REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 76 OF 2017

ESTON MWIRIGI NDEGE..............................1ST APPELLANT/APPLICANT

PAUL KIRIMI KITHINJI................................2ND APPELLANT/APPLICANT

-VS-

MUTUMA MUTHAMIA (Suing as legal representative

of the estate of KARAMBU MUTUMA)......................................RESPONDENT

R U L I N G

1. Before me is a Motion on Notice dated 14th June, 2018 brought pursuant ***to Order 42 Rule 21 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and sections 1A, 1B and 3A of the Civil Procedure Act CAP 21 of the Laws of Kenya*** in which the applicants seek the setting aside of the order of dismissal of the appeal made on 11th June, 2018 and for the consequent reinstatement of the appeal for hearing on merit.

2. The grounds upon which the motion is grounded are set out on the body of the Motion and in the affidavit of Lisper Nyaga, Advocate who has the conduct of this matter on behalf of the applicants. She deposed inter alia, that she was the advocate in conduct of the matter who was supposed to attend court on 11th June, 2018, when the same was slated for hearing. That however, by the time she got to court to attend to the matter, she realized that the same had been called out in her absence and dismissed.

3. She further deposed that, on the same day, she was also in conduct **of Meru High Court Succession Cause No. 8 of 2015,** which was listed as number 5 on the daily cause list for High Court No. 1 whereas this matter was listed as number 45. That she therefore first handled **Meru High Court Succession Cause No 8 of 2015** and then proceeded to handle the instant appeal. However, she found that the same had unfortunately been dismissed in her absence.

4. Counsel therefore deposed that the dismissal of the appeal was not the appellants' mistake but rather of counsel who was in conduct of the appeal. That, she was under the belief that the cause list would be followed.

5. The application was opposed vide a replying affidavit of **Milly Okello** filed on 9th July, 2018. She deposed that she was present in court when the matter was called out but the applicants' advocates were absent. That in the premises, she applied for the appeal to be dismissed with costs to her client which prayer was acceded to by the court.

6. She further deposed that, the orders of 15th November, 2017 in which the court ordered the applicants to file their record of appeal had not been complied with as at 11th June, 2018 when the court dismissed the appeal. She therefore prayed that the application be declined.

7. I have carefully considered the affidavits on record and submissions of learned Counsel. The record shows that when the appeal was dismissed on 11th June, 2018, the court noted that the orders of 15th November, 2017 had not been complied with.

8. This is an application for reinstatement of an appeal that was dismissed on 11th June, 2018. What is required is for the applicant to give reasons why the appeal should not have been dismissed. However, it seems that the application is premised on the mistaken belief that the appeal was dismissed for non-attendance which is not the case.

9. On the reason for non-attendance, Counsel swore an affidavit to the effect that she had another matter before High Court No.1 which was listed as number 5 in the Cause List. That she attended to it first before going to attend to this matter which was listed as number 45 on the Cause List.

10. Counsel did not annex or produce the cause list for the alleged Court 1 for that day to confirm her allegation. She also did not produce her

firm's diary for the day to buttress her allegation that she had the **Meru H. C. Succession Cause No. 8 of 2015** on the material day. To that extent, this court is unable to confirm or verify those allegations. In any event, it is not clear what time Counsel went before Mrima J to have found that the matter that was listed as number 45 had been dismissed.

11. To my mind, a party who seeks the exercise of the court's discretion must be as transparent as possible and should not hold back anything in order for the court to consider exercising its discretion in his/her favour. In this case, the applicants have neither been candid not have they made full disclosure as above noted. In this regard, the court is only left to deal with suppositions and speculation as to what might have happened.

12. As regards the orders of 15th November, 2017, Gikonyo J had directed the appellants to file a record of appeal within 14 days. I have seen on record a record of appeal court stamped 1st March, 2018. That would presuppose that as at 11th June, 2018 the appellants had complied with the order of Gikonyo J. However, there has been no explanation where that record was on the 11th June, 2018, when Mrima J indicated that the order of 15th November, 2018, had not been complied with. I note that although the appeal had been dismissed for failure to comply with that order, nothing was said about that fact or why the Record of Appeal was not on record as at that date or if it had been filed, as it would seem, where it was when the good Judge made the order impugned.

13. Would this court act on suppositions or speculation? I don't think so. ***Section 17 of the Evidence Act, Cap 8 Laws of Kenya*** provides to the effect that he who alleges must prove. It was upon the applicant to explain why the appeal should not have been dismissed for failure to comply with the order of Gikonyo J of 15th November, 2017. It was for them to explain to this court, if the record of appeal had been filed on 1st March, 2018 where it was on 11th June, 2018 when the court made the impugned order and how it subsequently found its way to the record. This has been done. Can it be said that Mrima J did not see the record when he made the order? I do not think so. This is a court of record. The record speaks for itself. It was for the applicants to explain where the record was when the court made the order it made on the 11th June, 2018. Mrima J must not have been blind when he made the order he made on 11th June, 2018, if the record of appeal was on record.

14. In **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] Eklr,** the Court of Appeal held:-

> ***"From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, 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 a corresponding duty to the court in which he practices and even to the other side. (See. Halsbury's Laws of England, 4th Edn, Vol 44 at p 100-101) and also Re Jones [1870], 6 Ch. App 497 in which Lord Hatherley communicated the court's expectations this way:***
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> ***'…I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned…'***
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> ***Under this duty, counsel is unequivocally obliged to exercise candor and not aid a litigant in subversion of justice. Even though the determination of whether or not counsel has failed in this obligation is dependent on the circumstances of a case, as a custodian of justice, the court must always stay alive to the interests of both parties. This is of paramount importance. Thus, there is a corollary to the hallowed maxim that mistakes of counsel should not be visited on a client. This is to be found in the case Ketteman & others v. Hansel Properties Ltd [1988] 1 All ER 38; in which an application was brought for belated amendment of the defence; an amendment which had been necessitated by mistake of counsel. In his judgment, Lord Griffith stated that***
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> ***"Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings."***

15. From the circumstances of this case, I find that the applicants have not explained why the order of 11th June, 2018 should not have been made. They have not explained when and how the record of appeal was filed. Or where it was on the 11th June, 2018 when Mrima J made the order he made. Holding otherwise would be to disbelieve a Judge of this court at the instance of applicants who have remained mum as to where their alleged record of appeal was when the court made the order it made.

16. In any event, an officer of this court, Milly Okello, swore on oath in paragraph 5 of her replying affidavit that the applicants had not yet complied with the order of 15th November, 2017 as at 11th June, 2018. That meant that as at 11th June, 2018 the applicants had not yet filed and served their record of appeal. This fact, although stated on oath by the said Advocate, was neither denied nor challenged by the applicants.

17. Accordingly, I am not convinced that the applicants have made a case for the grant of the orders sought. The application is for dismissal as it is hereby dismissed with costs to the respondent.

DATED and DELIVERED at Meru this 27th day of September, 2018.

A. MABEYA

JUDGE