REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 25 OF 2020

HAM.....APPLICANT

VERSUS

SOS.....RESPONDENT

R U L I N G

1. Before this Court for determination is a Notice of Motion dated 25.2.21 seeking:

1. THAT the order of this Honourable Court dismissing the Applicant's Application dated 2nd May, 2020 be set aside and the Application herein be re-instated for hearing inter-partes on merit.

2. THAT this Honourable Court invoke its inherent power in this case in the interest of substantive justice and re-instate the application dated 2nd May, 2020 which was dismissed on 25th February, 2021.

3. THAT the costs of this application be in the cause.

2. In his application dated 2.5.2020 (dismissed application), the Applicant sought stay of execution of the judgment and decree of 21.4.20 made in Nairobi Kadhi's Court Divorce Cause No. xxx of 2018. The application came up for hearing on 25.2.21 but was dismissed for non-attendance.

3. In her supporting affidavit, Mohamed Hana Osman, counsel for the Applicant averred that on the hearing date of the dismissed application, she had 2 matters. Mention in High Court IP/Exxx of 2018 before Hon. Mativo, J was number 4 on the cause list while the dismissed application before this Court was number 23 on the cause list. It therefore seemed reasonable to her to attend the mention and make it in time for the hearing of the dismissed application. After attending the matter before Hon. Mativo, J. counsel was informed by the Court assistant of this Court that the matter had already been called out and dismissed for non-attendance. Counsel stated that the Appellant stands to suffer irreparable loss if the dismissed application is not reinstated. He urged the Court to reinstate the matter in the interest of substantive justice and of the best interests of the children, for the same to be heard on merit.

4. In his replying affidavit sworn on 24.5.21, Mohamed Maulid, counsel for the Respondent opposed the Application. He stated that the hearing date was taken by the Applicant's counsel and served upon him and he attended Court ready to proceed with the hearing. He accused the Applicant's counsel for failing to ask someone to hold her brief knowing very well that her matter was listed for hearing. He further argued that the other matter was listed for mention and that counsel ought to have given priority to the dismissed application which was coming up for hearing noting that there are minors involved in the suit. He further contended that the Applicant's firm has more than 3 practicing advocates. Additionally, counsel stated that it has been more than a year since the appeal and the dismissed application was filed under certificate of urgency and the same is yet to be prosecuted as provided by law. To the Respondent therefore it is apparent that the Applicant is hell bent on wasting the Court's time and frustrating the Respondent

from enjoying the fruit of her judgment which was made for the benefit and interests of the minors. He urged the Court to dismiss the Application with costs and order the Applicant to set down the appeal for hearing forthwith.

5. In his supplementary affidavit sworn on 25.5.21 counsel for the Applicant reiterated her earlier averments. The dismissed application was coming up for the first hearing and she was ready to proceed and was in the Court precincts. She denied delaying the hearing of the application. taking into consideration that the prayers sought touch on the aspect of maintenance of minor children. Counsel further attributed the delay in getting a hearing date to a problem in allocation of case numbers when the dismissed application was filed in May, 2020. The case number allocated to this matter previously was H.C.F.A. xx of 2020 which had been allocated to another matter with different parties and that after numerous correspondence with the family division Registry they were able to get a new case number in September, 2020. That this matter on 8.10.20 came before Justice Dulu and thereafter on 25.2.21. Counsel further stated that mistakes of counsel should not be visited upon their clients. Counsel urged the Court to grant the Applicant an opportunity to prosecute the dismissed application in the interests of substantive justice as enshrined in Article 159 of the Constitution.

6. I have given due consideration to the parties' respective positions as deposed and submitted. Order 12 Rule 7 of the Civil Procedure Rules under which the Application is brought provides:

"Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just".

7. The Orders sought are discretionary. I am inclined to accept Ms. Mohamed's explanation that by the time she was done with the mention before Hon. Mativo, J, the dismissed application had been called out and dismissed for non-attendance. The Court notes that this was the first time the application had been set down for hearing. From the averments and submissions of the Applicant's counsel, it is quite clear that this was not a case of deliberate failure to attend Court but a miscalculation by counsel of time between the 2 matters.

8. Should the door of justice be closed to the Applicant for the mistake of counsel" I think not. In this regard, I am guided by the holding in Belinda Murai & Others - v- Amos Wainaina (1978) LLR 2782 (CALL) where Madan, JA (as he then was) stated:

A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of Junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. 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 certainly to do whatever is necessary to rectify it if the interests of justice so dictate.

9. In an application for reinstatement of a dismissed suit or application, an applicant appeals to the discretion of the Court. The Court must caution itself not to exercise its discretion in a manner that will result in an injustice. This position is fortified in the case of Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR, where the Court of Appeal stated:

We agree with those noble principles which go further to establish that the court's discretion to set aside an exparte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend court on the 10th June, 2013 with anxious minds. We have asked ourselves whether failure to attend court on 10th June, 2013, constituted an excusable mistake, an error of judgment regarding counsel's failure to diarize the date properly or was it meant to deliberately delay the cause of justice.

10. The circumstances of this case are sufficient to persuade the Court that the non-attendance by the Applicant at the hearing of the dismissed application was not a deliberate attempt to obstruct or delay justice. Accordingly, he should not be denied a hearing.

11. The Respondent submitted that the decision in the trial Court was delivered on 21.4.2020 and the Respondent had not executed the decree because of the appeal and application. It was also submitted that the Applicant was hiding in Canada and could not be reached. The Respondent urged that Court to order the Applicant to deposit in Court the decretal amount of Kshs. 840,000/= as well as costs as security for the grant of stay. It was also submitted that the Court should order that the appeal be dispensed with instantly

as a matter of priority and urgency.

12. The Respondent further urged the Court to consider that affording the Applicant more time to escape his parental responsibility of providing for the minors involved in this case will result in a higher risk of injustice. He cited the case of Samvir Trustee Limited v Guardian Bank Limited [2007] eKLR where Warsame, J (as he then was) stated:

I agree that every party aggrieved with a decision of this court has a natural and undoubted right to seek the intervention of the Court of appeal. And as far as this matter is concerned, I do not think this court should put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. In my understanding a stay would be granted unless there is overwhelming hindrance to the exercise of the discretionary powers of the court… At this stage we must as a court ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interest of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other party. The court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrives within the corridors of the court. In my view justice and fairness requires this court to give an order of stay but with certain condition.

13. With respect, the arguments by the Respondent are premature. They relate to the dismissed application for stay of execution of the orders of the trial Court. That is not the application presently before the Court. Notably, the Respondent appears to concede the application for stay of execution subject to the conditions that the Applicant deposits in Court the decretal amount of 840,000/= as well as costs and further that the appeal be dispensed with instantly as a matter of priority and urgency.

14. As stated earlier, the failure to attend Court on 25.2.21 is purely a mistake of the Applicant's counsel. My view is that the mistake on the part of counsel in the circumstances, is excusable and the door of justice ought not to be closed to the Applicant. The mistake of counsel should not be visited upon the Applicant. Further, Courts must dispense substantive justice in line with the constitutional imperative in Article 159 of the Constitution of Kenya, 2010 that justice shall be administered without undue regard to procedural technicalities. In the interest of substantive justice therefore, the dismissed application should be heard and determined on merit.

15. In the premises I allow the Applicants' Application dated 25.2.21 and set aside the order of 25.2.21 dismissing the application dated 2.5.2020 and order that the same be and is hereby reinstated for hearing on merit. The Respondent shall have costs of this Application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2021

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M. THANDE

JUDGE

In the presence of: -

..... for the Applicant

..... for the Respondent

.....Court Assistant