REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 78 OF 2019

KENYAN ALLIANCE INSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

NAOMI WAMBUI NGIRA & STANLEY NGIRA NGUGI

(Suing as the legal representatives and administrators of

the Estate of NELSON MACHARIA MAINA (deceased).....RESPONDENTS

R U L I N G

1. In 2016, the respondents instituted ***Meru CMCC No. 102 of 2016*** against one **Wilson Chege Gakunyi** whereby they sought damages as a result of a road traffic accident that had caused the death of **Nelson Macharia Maina**. Judgment was entered in their favour and they were awarded Kshs. 3,126,175/- together with costs and interest.

2. Out of the decretal sum, an amount of Kshs. 1, 278, 606/- was paid leaving a balance of Kshs. 2, 413, 048/-. This led to the filing of a declaratory suit by the respondents being ***Meru CMCC No. 76 of 2018*** against the appellant. On 27/06/2019, the lower court entered judgment against the appellant to the effect that the appellant was liable to satisfy the decree in ***CMCC No. 102 of 2016***.

3. Aggrieved by the said decision, the appellant preferred this appeal which was listed for directions on 5/2/2020. On that day, the Court directed that each party do file and exchange written submissions within 21 days. There was a default clause that in the event the appellant fails to file and serve its submissions within the time given, the appeal shall stand dismissed.

4. The appellant failed to comply with the said direction and on application by the respondents, the Court made an order on 28/4/2020 that the appeal stood dismissed by 26/02/2020 and ordered that the sum of Kshs.2,431, 048/- that was deposited in a joint earning account in the names of the advocates together with accrued interest be released to the respondents' advocates.

5. Aggrieved by the said orders of 28/4/2020, the appellant took out a Motion on Notice dated 4/05/2020 under ***Order 45 Rule 1, Order 50 Rule 5 of the Civil Procedure Rules and sections 1(A), 1(B) and 3(A) of the Civil Procedure Act.***

6. In the Motion, the appellant sought orders that there be a stay of the order directing that the sum of Kshs.2,431,048/- held in the joint interest account be paid to the respondent's advocates and that if already released, the same be returned to the joint account; that the orders of 28/02/2020 and 5/02/2020 be reviewed, set aside and or varied and the time within which the appellant may file its submissions be extended.

7. That Motion first came before Onginjo J. who however, disqualified herself on 8/5/2020 for reasons on record. The application was then placed before me on 15/5/2020 whereby the Court granted, in the interim, orders restraining the release of the aforesaid funds and ordered that the same be returned to the joint account pending the determination of the Motion.

8. The grounds upon which the Motion was grounded were set out in its body and in the supporting and supplementary affidavits of **Anthony Kariuki**, sworn on 4/05/2020 and 22/05/2020 respectively. It was further supported by the affidavits of **Crispin N. Ngugi** and **Joshua Mwiti,** advocates sworn on 4/05/2020 and 22/05/2020, respectively.

9. The appellant contended that its advocates were served with a notice from court on 29/01/2020 to attend court for directions on 5/02/2020. The said advocates requested **Joshua Mwiti** advocate to hold their brief. The said advocate attended Court and requested that each party be given 21 days to file and serve their respective submissions. The matter was then set for mention on 26/05/2020 to confirm compliance.

10. **Mr. Mwiti** relayed the said information to the appellant's advocate but due to pressure of work, the appellant's advocate was unable to file their submissions in February, 2020. That when they were preparing the same, the judiciary down-scaled court operations on 15/03/2020 due to the COVID-19 pandemic. When the court up-scaled its operations on 22/04/2020, the said advocates sent their submissions via email

on 29/04/2020. On 30/04/2020, they were notified of the order of 28/04/2020.

11. **Mr. C. N. Ngugi, advocate** swore that he was unaware of the order to the effect that the appeal would stand dismissed if the submissions were not filed and served within 21 days. On his part, **Mr. Mwiti, Advocate** asserted that he attended Court on 5/2/2020 and held brief for the appellant's advocates. That he was unaware of the default order and expressed shock that the record did not reflect his court attendance for that date.

12. It was further contended that the appellant was condemned unheard as the respondent's application that resulted in the orders of 28/4/2020 was not served upon them. That however, there was no evidence that the sum of Kshs.2,413,048/- had been released either to **Wangai Nguthe & Co Advocates** or the respondents.

13. The appellant maintained that ever since the filing of the appeal, it had been keen on having the same prosecuted expeditiously. Failure to file the submissions was not deliberate. The appeal is merited and should be heard on merit. That mistakes of counsel ought not to be visited on the appellant.

