



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISC. CIVIL CASE NO. 317 OF 2019

1. CHARLES KYENZE MUTUKU

2. HEATHER MUTINDA KYENZE

(suing as administrators on their own behalf of the dependants of the Estate of the Late

WAVINYA KYENZE MUTUKU (DECEASED).....PLAINTIFFS

VERSUS

1. ONGOMA CAROLINE CHRISTINE

2. PETER MACHARIA KIAMBUTHI

3. JOSEPH NJOROGE GICHINGA.....DEFENDANTS

RULING

1. The applicants filed before this Court Notice of Motion application dated 17th September, 2019. That application was filed under Certificate of Urgency. By that application the applicants sought leave to file an appeal out of time. When that application was placed before the Judge, on 19th September, 2019, the Judge directed the same be fixed for hearing at the registry.

2. The court record shows that on 27th September, 2019 a representative of the applicant's advocate fixed the application for hearing on 19th February, 2020. On 19th February, 2020 there being no party present before court that application was dismissed for non-attendance. The respondent, through the affidavit of *Morine Warigia King'e*, stated that they had not been served with that application. They therefore explained their absence on that day in that manner.

3. The applicant filed an application, now being considered through this Ruling, dated 18th August, 2020. By that application, the applicants seek an order to set aside the dismissal of their application on 19th February, 2020.

4. In the affidavit in support of the application the applicants stated that the advocate handling this matter failed to diarize the date of 19th February, 2020 and then proceeded to her maternity leave. That is the only explanation offered on behalf of the applicants in seeking to set aside the dismissal of the application.

5. The respondent in addition to stating they had not been served with the dismissed application also faulted the applicants for delaying 6 months before seeking to set aside the dismissal.

6. The applicants in approaching this Court by the application to set aside the dismissal seek the exercise of this Court's discretion. The applicants had therefore an obligation to be candid in presenting the reason for non-attendance on their behalf on 19th February, 2020. The applicant simply stated that the advocate handling the case failed to diarise the date before she proceeded on maternity leave. Of importance is that the said advocate was unnamed. Also that advocate did not swear an affidavit to confirm she failed to diarise. But perhaps what defeats that submission on behalf of the applicants is that the court record shows that the date for the hearing of the application was fixed at the court registry by someone recorded in the court file as "*Alfonce for Mbaluka & Co. Advocates.*" From that it is clear that the person who should have diarised the date was Alfoncel. Alfoncel does not seem to be a female.

7. I find there is no genuine mistake shown by the applicants. It follows that there is no explanation for failing to attend court on 19th February, 2020. A case to consider in this regard is, **JULIUS MBAABU MARETE VS. TOM AYORA & 3 OTHERS (2018) eKLR** thus:-

“It is not always that a court will exercise its discretion in favour of a party if the mistake is by its Advocates as submitted by the plaintiff. The Advocate must demonstrate genuine and acceptable mistakes not outright negligence as in the case in this matter.

In the circumstances as these, a client is not left without a remedy. If professional negligence is proved, the Advocates professional indemnity insurance cushions advocates against such acts of negligence by compensating the clients by way of damages...13. A case belongs to the plaintiff and it is its duty to take steps to progress it. Leaving a case to the Advocates without checking on its progress is also negligence on the part of the plaintiff”

8. The applicants have failed to explain the reason they failed to attend court on 19th February, 2020 for the hearing of an application that had been filed under Certificate of Urgency in September, 2019. This Court cannot exercise its discretion in favour of such a party.

9. Accordingly, the application dated 18th August, 2020 is dismissed with costs.

RULING DATED, SIGNED and DELIVERED at KIAMBU this 27TH day of MAY, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Ndege

Applicants: Miss Kamunya holding brief for Mr. Muhinda

Respondents: No appearance

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE