



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**MISCELLANEOUS APPLICATION NO.381 OF 2017**

FRANCIS NDUNDA ..... 1<sup>ST</sup> APPLICANT

JULIUS KIOKO ..... 2<sup>ND</sup> APPLICANT

BENSON MUTHUSI MUEMA ..... 3<sup>RD</sup> APPLICANT

**VERSUS**

**ELLJOY GATWIRI MUGAMBI**

**(Suing as legal representative and**

**administrator of the estate of NEEMA**

**PEACE KENDI GATWIRI – (DECEASED.....)RESPONDENT**

**RULING OF THE COURT**

1. The Applicants filed the present Notice for Motion dated 23/01/2018 seeking for orders, inter alia, that this court's orders made on 7/12/2017 dismissing the Applicants Application be reviewed and or set aside, that there be stay of proceedings by the Respondents in **Machakos CMCC No.827 of 2015** pending the hearing of the suit. The Applicants also seek for costs to be provided.

2. The Application is supported by an affidavit of Kinyanjui Theuri sworn on 23/01/2018 and further on the following grounds namely:-

*(i) That the Applicant's Application **Miscellaneous Application No. 381 of 2017**, the subject herein seeking for orders for stay of execution of judgment and decree against the Applicant, for extension of time for filing and lodging an appeal by seven days between the Applicant and the Respondent was dismissed for non-attendance and or want of prosecution on 7<sup>th</sup> December, 2017.*

*(ii) That the non- attendance in court on 7<sup>th</sup> December, 2017 was not intentional or in bad faith but due to the fact that the advocate who had personal conduct of this matter had boarded a vehicle that was intercepted by the police along Nairobi – Machakos Highway thus failure to appear on time on the said date is not as a result of negligence on the part of the applicant/defendant.*

*(iii) That the applicants/defendants require to be afforded an opportunity to be heard in accordance with the constitution and the rule of natural justice so as to ventilate the real issues in dispute on merits otherwise shall be condemned unheard.*

*(iv) That the dismissal of the suit has left the applicants/defendants in a state of great emotional frustration, trauma and anguish as they feel they have been condemned unheard.*

i. *(v) That it is in the best interest of justice that the orders sought herein are granted.*

3. The Application was strenuously opposed by the Respondent on the following grounds:-

*(i) That no compelling reasons have been advanced for failure to attend court on the 7/12/2017 when the application was dismissed for want of prosecution.*

*(ii) That the alleged claim that an Advocate travelling by public means from Nairobi to Machakos whose vehicle was intercepted by police has not been revealed properly and is thus an attempt to get sympathy from this court.*

*(iii) That the Applicants have been indolent and do not deserve the orders sought and further that the matter has been overtaken by events since the Respondent has already instituted a declaratory suit against the Respondents insurers.*

*(iv) That the Application is an afterthought meant to frustrate the Respondent from reaching the fruits of a successful judgement.*

*(v) That the Application is devoid of merit and is an abuse of the court process.*

4. Learned Counsels for the parties herein agreed to canvass the Application by way of oral submissions. It was submitted for the Applicant that the failure by the Applicant's advocates to reach the court in time was not deliberate as his vehicle had been intercepted by police officers on the highway. It was further submitted that the Applicant is ready and willing to deposit the security for costs and thus the Respondent will not be prejudiced in any way. It was further submitted that the Applicant who was dissatisfied in the judgement should be allowed to ventilate their case on appeal.

It was submitted for the Respondent that the failure by Applicant's Advocates to reach court on 7/12/2017 is just a fabrication and should not be excused. It was further submitted that the Respondent stands to be prejudiced as the Applicant is out to frustrate the Respondent from enjoying the fruits of the judgement.

5. I have considered the Applicants Application as well as the Affidavit in support. I have also considered the Respondents replying affidavit. I have also considered the submissions by learned counsels for the parties herein. The issue for determination is whether or not the Applicant has demonstrated sufficient reasons to warrant an order for reinstatement of the dismissed Application seeking to Appeal out of time.

6. The record reveals that the Applicant herein filed the dismissed Application dated 24/11/2017 which was placed before me in chambers and I directed that the same be served upon the Respondents for hearing inter partes on the 7/12/2017. It appears that during the hearing date the Applicants failed to turn up to prosecute the Application and Mr. Musembi, Counsel for the Respondent, sought for the dismissal of the Application with costs for want of prosecution. This court duly noted that the Respondent had filed a Replying Affidavit opposing the Application and due to the absence of Counsel for the Applicant, ordered the Application dismissed for want of prosecution.