14. The application was opposed vide the affidavits of **George Mahugu**, advocate sworn on 8/05/2020, 26/05/2020 and 4th June, 2020 respectively and the affidavit of Naomi Wambui Ngira sworn on 8/05/2020.

15. It was contended that the application was unmerited and bad in law. That the appellant's advocates had been properly served to attend the directions of 5/2/2020. That the order for filing the submissions and the default thereof was pronounced in open court in the presence of **Joshua Mwiti**, advocate.

16. That the 21 days given, lapsed on 26/02/2020 and the appeal stood dismissed on that date. That when the appellant realized that it could not file submissions as ordered, it should have applied for an extension of time but it failed to do so.

17. It was therefore contended that, with the dismissal of the appeal, the respondent applied for the release of the sum of Kshs.2,431,048/-. Pursuant to the orders given on 28/04/2020, the respondents' advocates presented the same to NCBA Bank on 5/05/2020 and requested the same to be transferred to their account which was effected on 7/05/2020. That the appellant's advocates were notified of that fact on 8/5/2020. That on receipt of the funds, the respondent's advocates released the same to the respondents in cash on 8/05/2020.

18. In view of the foregoing, the respondent contended that the application had been overtaken by events. That the application had no foundation as the appellant was seeking to reinstate an appeal that had been dismissed. If the Motion was allowed, the respondents would continue to suffer prejudice.

19. The respondents took the view that the order of dismissal of the appeal was not an interlocutory one capable of being reviewed or varied. That it was a final order that fully determined the matter and the only available remedy was to appeal.

20. In the premises, the respondents filed a preliminary objection dated 18/05/2020 on the grounds that the application was a non-starter as the appeal was non-existent. That the Motion was therefore an abuse of the court process.

21. The Court directed that both the preliminary objection and the Motion be heard together. The parties filed their respective submissions which the Court has carefully considered.

22. It was the appellant's submissions that the preliminary objection was without basis as the law recognizes that dismissal of a suit or appeal does not divest the court of the jurisdiction to revisit the order of dismissal. That since ***section 80 of the Civil Procedure Act*** and ***Order 45 of the Civil Procedure Rules*** grant the court wide discretion to review its judgments, decrees and orders, the court was not *functus officio.*

23. It was further submitted that the orders sought had not been overtaken by events by the alleged release of funds. In any event, there was no proof that the funds from the joint account had been released to either the respondent's advocates or the respondents.

24. That since the application for the release of funds was allowed *ex parte,* the appellant had been condemned unheard. That in the premises, the appellant had demonstrated sufficient reason for the review of the orders of 5/02/2020 and 28/04/2020.

25. The cases of **Re Dhanjal Brothers Limited [2018] eKLR**, **Pancras T Swai v Kenya Breweries Ltd [2014] eKLR** and **Nancy Musili v Joyce Mbete Katisi [2018] eKLR** among others were cited in support of those submissions.

26. It was submitted for the respondents that, the Motion was a non-starter as there was no appeal pending. There being no application for reinstatement of the appeal, the court has to down its tools. That the application had been brought with unclean hands.

27. It was further submitted that the appellant had demonstrated no sufficient reason as to why the court ought to review the orders of 5/02/2020 and 28/04/2020. That since justice delayed is justice denied, the court was right in giving timelines in its directions of 5/02/2020. The cases of **Francis Ekutu Washika & another v Vincent Sambulia & another [2005] eKLR** and **Francis Njoroge v Stephen Maina Kamore [2018] eKLR** were cited in support of those submissions.

28. This Court proposes first to deal with the Preliminary Objection since it raised the issue of jurisdiction. Jurisdiction is everything and without it, a court has no power to make any step. It is expected to lay down its tools. See **The Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd (1989) KLR 1.**

29. The respondents' contention was that since the appeal was dismissed, the court became *functus officio* and could not determine the Motion before it. The Court has considered the Motion. It primarily seeks the review, setting aside and or variance of the orders made on 5/02/2020 and 28/02/2020. The prayers for stay and return of the monies are only supplementary to the review orders.

30. ***Section 80 of the Civil Procedure Act*** provides that any person aggrieved by a decree or order which is appealable and no appeal has been preferred, or that which is not appealable may apply for a review. That application has to be made to the court that made the order or decree. In the present case, as already stated, the Court that made the impugned orders recused itself for reasons on record.

31. Neither ***section 80*** nor ***Order 45*** fetters the discretion of the Court in an application for review. The only fetters are; that the application should be made to the court which made the order or decree and, that if the order is appealable, no appeal should have been preferred.

