



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL APPEAL NO. 18 OF 2017**

**KATHANJE DANIEL**

**SILVERSPREAD COMPANY LIMITED.....APPELLANTS**

**-VS-**

**STELLA GACHERI GITONGA**

**MUGAMBI LINUS CHABARI (Suing as Legal Representative of the**

**Estate of HUMPREY MAWIRA KAMUNDI.....RESPONDENT**

**R U L I N G**

1. Before me is a Notice of Motion dated 14<sup>th</sup> 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 dated 11<sup>th</sup> June, 2018 and the 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 sworn by Lisper Nyaga an Advocate of the High Court of Kenya who has the conduct of this matter on behalf of the applicants. Counsel deposed, inter alia, that she was the advocate in conduct of the matter who was supposed to attend court on 11<sup>th</sup> June, 2018, when the same was slated for hearing. That however, by the time she got to court to attend the matter, she realized that the same had been called out in her absence and the appeal was dismissed.
3. Counsel further deposed that on the same day, she was also in conduct of **Meru High Court Succession Cause No. 8 of 2015** which was scheduled for hearing before High Court No. 1 and was listed as number 5 on the daily cause list. That she handled the same first and proceeded to handle the instant appeal which she unfortunately found had been dismissed. That the dismissal of the appeal is not a mistake by the appellants but rather by the counsel who was in conduct of the appeal and was under the belief that the cause list would be followed.
4. The application was not opposed and when the parties appeared in court on 11<sup>th</sup> July, 2018, Mr. Muchiri for the respondent intimated to court that they had not filled any document.
5. I have carefully considered the affidavit in support of the application. It is not in dispute that that the applicants appeal was on 11<sup>th</sup> June, 2018, dismissed for non attendance by counsel. Counsel contended that on the material day she was also in conduct of **Meru High Court Succession Cause NO. 8** which was coming up in court 1 and that mistake of counsel should not be visited upon the litigant. I am alive that the respondent did not respond to the application although served.
6. In an application such as this one the principles applicable are that the application must be made timeously, the reason advanced for failure to appear in court and the prejudice, if any, to be suffered by the other party.
7. As regards the first issue, the appeal was dismissed on 11<sup>th</sup> June, 2018. The present application was made on 14<sup>th</sup> June, 2018 barely 3 days later. To that extent, the application was made timeously.
8. 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 46 on the Cause List.

9. 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 46 had been dismissed.

10. 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, that has not been the case and the court is only left to deal with suppositions and speculation.

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

**“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, 4<sup>th</sup> 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:**

**‘...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...’**

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:-*

**“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.”**

12. From the circumstances of this case, I find the reasons advanced by the applicants not to be justifiable. The Counsel has not been truthful as to what transpired. Not everything has been disclosed to the court to enable it exercise its discretion in favour of the applicants.

13. Accordingly, I find the application to be without merit and the same is dismissed with costs.

**DATED and DELIVERED at Meru this 27<sup>th</sup> day of September, 2018.**

**A. MABEYA**

**JUDGE**