



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 144 OF 2014**

**ZINC INSURANCE AGENCY LIMITED.....APPELLANT**

**VERSUS**

**REDEMPTA KOKI MUTHAMA (*suing as the Legal Representative of***

***The Estate of MESHACK MWANZIA MUTUA DECEASED.....RESPONDENT***

**RULING OF THE COURT**

**The Application**

1. The Notice of Motion application before the court is dated **10<sup>th</sup> October, 2016** and filed by the appellant pursuant to the provisions of the law stated on the face thereof. The application prays for the following orders;

- a. That the application be certified as urgent and heard *ex parte* in the first instance.
- b. That the firm of Muriithi & Ndonye Advocates be allowed to come on record for the appellant in place of the firm of Kairu Mbuthia & Kiingati Advocates.
- c. That the honourable court be pleased to enlarge time and grant the appellant unconditional leave to file its record of appeal out of time.
- d. That the honourable court be pleased to issue orders staying any further proceedings in this matter until determination of the present application.
- e. That the honourable court be pleased to set aside and/or vary its orders of the 21<sup>st</sup> July, 2016 which dismissed the appellant's appeal and reinstate the appeal for the same to be determined on its own merit.
- f. That the costs of this application be provided for.

2. The application is founded on the grounds set out therein and is supported by affidavit of **Martha Mutoro** sworn on **11<sup>th</sup> October, 2016**.

3. The applicant's case is that the firm of Kairu Mbuthia & Kiingati Advocates were previously instructed by Cannon Assurance Limited, the insurers of the motor vehicle registration number KBH 495V belonging to the defendant herein to come on record and represent the defendant in Chief Magistrate's Court Case No. 498 of 2011 the same arising from a road accident. The matter proceeded under the

conduct and care of the said firm of advocates and judgment was delivered which judgment was appealed against under the present case. The appeal was dismissed on the 21<sup>st</sup> July, 2016 for failure to file the record of appeal within the time agreed upon, which dismissal was at the detriment of the client. The instructing client Cannon Assurance has now instructed the present firm of Muriithi & Ndonye Advocates to come on record and salvage the situation as it stands to suffer irreparable damage as its rights and interest have not been represented as expected. It is alleged that the appeal had high chances of success and unless the dismissal of the appeal is set aside and the appellant allowed to proceed with the appeal, the respondent shall have the security which was deposited in court released to her at the detriment of the appellant. The appellant herein and the instructing client being the appellant's insurer has at all times been interested in proceedings with the appeal and the advocates mistakes should not be visited on the appellant as it remains an innocent party to the present proceedings. This matter is scheduled for mention before the court on the 12<sup>th</sup> October, 2016 for directions on the decretal sum paid to court. The applicant's case is that it is in the interest of justice and rule of law that the proceedings in this matter be stayed to allow the court to deliberate on this application. The present firm of advocates for the appellant is ready to prepare the record of appeal and proceed with the appeal without any further delay. It is submitted that the application has been made timeously and it is in the interests of justice for the orders sought to be granted as the respondent will not suffer any prejudice herein.

### **The Response**

4. The application is opposed vide a replying affidavit sworn by **Alex K. Mutua** on **24<sup>th</sup> October, 2016**. The deponent is an advocate of the High Court of Kenya and in conduct of this matter and duly authorized to depone to the said Affidavit. The deponent states that the applicant's application is made in bad faith to frustrate the efforts of the Respondent in realizing the decretal sum. Counsel deponed that the appeal herein was admitted for hearing on 1<sup>st</sup> October, 2015 and no efforts was made by the appellant/applicant to fix the same for directions and/or to prepare the record. It is the respondent who has been fixing the appeal for directions despite the appeal being filed by the appellant. Counsel deponed that the appellant has changed advocates as an afterthought and to defeat the orders of the court made on 20<sup>th</sup> July, 2016 and to delay justice. On 16<sup>th</sup> February, 2016, the then advocates on record for the appellant sought for seven (7) days to compile the record and the court gave the appellant/applicant thirty (30) days instead and no record was compiled. Counsel deponed that on **13<sup>th</sup> June, 2016**, the court gave the applicant a further thirty (30) days to compile the record of appeal and serve and the appellant/applicant refused so to do. The appellant/applicants advocate was not attending court for all those occasions and sending advocates to hold their briefs. The respondent's case is that the applicant is a party that has not been obeying court orders. From the time the appeal was dismissed, it is over three (3) months and the applicant did not bother to seek reinstatement immediately and/or appeal against the said orders. There is no appeal on record to warrant this court to exercise its discretion and order stay. There is no explanation given by the applicant/appellant why it was not obeying courts orders. The applicant/appellant has not even attached a record of the appeal as a sign of good faith to show that it has an appeal with chances of success or it is ready to prepare the same. The respondent's case is that the advocate for the applicant has no capacity to file the notice of appointment without the leave of the court and the present application should fail. If this application is to be allowed, it is the respondent who will be prejudiced since it has already filed a Bill of Cost.