32. In **Re Dhanjal Brother Limited [2018] Eklr**, the court held: -

> ***"Indeed, an order for review in its known character is intended to enable the court revisit its earlier decision in order that an incorrect, mistaken or unjust position is corrected. That is what I make of the very wide discretion given to court, under both Section 80 and Order 45 Rule 1 of the Act, to grant review for sufficient reason. It has now been settled that the expression sufficient cause need not be interpreted to be ejus dem generis to the other three grounds for review under the provisions."***

33. Both ***section 80 of the Act*** and ***Order 45*** grant the court a wide discretion to the Court to revisit its own orders. That is the jurisdiction which the appellant has invoked. The respondents' submission that the order of dismissal of a suit or appeal is final and cannot be reviewed is mistaken. All an aggrieved party has to establish before court is that the grounds for review as set out in the Act and the rules have been complied with.

34. In the present case, the orders of both 5/2/2020 and 28/4/2020, fall squarely under ***section 80 of the*** Act. The discretion donated therein is meant to enable the court to correct any mistake, error or position reached due to lack of important information which may not have been available when an order was made. ***Order 45 of the Civil Procedure Rules*** provides grounds when a review is merited.

35. In view of the foregoing, this Court is not *functus officio* and I find the preliminary objection to be without merit and dismiss the same.

36. As already held, ***Order 45 Rule 1 of the Civil Procedure Rules*** provides three grounds upon which a review may be made. These are; discovery of new and important matter or evidence not within the knowledge of an applicant at the time the decree/order was passed, mistake or error apparent on the face of the record or for any other sufficient reason. Such an application should be made without unreasonable delay.

37. With regard to the filing of the application, the appellant filed the motion on 5/05/2020. It alleged that it was not aware of the default part of the directions of 5/2/2020 nor the order of 28/4/2020. I am satisfied that the Motion was filed without unreasonable delay.

38. As regards the order of 5/02/2020, the appellant contended that it was not aware of the default order. **Mr. Mwiti, advocate** who held brief for the appellant's advocate, admitted having appeared and requested for 21 days. He however, stated that he did not hear that part of the default order.

39. Although the record does not show that **Mr. Mwiti** appeared and held brief for the appellant's advocates, I am satisfied from his averments and that of **Mr. Kenneth Muthomi, advocate** that **Mr. Mwiti** actually appeared and held brief as aforesaid. However, I am not convinced with his assertion that the default order on dismissal was not part of the directions made by the court.

40. The record is clear that the directions were made in a continuous prose. They were not disjointed. **Mr. K. Muthomi** heard the order and communicated the same to his principals.

41. In my view, **Mr. Mwiti** advocate acted inappropriately and sought to hide behind the allegation that the said order was not made in open court. That in my view is not conduct expected of an advocate. He should have owned to his lack of diligence in failing to relay to the appellant's advocates the correct position of what transpired in court on that day.

42. It is clear that the appellant's advocates were aware of the requirement that the submissions should be filed within 21 days. All that they were unaware of, since **Mr. Mwiti, advocate** did not inform them, was that the appeal would stand dismissed if the submissions were not filed and served within the period given.

43. The said advocates contended that because **Mr. Ngugi** advocate was busy during the month of February, 2020, he was unable to prepare and lodge the submissions as ordered. That when he was ready with the submissions, the courts downscaled their operations and he was unable to file them. That by the time he was filing them on 29/4/2020, he then learnt of the default orders of 5/2/2020 as well as the orders of 28/4/2020.

44. The Court's view is that, both **Mr. Mwiti** and the appellant's advocates are to blame for the position the appellant finds itself. It is the mistakes of the said advocates that has led to the current position. **Mr. Mwiti** failed to capture the directions of the Court correctly and relay the same to his principals and **Mr. Ngugi,** advocate was busy on other matters and thereby failed to diligently pursue compliance of the directions given by the Court.

45. In the premises, the question that beg determination is; with such mistakes, what should a court of law do. It was submitted for the appellant that mistakes of its advocates should not be visited upon it. That it had been condemned unheard. On the other hand, the respondents submitted that the appellant was overreaching. That it had dragged its feet in the prosecution of the subject appeal and the 1st respondent being a widow has suffered for far too much long.

46. The record shows that the Memorandum of Appeal was filed on 17/7/2020. The Record of Appeal was prepared and lodged in Court on 14/11/2020. Eleven (11) days later, the appellant's advocates wrote to the Deputy Registrar requesting that the matter be placed before a Judge for admission. The appeal was admitted on 5/12/2019 and fixed for directions on 15/1/2020. On the said 15/1/2020, none of the parties attended and the Court then fixed the appeal for directions on 5/2/2020.

