



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OUKO (P), KOOME & MURGOR, JJA)**

**CIVIL APPLICATION NO. 13 OF 2019**

**BETWEEN**

**FIVE FORTY AVIATION LIMITED.....APPELLANT**

**AND**

**JACQUELINE ARKLE.....RESPONDENT**

*(Being application under rule 56 (3) of the Court of Appeal rules for setting aside of the*

*ruling dated 9<sup>th</sup> December 2019 dismissing the applicant's application dated 28<sup>th</sup>*

*December, 2018 and delivered at Nairobi by Hon. Judge Maureen Onyango on 12<sup>th</sup>*

***October, 2018, pending hearing and final determination of the appeal against Cause No. 1443 of 2014***

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**RULING OF THE COURT**

By way of a Notice of Motion dated 20<sup>th</sup> December 2019, the applicant sought orders to set aside its ruling dated 9<sup>th</sup> December 2019 and restore the applicant's application for stay of execution dated 28<sup>th</sup> December 2018 (*the stay application*). The motion was premised on the grounds that this application had been filed without delay which was immediately after the applicant becoming aware of this Court's ruling of 9<sup>th</sup> December 2019 dismissing the stay application. It was contended that the applicant would suffer irreparable harm if the stay application were not restored and that the respondent would suffer no prejudice that could not be compensated with costs.

The application was supported by the affidavit of Edward Kibet Kimetto sworn on the same date where it is deponed that on 15<sup>th</sup> November 2019, the respondent's advocates wrote to the applicant's advocates advising that the stay application dated 28<sup>th</sup> December 2018 would be heard on 16<sup>th</sup> December 2019; upon receipt of the letter the applicant's counsel diarized the hearing date as notified; that on 26<sup>th</sup> November 2019, this Court's Registry served the applicant's advocates with a hearing notice notifying them that the hearing was fixed for 9<sup>th</sup> December 2019. In the belief that the matter already had a date fixed for 16<sup>th</sup> December 2019, the applicant's advocates erroneously filed away the hearing notice served by the Registry; that as a consequence they did not attend the hearing on the date specified by the Registry's Hearing notice. And as a result the stay application was dismissed.

Submitting before us, **Mr. G. Mungu** learned counsel for the applicant holding brief for Mr. Kimetto asserted that when the stay application came up for hearing on the material day, learned counsel for the appellant ought to have informed the Court of the misleading date communicated to them in their letter of 15<sup>th</sup> November 2019, and that had they done so, this Court would not have dismissed the stay application.

The respondent did not file a replying affidavit, but submitting on the respondent's behalf was learned counsel **Ms. C. Mpathia**. Counsel admitted having communicated the hearing date of 16<sup>th</sup> December 2019 to the applicant's advocates, but went on to argue that their letter ought not to have taken precedence over the Court's hearing notice; that by failing to adhere to the notification and attend court as informed, this Court rightfully dismissed the stay application.

We have considered the application and the parties' submissions. This application has been brought under **rule 56** of this Court's rules which sets out the consequences of failure by a party to attend court on the day fixed for hearing of an application. It is specified that the Court may dismiss the application, or in the absence of the respondent, the Court may proceed to hear the applicant. In the instant case the applicant failed to attend Court on the date fixed for hearing, as a consequence of which the Court dismissed the stay application.

Needless to say, **rule 56 (3)** goes further to provide that;

***“Where an application has been dismissed under sub-rule (1) or allowed under sub rule (2), the party in whose absence the application was determined may apply to the court to restore the application for re-hearing or to re-hear it, as the case may be, if he can show that he was prevented by any sufficient cause from appearing when the application was called on for the hearing.”***

This application seeks to restore the stay application dismissed by this Court on 9<sup>th</sup> December 2019. And what we are required to consider is whether the applicant has shown that it was prevented by sufficient cause from attending Court on the material day for the hearing of the stay application.

The applicant's counsel conceded that he was not in court on the date fixed for hearing of the stay application for the reason that despite their having been served with a hearing notice by the Registry indicating that the application would be heard on 9<sup>th</sup> December 2019, they had prior to that received communication from the respondent's advocates informing them that the same application would be heard on 16<sup>th</sup> December 2019; that having already received a notification of a hearing date, they filed away the notice served on them by the Court without due reference to the hearing date indicated, and in so doing, did not notice that the hearing date differed from that communicated by the respondent; that believing instead that the application would be heard on 16<sup>th</sup> December 2019, they did not attend Court on the 9<sup>th</sup> December 2019, as a consequence of which the stay application was dismissed.

We have been through the record and indeed, the respondent's notification to the applicant's counsel of 15<sup>th</sup> November 2019 is clear. It reads in part;

***“As per information we obtained from the Registry, the hearing date for the application has been set for the 16<sup>th</sup> December 2019, they assured us that a Notice will be served to that effect.”***

Little wonder that the applicant's counsel did not notice the difference in the date, and mistakenly believed that the hearing notice received from Court bore the same date. Clearly by failing to take cognizance of the date specified in the Court's hearing notice and relying instead on the date supplied by the respondent's counsel, the applicant's counsel made a fundamental but excusable mistake.

But of crucial importance, it is observed that, having communicated a different hearing date to the applicant's counsel, when counsel for the respondent noticed the absence of the applicant counsel's on the hearing date, it was incumbent upon her to notify the Court of the other date they had communicated to the applicant's counsel. Faced with the possibility that the applicant could have failed to attend the hearing because they relied on the date communicated to them by the respondent's counsel, there is every likelihood that this Court might have declined to dismiss the applicant's application. But this was not done.

Be that as it may, it is evident to us that the applicant's counsel mistakenly believed that the date communicated by the respondent's counsel was the hearing date for the stay application, and as a result they did not attend Court on 9<sup>th</sup> December 2019.

This Court has variously stated that counsel's mistakes should not be visited upon the applicant. See *Belinda Murai & others vs Amos Wainaina 1978 LLR 2782*. As such, we are satisfied that the applicant has sufficiently demonstrated that it mistakenly placed reliance on the hearing date communicated by the respondent's counsel. That was the reason for their failure to attend court, and had that not been the case, they would have attended Court for the hearing of the stay application on the date fixed for hearing.

Given the aforesaid, we are inclined to exercise our discretion in favour of the applicant and set aside the order of 9<sup>th</sup> December 2019, with the effect that the motion of 28<sup>th</sup> December 2018 is reinstated with costs to the respondent.

*It is so ordered.*

*Dated and delivered at Nairobi this 19<sup>th</sup> day of June, 2020.*

**W. OUKO (P)**

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**JUDGE OF APPEAL**

**M. KOOME**

.....

**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**



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