



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 53 OF 2016**

**CO-OPERATIVE INSURANCE COMPANY**

**LIMITED.....APPELLANT**

**VERSUS**

**CHARLES MWORIA M'ARANJA & JANE KAMBURA**

(Suing as the Legal Representatives to the estate of

**LENSON MUTHURI MWORIA (Deceased).....RESPONDENT**

**RULING**

1. On 13<sup>th</sup> June, 2016 the appellant filed a memorandum of appeal in the High Court against the judgment of the Senior Resident Magistrate's Court at Machakos in Civil Suit No. 814 of 2014. However, on 13<sup>th</sup> March 2018 after hearing both parties, after being invited to take directions on the appeal, the same was dismissed for failure to file the record of appeal. Thereafter, on 19<sup>th</sup> April, 2018 the appellant filed an application in the High Court seeking reinstatement of the appeal. The grounds in support of the application were that, on the said date, the advocate handling the matter went to court and was informed that the file was not in court. The file was later found and taken to court, but the advocate had other matters in the lower court and instructed another advocate to hold his brief. The said advocate informed court that the record of appeal was not ready and the appeal was dismissed; that the mistake of counsel should not be visited on the appellant. The appellant maintained that the application was filed without undue delay and that if the appeal is dismissed, the applicant shall lose the Kshs 1,207,446.00 that he deposited in court.

2. In opposing the application, the respondents filed replying affidavits. They deposed that the applicant fixed the said date ex-parte and thus could not claim to be engaged elsewhere. That the advocate present in court who confirmed that the said record was not ready and it resulted in a failure to comply with the court orders dated 4<sup>th</sup> October, 2017 hence by operation of the said order, the appeal stood dismissed as at 5<sup>th</sup> December, 2017.

**3. The parties canvassed the appeal via submissions**

4. Learned counsel for the appellant, submitted that the appellant was not given a hearing in the lower court as he is appealing against an ex-parte judgment. According to him, the respondent shall suffer no prejudice that cannot be compensated if the application is allowed. He argued that the application was filed without inordinate delay. He argued that the appellant would require an opportunity to be heard and a fair trial in accordance with fundamental rights under the Constitution. He urged this court to allow the appeal. He relied on the case of **Richard Ncharpi Leiyagu v IEBC and 2 Others (2013) eKLR** that the door of justice should not be closed because of the mistake of counsel.

5. Learned counsel for the respondents submitted that the appellants seek to obtain an extension of time to lodge the appeal through the backdoor for they have never made an application seeking for extension of time. He argued that the appellant was aware of the consent that was recorded on 14<sup>th</sup> October, 2017 and the consequences of the default thereof, and should not blame everyone for its own failure to abide by the said order. According to him, the appeal stood dismissed as at 14<sup>th</sup> December, 2017 and the application is an abuse of court process and ought to be dismissed.

6. I have considered the application, the record, submissions by counsel and the law. The issue that is before me is whether the appellant is entitled to an order to reinstate the appellant's appeal. I take note the Appellant had been given several chances to file the record of appeal but it is yet to do so.

7. I quote *Seton on Judgments and Orders*, 7<sup>th</sup> Edition, Vol. in stating thus:-

**“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an arrangement contrary to the policy of the court ... or if consent was given without sufficient material facts or in misapprehension or ignorance of such material facts, or in general for a reason which would enable the court to set aside an agreement.”**

8. In *Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd [1982]KLR 485*, Harris, J correctly held, *inter alia*, that -

**“1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.**

**2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.**

9. The appellant's appeal was dismissed for non-compliance with a consent that was entered into. The learned Judge held that the consent is still binding.

10. The applicant avers that the advocate who held his brief acted contrary to instructions, but had not demonstrated what those instructions were. The applicant could have attached a copy of those instructions or have the said advocate depone to that effect, but the same was not done when the application was filed there. I am of the considered view that looking at the appellant's conduct from the time the appeal was filed up to the date the application for reinstatement was filed, the applicant has no excuse for his non-compliance.

11. In *Kenya Commercial Bank Limited vs Benjoh Amalgamated Limited & Another [1998] eKLR* this Court cited a passage in The Supreme Court Practice 1976 (Vol. 2) paragraph 2013 page 620 stating:-

**“Authority of Solicitor - a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction; and it would seem that a solicitor acting as agent for the principal solicitor has the same power (*Re Newen*, [1903] 1 Ch pp 817,818; *Little vs Spreadbury*, [1910] 2 KB 658). No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice - see *Welsh vs Roe* [1918 - 9] All E.R Rep 620.”**

12. At this juncture I seek to distinguish the quoted case of *Richard Nchapi Leiyagu -vs- IEBC & 2 others- Civil Appeal No. 18 of 2013* because in that matter, both counsels were absent, and the decision was made ex-parte, however in the instant case, counsel had a representative in court. The court while considering circumstances under which an *ex parte* order may be set aside expressed itself as follows:-

**“We agree with the noble principles which go further to establish that the court's discretion to set aside an *ex parte* judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.”**

The said case is inapplicable to the issue that I am addressing in the circumstances

13. The reason advanced by the appellant for the delay in filing the record in time, that he was unaware of the consent is not convincing, *a fortiori*, the appellant has failed to explain the delay. Be that as it may, why didn't the appellant file an application for extension of time. He was only awakened from her slumber by the dismissal of the appeal.

14. On the issue of the right to be heard, this Court in *Richard Nchapi Leiyagu -vs- IEBC & 2 others (supra)* held:-

**“The right to a hearing has always been a well protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”**

15. The explanation given by the Appellant/Applicant appears to me to be rather lame and ought not to be entertained. However, I note that the Appellant has already deposited the entire decretal sums as security and therefore this money is likely to go to the Respondent without the appeal being heard. The lower court record is already availed and is part of the Appeal fee and further the proceedings of the lower court were duly typed. It is therefore rather perplexing why the Appellant cannot prepare the record of Appeal. Indeed not even a draft copy has been annexed to the Appellant's application. The Appellant must be indecent and the delay prejudices the Respondent. This court will not allow the Appellant to continue delaying the finalization of the matter as the Respondent needs to enjoy the fruits of the judgement. So as not to shut the door to the Appellant, I am inclined to give the Appellant one more chance but with conditions and that if it fails to adhere thereto then the door alluded to hereabove will be shut and the Respondent shall thereafter proceed to access the decretal sums.

16. In the result the Appellant's application dated 19/4/2018 is allowed with the following conditions:

(a) *The orders made by this court on the 13/3/2018 are hereby set aside.*

(b) *The Appellant's appeal is reinstated together with the substituting orders of stay pending appeal.*

(c) *The Appellant is directed to file and serve its record of appeal within fourteen (14) days from the date of this ruling failing which the appeal shall stand dismissed.*

(d) *The costs of the application shall be to the Respondent.*

It is so ordered.

**Dated and delivered at Machakos this 8<sup>th</sup> day of November, 2018.**

**D.K. KEMEI**

**JUDGE**