47. From the foregoing, it cannot be said that the appellant had dragged its feet in having the appeal heard. It is clear that within a span of six (6) months, the appellant had diligently pursued its appeal to the point of it being ready for hearing. Indeed, it would seem that were it not for the mistake of failing to comply with the directions of 5/2/2020, the appeal would have been heard and determined within the 360 days as required by the Station's performance contract with the judiciary.

48. Accordingly, I am satisfied that the appellant was not bent in delaying the prosecution of the appeal as contended by the respondents. It is clear that it is its advocates, who upon filing the Record of Appeal, who prodded the Court to admit the same. That is not a conduct of a dilly dallying or an overreaching litigant.

49. On the fact of the mistake of an advocate, there is rich jurisprudence on how the court should act. In **Tana & Athi Rivers Development Authority v. Jeremiah Kimigho Mwakio & 3 Others [2015],** the court held: -

> ***"From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justifiable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has corresponding duty to the court in which he practices and even the other side". (Emphasis added)***

50. In **Omwoyo v. African Highlands & Produce Co. Ltd [2002] 1 KLR,** it was held: -

> ***"Time has come for legal practitioners to shoulder the consequences of their negligent acts or omissions like other professions in their fields of endevour. The Plaintiff should not be made to shoulder the consequences of the negligence of the Defendant's advocates. This is a proper case where the Defendant's remedy is against its erstwhile advocates for professional negligence and not setting aside the judgment".***

51. In **Belinda Murai & 6 Others v. Amos Wainaina [1978] KLR,** it was held: -

> ***"A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel 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 of a mistake that has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interests of justice so dictate".***

52. Then in **Shah v. Mbogo & Another [1967] EA,** the Court for Eastern Africa held: -

> ***"Applying the principle 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 deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should be refused".***

53. It is clear from the foregoing that, it is not always automatic that a mistake of an advocate should not be visited upon a litigant. Because of the influx of litigation and an enlightened public, legal business should, as matter of necessity be conducted efficiently. The advocate in that case should shoulder the cross of his negligence.

54. Long gone are the leisurely days when indulgence would be shown to negligent conduct of litigation. The court has to stop an overreaching litigant and his advocate on their tracks. Where an alleged mistake is deliberately meant to obstruct or delay the wheels of justice, the court must direct a litigant to seek his remedy against his offending advocate.

55. In the present case, the Court has already found that the appellant and its advocate had been diligent in having the appeal prosecuted. The lapse that occurred on the 5/2/2020 was not deliberate and was not intended to delay the conclusion of the appeal.

56. In my view, the same was an inadvertent mistake on the part of **Mr. Mwiti** advocate that was exacerbated by **Mr. Ngugi's** inability to beat the deadline of filing the submissions.

57. In determining whether to exercise its discretion in such a matter, the Court has to pay regard to the damage sought to be forestalled *viz-a-viz* the prejudice to be visited on the opposite party. In this Court's view, the respondents stand to suffer no prejudice if the appeal proceeded and is heard and determined on merit. The only prejudice alluded to is the delay in their enjoying the fruits of their judgment. However, the Court has found that there has been and would be no inexcusable delay.

58. On the other hand, the appellant has been locked out of the seat of justice. It is imperative that disputes are determined on merit where necessary and possible. The prayer for extension of time within which to file the submissions is therefore well founded.

59. As regards the order of 28/4/2020, the same was sought and granted ex-parte. The appellant had fallen foul with the Court for failing to comply with its directions of 5/2/2020. That however, did not entitle the respondents to apply ex-parte for the release of the funds held in the

joint account. Although the appeal stood dismissed by 26/2/2020, the respondents were aware that the appellant was entitled to be heard on their application.

60. In **Patriotic Guards Ltd v. James Kipchirchir Sambu [2018] Eklr,** the Court of Appeal held: -

> ***"The right to a fair trial remains at the heart of any judicial determination and courts should endeavor to protect and uphold the same. It is a cardinal rule and it emanates from the principle of natural justice. In M K v. M W M & another [2015] Eklr, it was reiterated that;***
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> *'The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. In* ***ONYANGO V. ATTORNEY GENERAL [1986-1989] EA 456,*** *Nyarangi JA asserted at page 456:*
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> ...
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> ***At page 460 the learned Judge added:***
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> ***'A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at'.***
>
> ***..."***.

