following grounds:-

“(1) THAT the applicants Appeal No. 313 of 2003 was dismissed on 23rd July, 2003 for non-appearance of the appellant.

(2) THAT the applicant only became aware of the dismissal on 27th January, 2005 when he was served with Notice of Execution from the High Court of Uganda.

(3) THAT the applicant's counsel then on record never advised the applicant on the hearing date.

(4) THAT the applicant's counsel then on record never attended the hearing

(5) THAT the applicant's counsel then on record never attended the hearing of the appeal

(6) THAT Negligence and or mistake of counsel should not be visited upon the Applicant.”

Further to the foregoing grounds there is a supporting affidavit sworn by Oscar R. Businge – Baitwa who describes himself as the Chairman and Director of the Applicant's company. In that affidavit an explanation is given which in effect means that the applicant's previous advocate failed to communicate to it or its officers as regards the progress of the appeal which had been filed in this Court.

Mr. Kenzi, the learned counsel for the applicant, submitted that the appeal (which is sought to be restored) was dismissed for non-attendance of the applicant's advocate. He pointed out that the applicant did not hear from its advocate about the appeal until 27th January, 2005 when a notice of execution was served upon it. Finally, Mr. Kenzi submitted that mistake of counsel should not be visited upon the litigant. In opposing the application, Mr. Omondi, the learned counsel for the respondent submitted that this application was filed about two years after the appeal was dismissed. He pointed out that the former advocate did not swear any affidavit to explain what really happened. Mr. Omondi reminded us that the execution was at an advanced stage as the judgment had been registered in the High Court of Uganda. For these reasons, Mr. Omondi, was of the view that granting the application would cause great injustice to the respondent.

The background to this application appears fairly straightforward. On 23rd July, 2003 the applicant's appeal (Civil Appeal No. 313 of 2002) was dismissed thus:-

“As the advocate for appellant has been served with hearing notice but have failed to appear to prosecute the appeal and as the respondent's counsel who is ready to proceed applies for dismissal of the appeal, the appeal is dismissed with costs to the respondent under Rule 99(1) of the Court of Appeal Rules.”

That appeal having been so dismissed could only be restored pursuant to rule 99(3) of this Court's Rules which provides:-

“(3) An application for restoration under the proviso to subrule (1) or the proviso to sub-rule (2) shall be made within thirty days of the decision of the Court, or in the case of a party who should have been served with notice of the hearing but was not so served, within thirty days of his first hearing of that decision.”

It is to be observed that this application before us was filed in this Court on 17th February, 2005. Since the appeal was dismissed on 23rd July, 2003, this application ought to have been filed within thirty days of that decision. Clearly this application was filed well out of time without an order of extension of time in which the application was to be filed. On that ground alone this application lacks merit. That is however not the only ground for dismissing the application. We have been told by Mr. Omondi, counsel for the respondent that execution is at an advanced stage as the judgment had been registered in the High Court of Uganda. The question of advocate's mistake being visited on the client has been raised from time to time. Rt. Hon. Lord Denning M.R. in “The Due Process of Law” London Butterworths at p. 93 said:-

“Whenever a solicitor, by his inexcusable delay, deprives a client of his cause of action, the client can claim damages against him; as for instances when a solicitor does not issue a writ in time or serve it in time or does not renew it properly. We have seen, I regret to say, several such cases lately. Not a few are legally aided. In all of them the solicitors have, I believe, been quick to compensate the suffering client; or at least their insurers have. So the wrong done by the delay has been remedied as much as can be. I hope this will always be done.”

The above passage is relevant to the present application in which the applicant is blaming its previous counsel for the misfortune that it finds itself in. It must be emphasized that justice must look both ways. Here the respondent obtained a judgment which has now been registered in the High Court of Uganda. Notice of execution was issued and as of now execution is at an advanced stage. In our view, it is too late to reverse the process

In view of the foregoing, we are satisfied that there is no merit in this application which we order that it

be dismissed with costs to the respondent.

Dated and delivered at Mombasa this 29th day of July, 2005.

E.O. O’KUBASU

JUDGE OF APPEAL

E.M. GITHINJI

JUDGE OF APPEAL

W.S. DEVERELL

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.