### **Submissions and Determination**

5. Parties filed submissions which I have considered. From those submissions two issues for determination arise. These are;

- i. Whether this court can accept the reasons given for delay in filing the appeal.
- ii. Whether the applicant's advocates are properly on record.

6. The applicants submitted that the application was filed without any inordinate delay since the information on the dismissal of the appeal came to the appellant's insurer's knowledge on the 23<sup>rd</sup>

September, 2016. However, this only explains the delay in bringing this matter. It does not explain the appellant advocates conduct before the appeal was dismissed.

7. The respondents submitted that the history of the application shows that all along the applicant's advocates were not serious. The applicant/appellant herein filed a memorandum of appeal on 16<sup>th</sup> July, 2013 challenging the judgment of the Chief Magistrate in CMCC No. 498 of 2011. After the memorandum of appeal was filed, the applicant obtained Orders of stay and they forgot about the matter and went on enjoying the stay orders. By a letter dated 13<sup>th</sup> August, 2015 and filed in court on 13<sup>th</sup> August, 2015 counsel for the respondent was concerned with the delay in compiling the record of appeal. It is after that letter that the then counsel for the appellant/applicant woke up from its sleep and started writing to court. The appeal was admitted for hearing on 1<sup>st</sup> October, 2015 and no step was taken by the applicant. By an invitation dated 15<sup>th</sup> September, 2015 and filed in court on 29<sup>th</sup> September, 2015 counsel for the respondent fixed the appeal for directions and served the appellant/applicant for mention on 16<sup>th</sup> February, 2016 and an affidavit of service was filed. On 16<sup>th</sup> February, 2016 the then advocate for the applicant/appellant through **Muumbi advocates** holding brief sought for seven (7) days to compile and serve the record and it was given thirty (30) days by the court to do so and the matter was fixed for mention again on 13<sup>th</sup> June, 2016. On 13<sup>th</sup> June, 2016 the then advocates for the appellant/applicant sought for more time through **Ombega advocates** holding brief and it was given thirty (30) days to compile and serve the record and matter was fixed for mention on 20<sup>th</sup> July, 2016 to confirm filing of record and service. On 20<sup>th</sup> July, 2016 there was no appearance on part of the applicant and the memorandum of appeal was dismissed with costs hence the present application.

8. The major ground of the application is prayer (e) that seeks setting aside and/or varying the orders of the court dated 21<sup>st</sup> July, 2016. In the opinion of this court, and as is correctly put by **Mr. Mutua** for the applicant, this prayer is misplaced and untenable, for the appellant/applicant is seeking for the court to vary and set aside orders that do not exist. There is no order that was granted on 21<sup>st</sup> July, 2016 to warrant the court to exercise its discretion to vary and/or set aside. The order dismissing the appeal was issued on 20<sup>th</sup> July, 2016 and the applicant is not even seeking the court to interfere with it. This failure even to observe correct dates, given the background of the application, only shows how lethargic the applicant's advocates continue to be in this matter.

9. In prayer c of the notice of motion, the appellant is seeking for enlargement of time to file the record of appeal out of time. The provisions of the law in which the prayer is based provides;

*Where a limited time has been fixed for doing any act or taking any proceedings under these rules, or by summary notice or by order of the court, the court shall have the power to enlarge time upon such terms (if any) as the justice of the court might require, and such enlargement may be ordered although the application for the same is not made until after expiration of the time appointed or allowed. Provided costs of the application shall be borne by the party making the application.*

10. It is the finding of this court that the applicant is a party that does not obey court orders. This court is therefore reluctant to exercise its discretion in favour of the applicant.

11. to the above findings, the application before the court lacks merit and is dismissed with costs to the respondents. Accordingly, there is no need to determine issue number two (2).

Orders accordingly.

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**E.K.O. OGOLA**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 15<sup>TH</sup> DAY OF FEBRUARY, 2017**

.....

**DAVID KEMEI**

**JUDGE**

**In the presence of:**

Musila – for Kioko for Applicant