61. In the present case, the courts scaled down operations on 15/3/2020. The respondents rushed to court on 28/4/2020 during the height of the pandemic, lockdown aand near zero action in the courts. It did so ex-parte and failed to serve the appellant with their application. The respondents were enjoined to serve the said application upon the appellant but they decided not to do so. At the time, judicial officers were working from home where the circumstances were reasonably difficult and the respondents must have taken advantage of that fact. To this Courts mind, the fact that the order of 28/4/2020 was sought and made ex-parte is sufficient reason to review the said order.

62. Having found that the orders of 5/2/2020 and 28/4/2020 are amenable to review, what of the prayers for the return of the funds that were ordered released to the respondents' advocates?

63. This Court did order on 15/5/2020 that, if the funds had already been released to the firm of Wangai Nyuthe & Co. Advocates the same be reversed to the joint account. The bank explained to the Court through the affidavit of **Carolyn Julie Mungai** sworn on 26/5/2020 that, the money was transferred to the account of Wangai Nyuthe & Co. on 7/5/2020. The bank produced a bank transfer advise of the same date. The account of Wangai Nyuthe Company was with the same bank and branch.

64. It was submitted for the appellant that the bank did not offer acceptable evidence that the money had moved from the joint account. In the view of this Court, the said transfer advice and the acknowledgement by the firm of Wangai Nyuthe & Co, that they had received the funds, releases the bank from liability on those funds.

65. The issue is where those funds are. The respondents through the affidavit of **Naomi Wangui Ngira** sworn on 8/5/2020 stated in paragraph 8 that the decretal sum was to be paid to her on the said date. At the same time, in paragraph 9 thereof, the deponent stated that the sum of Kshs.2,431,048/- had been released to her.

66. At paragraph 12 of **Mr. George Mahugu, advocate** sworn on 26/5/2020, he stated that the decretal sum was released to the respondents in cash on 8/5/2020. He then produced an 'Acknowledgement' dated 8/5/2020. Signed by both respondents.

67. The position that this court takes is that there is no acceptable evidence that the money was ever released from the firm of Wangai Nyuthe & Co advocates to the respondents. The order for release was served on the bank on 5/5/2020. The funds were transferred by the bank to the said advocates on the 7/5/2020. It is unlikely that in less than 24 hours, the said advocates would have had the respondents in their offices to pay the money and in cash at this time and era.

68. Further, the discrepancies in the testimonies of **Mr. Mahugu and Naomi Wambui** casts doubt in the mind of this Court. The respondents and their advocates had the earliest and first opportunity to explain to Court the issue of release of the money, if at all, in the affidavit of **Naomi Wambui** of 8/5/2020. If it be true that the money was released to the respondents on the 8/5/2020 as alleged;

a) **Naomi Wambui** would have categorically stated in her said affidavit that she and the 2nd respondent had received the money;

b) **Naomi Wambui** would have stated with certainty that what she or the respondents had received was Kshs.1,557,925/- as the 'Acknowledgement' purports to show;

c) A copy of the advocates bank statement showing the huge withdrawal of the said amount for payment in cash would have been produced.

69. All the foregoing was not done. Instead the affidavit of Naomi Wangai of 8/5/2020 was vague as to the amount to be released and there was nothing to show that the money had left the account of Wangai Nyuthe.

70. In view of the foregoing, the courts holds the view that the decretal sum is still in the possession of the firm of Wangai Nyuthe & Co. Advocates and the said advocates should comply with the order made by this Court on 15/5/2020.

71. Accordingly, the Court's view is that the following orders be issued: -

a) The preliminary objection dated 18/05/2020 be and is hereby dismissed with costs.

b) The application dated 04/05/2020 be and is hereby allowed.

c) The orders of 28/4/2020 are hereby reviewed and set aside. The firm of **Wangai Nyuthe & Co. Advocates** is directed to return the funds received from NCBA Bank Ltd on 7/5/2020 the sum of Kshs.2,431,048/- to the joint AC. No.8382080018 at NCBA Bank Kenya, NCBA House Branch in the joint names of the advocates on record forthwith.

d) The directions of 5/2/2020 are hereby reviewed and the time for filing and service of the submissions extended as follows: -

i) The appellant to file and serve its submissions within 7 days of this ruling.

ii) The respondent to file and serve their submissions within 7 days of service.

iii) In default it by the appellant the appeal shall stand dismissed with costs.

iv) The appeal to be heard during the September, 2020 service week.

v) The costs of the application is awarded to the respondents in any event.

DATED and DELIVERED at Meru this 12th day of August, 2020.

A. MABEYA

JUDGE