**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**APPEAL NO. 69 OF 2018**

***(Formerly HCCA 124 of 2007)***

**Before Hon. Lady Justice Maureen Onyango**

**DANIEL MUNYAO.....APPELLANT**

**VERSUS**

**EUROCON TILES PRODUCTS LIMITED..... RESPONDENT**

***(Being an appeal arising from the ruling and order of Hon. Miss Maina E. N. Ag. Senior Principal Magistrate, delivered and made on 2nd February 2007 at the Chief Magistrate's Court at Milimani Commercial Court in Civil Case No. 5578 of 2006)***

**JUDGMENT**

On 2nd February 2009, the Hon. Senior Principal Magistrate E. N. Maina (Miss), dismissed the Appellant's application dated 17th November 2006 in CMCC 5578 of 2006, seeking to set aside her order of 13th November 2006 dismissing the suit with costs to the Respondent.

The Appellant was aggrieved by this decision and on 1st March 2007, he filed an appeal at the High Court in Civil Appeal 124 of 2007. On 18th July 2018, Thuranira J. directed that the appeal be transferred to this Court for hearing and disposal.

In the Memorandum of Appeal, the Appellant sets out the following grounds of appeal –

1. *That the Honourable Magistrate erred in law in failing to exercise her discretion judiciously in dismissing the Appellant's Application.*

2. *That the Honourable Magistrate erred in law and in fact in dismissing the Appellant's suit for non-attendance although he was not aware of the hearing date.*

3. *That the Honourable Magistrate erred in law and in fact in dismissing the Appellant's assertion that his non-attendance was due to a mix up while taking hearing dates.*

4. *That the Honourable Magistrate erred in law and in fact in penalizing the Appellant for the mistake and errors by his advocate and its agents, servants and employees.*

5. *That the Honourable Magistrate erred in law and in fact basing her findings on the Court record in total disregard to the Appellant's submissions and pleadings.*

6. *That the Learned Magistrate erred in law and in fact in finding that the Appellant's Application was not made in good faith.*

7. *That the Learned Magistrate erred in law and in fact in finding that the Appellant had not sought the Court's discretion with clean hands.*

He prays that –

1. *This appeal be allowed.*

2. *The Order of the Court made on the 13th November 2006 be set aside.*

3. *The Appellant's suit be reinstated.*

4. *Such other or further orders that the Honourable court will deem fit to be granted.*

The appeal was disposed of by way of written submissions.

**Appellant's Submissions**

The Appellant submits that his failure to attend court on 13th November 2006 was an honest mistake and not deliberate as evidenced by the supporting affidavits sworn in support of the impugned application. It is his submission that the mistake of the counsel should not have been visited upon the client.

The Appellant further submits that the discretion of the court to dismiss the matter should not be draconian and should be weighed against the interests of justice. It is his submission that by dismissing the application without considering his submissions and the issues raised the Learned Magistrate condemned him to a state of injustice. He relies on the decision in **Belinda Murai & Others v Amoi Wainaina [1979] eKLR** where the Court observed as follows –

> *"The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought to certainly do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistake which is politely referred to as erring in the interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule…"*

**Respondent's Case**

The Respondent submits that in dismissing the application, the Learned Magistrate analyzed its merits against the court record which indicated that it was the Appellant's advocates who fixed the hearing date. It submits that the reason given for non-attendance was an afterthought aimed at misleading the Court.

It is submitted that the Appellant has not discharged his burden of proving that the Learned Magistrate failed to act judiciously, instead, he has shifted the blame to his counsel. It is the Respondent's submissions that the Appellant's indolence can be seen in the time she has taken to prosecute this appeal.

The Respondent submits that the reasons advanced by the Appellant are not meritorious to warrant the interference of the trial court's discretion. He has cited the case of **Shah v Mbogo [1967] EA 116** where it was observed as follows-

> *"Applying the principles that the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has already deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice."*

**Analysis and Determination**

I have carefully considered the Appellant's record of appeal, the evidence adduced in the trial court and submissions by the parties, and find that the issues for determination before this Court are –

a. Whether the Learned Magistrate erred in law by dismissing the Appellant's suit for non-attendance on 13th November 2006,

b. Whether the Learned Magistrate erred in law by dismissing the Claimant's application seeking to set aside the orders issued on 13th November 2006 and have the suit reinstated.

c. Whether the orders sought by the Appellant should be granted.

Section 12(1) of the Employment and Labour Relations Court Act confers upon the Employment and Labour Relations Court, appellate jurisdiction to hear and determine employment and labour relations matters. The Court of Appeal for East Africa in **Peters v Sunday Post Limited [1958] EA 424** was of the following opinion regarding the duty of a court in a first appeal:

> *"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."*

In light of the foregoing, this court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity to experience things first hand.

**Dismissal of the Suit**

On 13th November 2006, the Learned Magistrate dismissed the Appellant's suit for non-attendance. Consequently, he filed the application of

17th November 2006 seeking to have the orders set aside and the suit reinstated. The reason given by the Appellant for non-attendance was that he was not aware of the hearing date as the court file had been missing since 12th July 2006 only to appear on the cause list for 13th November 2006.

