



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 64 OF 2014**

**ATTORNEY-GENERAL..... 1<sup>ST</sup> APPELLANT**

**CHARLES MOMANYI.....2<sup>ND</sup> APPELLANT**

**KIPKORIR NG'ENO.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**ANTONY NABENDE.....RESPONDENT**

**(An appeal arising from the judgment and decree of the Hon. GN Sitati, Resident Magistrate, in Mumias RMCCC No. 275 of 2014 of 25<sup>th</sup> May 2014)**

**JUDGMENT**

1. The appellant lodged a memorandum of appeal herein dated 27<sup>th</sup> June 2014, in which it is averred that the trial court exercised its discretion erroneously and failed to set aside the *ex parte* proceedings when the circumstances warranted such setting aside, erred by failing to exercise discretion in their favour when their mistake entitled them to such a remedy, failed to appreciate that the failure to attend court was due to mistake of counsel to diarise correct hearing date and that the error was excusable, and failed to appreciate that they had a plausible defense which ought to have been heard. It is prayed that the appeal be allowed, and the proceedings and judgment of the lower court be set aside.

2. The factual background to the matter, gleaned from the material on record, is that the respondent had lodged a suit in Mumias RMCCC No. 103 of 2011 seeking to recover damages for personal injury, unlawful arrest, false imprisonment and malicious prosecution, and for special damages. The matter proceeded *ex parte* on 10<sup>th</sup> December 2012, after the court had satisfied itself that the defendants, the appellants herein, had been properly served but had omitted to come to court. Evidence was taken from three witnesses, and judgement was reserved for 17<sup>th</sup> December 2012, and was delivered on 21<sup>st</sup> December 2012. Thereafter the respondent lodged at the registry on 30<sup>th</sup> January 2013 a bill for assessment of costs. The bill was taxed by the court on 18<sup>th</sup> February 2013 after the court had been satisfied that there had been proper service on the appellants. The appellants then filed an application on 9<sup>th</sup> January 2014 seeking the setting aside of the judgement of 21<sup>st</sup> December 2012. The application was urged by way of written submissions, and a ruling thereon was delivered on 25<sup>th</sup> May 2014 dismissing the same. It is the said ruling that is the subject of the instant appeal.

3. In the said application, by way of a Motion dated 9<sup>th</sup> January 2014, the appellants sought stay of execution and setting aside of the judgment. The affidavit in support of the application was sworn by a counsel in the Office of the Attorney-General who allegedly acted for the appellants. He acknowledged that a hearing notice for 10<sup>th</sup> December 2012 was duly served on them, but their clerk erroneously diarized the matter for 12<sup>th</sup> December 2012, which was a national day, instead of 10<sup>th</sup> December 2012. He pleaded that there was confusion and failure to attend court was not deliberate. He said that there was a good defense to the claim. In response the respondent pointed out that neither the appellants nor their counsel ever attended court on the many occasions that matter came up for hearing. He also argued that 12<sup>th</sup> December 2012 was a public holiday in Kenya, and that it was inconceivable that both counsel and his clerk could have diarized a matter for hearing on that day. He contended that the appellants had not explained what they had done after 12<sup>th</sup> December 2012 after discovering that the matter had been erroneously diarized. He pointed out that after judgement was delivered he filed a bill of costs for taxation, which was served on the appellants but they did not attend court for the event. He asserted that there was no merit in the application. The application was disposed of by way of written submissions. After the court considered the issues it dismissed it on the finding that the appellants had not taken any steps to ameliorate the error arising from wrong diarisation of the matter.

4. Directions on the disposal of the appeal before me were given on 2<sup>nd</sup> October 2017. The appeal was to be canvassed by way of written submissions, to be highlighted. Both parties complied by filing their respective written submissions. The same were highlighted on 11<sup>th</sup> July 2018.

5. I have carefully gone through and considered everything that was placed before me. 12<sup>th</sup> December of every year commemorates the most important day for the nation of Kenya. It is far more important than Madaraka Day which is marked on the 1<sup>st</sup> of June and Mashujaa Day which is marked on 20<sup>th</sup> October. Jamhuri Day, as 12<sup>th</sup> December is called, marks the day Kenya attained full independence from colonial rule and it is also the day that Kenya became a Republic. In other places it is known as Independence Day. It a day that any patriotic Kenyan should have seared in their minds. It would be unbelievable that an error such as the one alleged could be made. It is even more unbelievable that once the error was allegedly made by the clerk, counsel appearing for the appellants did not notice it. I believe that the trial court was quite gracious to the appellants in accepting that they could have possibly made the error that they alleged they made.

6. It would appear that after the alleged error was made no effort was made to make good. 12<sup>th</sup> December 2012 was a Wednesday. It would have been expected that any diligent and reasonable person would have noted, from looking at their diary the following day, Thursday 13<sup>th</sup> December 2012, that there had been a problem with diarising matters on 12<sup>th</sup> December 2012, and would have taken certain steps, such checking up in their files to confirm the correct dates, and establishing either from the court or from their counterparts on what might have transpired on 10<sup>th</sup> December 2012. If that had been done and setting aside sought shortly thereafter am sure the trial court would have had no difficulty allowing the application. As it is the appellants simply went to sleep and were only roused therefrom by the respondent's efforts to recover the judgement sum.

7. The indolence on the part of the appellants was compounded by the fact that the respondent filed a bill of costs for taxation, and caused it to be served on the appellants, but they still did not take any steps. There is an affidavit of service on record in the lower court file, sworn on 7<sup>th</sup> February 2013 and filed on 8<sup>th</sup> February 2013. It shows that the appellants were served through their counsel on 5<sup>th</sup> February 2013. The bill was received by a person who signed on it to acknowledge receipt and embossed on it the stamp of the Attorney-General. The appellants have not denied that fact. It meant that the respondent served them with process that should have alerted them that the matter had proceeded on 10<sup>th</sup> December 2012. If they desired to mitigate their loss they would have taken steps as from 5<sup>th</sup> February 2013. They did not avail themselves of that opportunity, and moved the court eleven months later on 9<sup>th</sup> January 2014. They surely cannot be heard to complain that the trial court did not consider their case favourably.

8. There was the submission that mistake of counsel ought not to be visited on the party they represent. There is also the converse that counsel is expected to act with diligence, caution and professionalism. Professional negligence should not be condoned or overlooked. A client who is exposed to loss on account of negligence on the part of their lawyer has a remedy in law. They can recover damages from their advocate for professional negligence. I note here that the counsel in question is the Attorney-General, the titular head of the legal profession. That does not, however, excuse him. He is an advocate like any other, bound by the same rules of professional conduct and ethics that bind other advocates. Indeed, better conduct and higher standards are expected of him and his officers.

9. In view of everything that I have said so far, it is my conclusion that the trial court did not fall into error in any way. It properly exercised its discretion and came to the right conclusions. I shall therefore not disturb its findings. I shall accordingly disallow the appeal and uphold the decision of the trial court in the ruling delivered on 28<sup>th</sup> May 2014. I accordingly dismiss the appeal herein with costs to the respondent.

**PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 31<sup>st</sup> DAY OF January, 2019**

**W. MUSYOKA**

**JUDGE**

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 7<sup>th</sup> DAY OF February 2019**

**J. NJAGI**

**JUDGE**