7. The Applicant has indicated that the failure to attend court on the 7/12/2017 was not deliberate as their Advocate who was travelling by public means got held up when their vehicle was intercepted by police officers along Mombasa road. Indeed the Respondent has sought to dismiss this claim as made up and not genuine at all and is of the view that the Applicant is not deserving of the orders sought. The Respondent has further indicated that a declaratory suit has already been filed against the Applicants insurers and in which the Applicants' present Advocates have entered appearance and filed a statement of Defence. It is the view of the Respondent that this Application and the one sought to be reinstated is meant to frustrate them from accessing the fruits of the judgement. The Applicant on the other hand pleads with this court to reinstate the dismissed Application so as to enable them prosecute and obtain the necessary leave to lodge

appeal out of time and to finally challenge the judgment obtained by the Respondent in **Machakos CMCC No. 827 of 2015**. The Applicant has indicated that they are ready and willing to deposit the security for costs and thus the Respondent will not be prejudiced in any way.

8. Looking at the explanation offered by the Applicant, it is noted that the Applicant appears to have been rather lax or dilatory in prosecuting their case because upon the dismissal of the Application on the 7/12/2017, they only filed the present application for reinstatement on the 23/01/2018. Even though this court might have been away on vacation there had been a duty Court during the said period to attend to urgent matters. It seems the Applicants did not bother to make a move then to challenge the dismissal orders. However, there seems to have been major steps taken by the Respondent soon after the dismissal of the Application on the 7/12/2017 that might explain the Applicant's predicament. The Respondent swiftly moved to the Chief Magistrate's Court Machakos one week thereafter and filed a declaratory suit against the Applicants insurers being **Machakos CMCC No. 803 of 2017**. It happened that the present counsels were still the ones acting for the insurers and who filed a memorandum of appearance and statement of defence to the declaratory suit dated 26/01/2018 and in which the Respondent's claim therein was vehemently denied. It would therefore appear that the Respondent had launched a multi pronged fight against the Applicants soon after the initial judgment had been entered in **Machakos CMCC No. 827 of 2015** and which appears to have rather disoriented the Applicants herein and their insurers. It is no wonder therefore that the Applicants herein have lamented that due to the state of affairs, they have been left in a state of emotional frustration, trauma and anguish as they feel they have been condemned unheard. It appears the Respondent stole the thunder from under them as it were. The Applicants have indicated that they are ready and willing to furnish security for costs so that they can ventilate their case.

9. Going by the fact that the Applicants had contested the Respondent's primary suit and seeking to lodge an appeal against the judgement thereof albeit out of time and further contesting and or defending the declaratory suit is a clear indication that the Applicants are really desirous of ventilating their case before the courts. I find the Applicant's conduct herein in coming to this court is not intended to obstruct or delay the court of justice to the prejudice of the Respondent. I find the reasons advanced by the Applicants to be convincing and they deserve to be given a chance to canvass their application that had been dismissed for want of prosecution. I am guided by the decision of the Court of Appeal in **PHILIP CHEMWOLO & ANOTHER =VS= AUGUSTINE KUBENDE [1982 – 88] KAR 103** when it held thus:-

*“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit..... the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline”.*

10. The Applicants have beseeched this court to reinstate the dismissed Application so that they ventilate their grievances. I find I am unable to deny them such an opportunity since the right to a hearing is protected under the Constitution and is a tenet of the rule of law. Even though the Respondent has already moved fast and filed a declaratory suit following the determination of the primary suit, I find the Applicant should not be denied a chance to address the court as to whether or not his request to appeal out of time is merited. To deny him such a right would amount to an injustice. The Respondents discomfiture would be comfortably taken care of by way of costs.

11. In the premises the Applicants' Application dated 23/01/2018 is allowed. I accordingly set aside this court's order made on 7<sup>th</sup> December, 2017 dismissing the Applicants' Application dated 24<sup>th</sup> November, 2017 and order the same reinstated. The Applicants are directed to set down the said Application for hearing on priority basis. The costs hereof shall be to the Respondent.

Orders accordingly.

Dated, signed and delivered at Machakos this 14<sup>th</sup> day of February, 2018.

**D. K. KEMEI**

**JUDGE**

**In the presence of:-**

Mbithi for Kinyanjui for the Applicants

Langa Langa for Musembi for the Respondent

Kituva - Court Assistant