The Learned Magistrate dismissed the Application. In her ruling, the Learned Magistrate observed as follows-

> *"Whereas I do not agree that citation of wrong rule on a non-existence (sic) provision is ground for dismissing the application, it is my finding that the same has no merit. It is alleged that this matter was filed for hearing on 12/7/2006 but the same was never listed. That the file went missing only to re-appear on the cause list on 13/11/2006 when it was dismissed.*
>
> *However, the record does to show that the matter was fixed for hearing. Either ex parte or by consent, on 12/7/2006 but there us a letter from Mwangi Wahome & Company Advocates inviting Kelvin Mogeni Advocates to attend the registry to fix a hearing date. That letter is dated 10/2/2006. It has a court stamp indicating that it was received here on 27/2/2006. Kelvin Mogeni Advocates had received it on 22/2/2006.*
>
> *The hearing date given on the letter is 13/11/2006. There is also a stamp/minute showing that on 1/3/2006, the case was by consent fixed for hearing on 13/11/2006 (sic). I say by consent because there are two signatures on next to that minute.*
>
> *It cannot therefore be true that date was 12/7/2006. This was duly explained to the advocate who appeared for the Plaintiff on 13/11/2006. This application is clearly not made in good faith. If counsel neglected to inform his client of the correct date then that is negligence and the client would have recourse to that. A party who comes to equity must do so with clean hands. The Plaintiff has come to this court with dirty hands and for that reason his application is dismissed with costs to the defendant/respondent."*

Order IXB rule 2 of the Revoked Civil Procedure Rules provided as

follows –

> ***"If on the day fixed for hearing, after the suit has been called on for hearing outside the Court and neither party attends, the Court may dismiss the suit."***

On the date the suit was dismissed, there was no attendance from the Respondent. The Appellant was personally not in attendance but Ms. Onsare was holding brief for his counsel. Ms. Onsare informed the court that the matter was wrongly listed, hence, this could have been an indication that they might not have intended to proceed with the matter.

A question therefore arises whether this amounted to non-attendance by the Appellant. I think not. It is trite law that where a litigant has instructed an advocate, the advocate can appear in the absence of the litigant and this would not constitute absence by the litigant. In the current case, the firm of Mwangi & Wahome Company Advocates was on record for the Plaintiff. The proceedings indicate that on 13th November 2006, Ms. Onsare was holding brief in the matter hence there was attendance for the Appellant.

I note that on that day the matter was coming up for hearing. As such, the Plaintiff's presence as a witness might have been required. However, dismissing the suit for non-attendance was not the correct approach as the Plaintiff had been sufficiently represented by Counsel. I find that the Learned Magistrate did not exercise her discretion correctly by dismissing the suit for non-attendance as she misguided herself that the Plaintiff's failure to attend court in person where the advocate was present, amounted to non-attendance.

The Court of Appeal in **Channan Singh Chatthe & 5 others v Delphis Bank Limited (Now Oriental Commercial Bank Limited) [2011] eKLR** distinguished the two instances as follows-

> *"It is clear that Order IXB Rule 4 (1) (now Order 12 Rule 3 (1) applies in cases of non-attendance – that is where the plaintiff or his counsel does not attend for hearing of the case in contrast to cases where the plaintiff or his advocate has in fact attended the hearing of the suit but for one reason or another fails to prosecute the suit or counter-claim as the case may be as happened in the present case."*

The discretion to dismiss a suit under Order IXB Rule 2 of the Revoked Civil Procedure Rules was preserved for instances where neither the parties nor their advocates attended court. Not where the Plaintiff's advocate was in attendance but was not ready to proceed with the hearing. Further, there is no indication that counsel was given an opportunity to present the Appellant in Court but failed to do so.

**Dismissal of the Appellant's Application**

By dismissing the Appellant's application, the Learned Magistrate exercised a discretionary power. The question is whether, the discretion was exercised correctly and in the interest of substantial justice to all the disputants before her.

Having established that the Learned Magistrate misguided herself by dismissing the suit for non-attendance, it therefore follows that she ought to have exercised her discretion as provided for under Section 3A of the Civil Procedure Act and Order IXB Rule 8 of the Revoked Civil Procedure Rules, to set aside her order. Order IXB Rule 8 of the Revoked Civil Procedure Rules provided as follows –

> ***"Where under this Order judgment has been entered or the suit has been dismissed, the court, on application by summons may set aside or vary the judgment or order upon such term are just."***

Her failure to set aside her order occasioned an injustice as she had wrongfully applied the law in dismissing the Appellant's suit in the first instant.

In light of the foregoing, I find that the Learned Magistrate erred in law by dismissing the Claimant's application of 13th November 2006.

The Court in **Mbogo & Another v Shah**, **EA [1968]** at page 15 observed as follows-

> *"An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice."*

**Having established that the Learned Magistrate erred in law by dismissing the suit for non-attendance and failing to set aside the said order or reinstate the suit, I hold that the Appellant is deserving of the remedies sought. The Respondent stands to suffer no prejudice which cannot be remedied by way of damages. As such, the appeal is allowed, the order made on 13th November 2006 is set aside and in its place an order is made reinstating the suit.**

The costs of the appeal shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF MAY 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**