



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 141 OF 2010**

**WANJIKU MUCHEMI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**THE STANDARD GROUP LIMITED.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**KIPKOECH TANUI.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**CYRUS OMBATI.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**RULING**

1. The subject matter of this ruling is the Notice of Motion dated 8<sup>th</sup> June, 2020 brought by the defendants/applicants herein and supported by the grounds set out on its body and the facts stated in the affidavit of advocate **Kevin Wakwaya**. The applicants sought for an order that the ex parte order made by this court on 8<sup>th</sup> June, 2020 be set aside and that the application dated 8<sup>th</sup> January, 2020 be reinstated.
2. To oppose the Motion, the respondent put in the replying affidavit sworn by **Mr. Joram Mwenda Guantai** learned advocate dated 8<sup>th</sup> July, 2021.
3. When the Motion came up for interparties' hearing before this court, the parties' respective advocates chose to rely on the averments made in their respective affidavits.
4. I have considered the grounds laid out on the body of the Motion, the facts deponed in the affidavits supporting and opposing the Motion and the brief oral arguments.
5. A brief background of the matter as seen in the record is that the respondent filed a defamation claim against the applicants herein and sought for various reliefs arising therefrom. The claim was defended by the applicants.
6. Upon hearing the parties, the court vide the judgment delivered on 7<sup>th</sup> November, 2019 awarded the respondent an aggregate sum of Kshs.17,000,000/= as damages plus costs of the suit and interest thereon, to be paid by the applicants jointly and severally.
7. The record shows that the applicants filed a notice of appeal indicating their intention to challenge the aforementioned judgment before the Court of Appeal. The record also shows that the applicants filed the application dated 8<sup>th</sup> January, 2020 and sought for an order for a stay of execution pending the hearing and determination of the intended appeal.
8. When the said application came up for hearing on 8<sup>th</sup> June, 2021, following the absence of counsel for the applicants from court, this court dismissed the application for non-attendance at the request of the advocate for the respondent.
9. The dismissal order has prompted the Motion now before this court.
10. In his affidavit, Mr. Kevin Wakwaya states that on the date on which the application dated 8<sup>th</sup> January, 2020 was scheduled for hearing, his attempts to access the online cause list were futile as the same was unavailable and that he made follow ups with the High Court Civil Registry.
11. The advocate stated that he was informed by one of the registry staff that the matter was scheduled to come before a judge who was not sitting on that particular day, following which he sent his office clerk to obtain another date from the registry.
12. It is the advocate's assertion that as the clerk accessed the online platform in order to obtain a different date, he discovered that the

application had been listed before this court and that by the time the advocate managed to log in, the matter had been called out and the application dismissed for non-attendance.

13. In response, Mr. Joram Mwenda Guantai stated that there were no difficulties in accessing the online platform on the material date and that the assertions being made by the advocate for the applicants are untrue and only intended to delay the matter.

14. From my perusal of the record, I note that when the application dated 8<sup>th</sup> January, 2020 came up for hearing on 8<sup>th</sup> June, 2020 only the counsel for the respondent was in attendance.

15. It is clear from the record that the aforementioned application was consequently dismissed for non-attendance.

16. Upon considering the rival positions above, it is clear that the inadvertence was on the part of the applicants’ advocate for not attending court for the hearing of their application.

17. It is a matter of legal principle that the mistake of an advocate ordinarily ought not to be visited upon a client. This was the position taken by the Court of Appeal in the case of **Ahmed v Highway Carriers (1986) LLR 258 (CAK)** when it held that:

***“...a litigant should not suffer for his advocate’s mistakes; if the court should be inclined to punish the advocate, it should state so and choose the appropriate punishment without injuring the litigant’s rights.”***

18. In view of the foregoing circumstances, I am persuaded that it would be an injustice for the applicants herein to be punished for the fault of their advocate. I will therefore accept the explanation given and apply substantive justice.

19. The upshot is that the Motion dated 8<sup>th</sup> June, 2020 is allowed in terms of prayer (1) giving rise to the following orders:

**i. The ex parte order made on 8<sup>th</sup> June, 2020 is hereby set aside and is substituted with an order reinstating the defendants’/applicants’ Notice of Motion dated 8<sup>th</sup> January, 2020.**

**ii. The defendants/applicants shall set down the Notice of Motion dated 8<sup>th</sup> January, 2020 for hearing at the earliest opportunity.**

**iii. In the circumstances, the parties shall bear their own costs of the instant Motion.**

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021.**

.....

**J. K. SERGON**

**JUDGE**

**IN THE PRESENCE OF:**

..... **FOR THE PLAINTIFF/RESPONDENT**

..... **FOR THE DEFENDANTS/APPLICANTS**