REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 40 OF 2014

(An appeal from the Ruling of Senior Principal Magistrate, Embu in CMCC No. 156 of 2012 dated 5/12/2014)

SAMUEL NJAU……..…...……1ST APPELLANT

JANE MUTHONI GICHUKI.....2ND APPELLANT

VERSUS

PAULINE NYAWIRA GITONGA.....RESPONDENT

R U L I N G

1. This is the application dated 7/10/2015 seeking *interalia* that the court be pleased to review/set aside judgment issued on 23/9/2015 striking out the appellant's appeal and reinstate the appeal for hearing and that the court be pleased to stay execution of the decree obtained in Embu CMCC 156 of 2012 pending hearing and determination of the appeal. The application is supported by the affidavit of Sandra Nyakweba.

2. It is stated that the deponent is authorized to swear the affidavit being the claims director of Directline Assurance Company. The respondent sued the appellants following an accident involving motor vehicle registration number KAZ 071 J. Having insured the said motor vehicle, Directline Assurance Company Limited defended the suit on behalf of the appellants under the doctrine of subrogation and appointed the firm of Kairu & McCourt Advocates (former advocates) to act on behalf of the appellants. Mr Festus Mogere an advocate of the working for the said firm at that time recorded a consent order with the respondents advocate to dispose the appeal by way of written submissions.

3. At the time of recording the consent, two interlocutory applications (one by each party) were pending. The appellants were yet to file their record of appeal so that the appeal could be admitted. The applicant argues that filing a record of appeal together with admission of the appeal is a mandatory requirement before directions on the appeal can be taken. The directions taken in this matter were irregular given as the record of appeal had not been filed. Mr Festus then left the firm of Kairu McCourt without informing the firm that directions had been given in the matter.

4. The appellant's advocates Messrs Kairu & Mc Court remained under the impression that the directions given were for the appellants notice of motion dated 15/12/2014 and only realized the error after they were served with the respondents submissions dated 16/6/2015. By that time the court file had been moved from the court registry for purposes of preparing the judgment and it was impossible to take a remedial action. The court subsequently struck out the appeal in absence of the record of appeal. The directions taken on 30/4/2015 were taken by consent and were irregular and a nullity.

5. The appellant further stated that the mistake which led to the orders made on 23/09/2015 is attributed to Mr. Festus who was an employee of the former firm acting for the appellants. The appellants have always been keen on prosecuting the appeal and mistake of counsel should not be visited upon them. According to the applicant, there are sufficient grounds to warrant review. The applicants have approached court with promptness as the decision sought to be reviewed was delivered on 23/9/2015.

6. The respondent in the replying affidavit stated that the appellants advocate at that time had the mandate and competence to enter into consent on behalf of the appellants at the material time. After the consent to dispense with all pending applications the appellants advocates had a duty to ensure that the appeal was properly before court. It was the incompetence of the advocate that led to the striking out of the appeal. The appellants advocate should have addressed the error the moment they were served with the submissions dated 29/6/2015. it is contended that there was nothing irregular or unprocedural with the consent filed in court.

7. Parties agreed to dispose of the application by way of written submissions which were accordingly filed.

8. The applicants restated what is contained in the replying affidavit and added that the the consent entered into on 30/4/15 was entered into by mistake and led the court into believing that the record of appeal had already been filed. The record of appeal must be filed before directions can be issued. The mistake of the advocate should not be revisited upon the appellants.

9. It is further argued that the appellants will be greatly prejudiced if the appeal is not reinstated. The court was urged to reinstate stay of execution pending hearing and determination of the appeal as the respondent will not be able to reimburse the colossal amount of Kshs.2,381,575/= plus costs and interests as she is not person of means.

10. The appellants filed a list of authorities some of which will be highlighted herein.

(i) In the case of ***KITHOI VS KIOKO [1982] KLR 177*** the court held that the application for review must be based on the discovery of new evidence and important matter of evidence which after exercise of due diligence was not within the knowledge or could not be produced by him at the time when the decree was passed or on account of some mistake or error apparent on the face of the record or for any other sufficient reason.

(ii) In ***KIMITA VS WAKIBIRU [1985] KLR 317,*** thecourt held that any other sufficient reason is not confined to the previous two heads of mistake and discovery of new evidence but the court has unfettered discretion to consider any factors it deems necessary

(iii) The court in ***COMMISSIONER OF INCOME TAX VS KENCELL COMMUNICATIONS LIMITED[2013] eKLR*** held that it doesn't matter the experience of an advocate but mistakes occur all the time and that a party can rectify such a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better.

(iv) In ***BRUCE MUTIE MUTUKU TA DIANI TOUR AND TRAVEL CENTER VS EQUITY BANK LIMITED[2014] eKLR*** the court held that the registrarcannot give notice of directions to the parties of an appeal until the appellant has served thememorandum of appeal and record of appeal.

(v) The court held in ***BENSON MUNGERA &ANOTHER VS WAMBUA MBUVA [2014] eKLR*** that it would be reluctant to strike out suits onprocedural technicalities. The court has a duty to consider the length of delay, the cost and prejudice likely to be occasioned to not only the respondent but also the appellant if the appeal is dismissed.

(vi) In ***NATIONAL BANK OF KENYA LTD VS NDUNGU NJAU [1997] eKLR*** the court held that areview may be granted whenever the courtconsiders that it is necessary to correct anapparent error

or omission on the part of the court. The error must be self evident and should require no elaborate argument to be established.

11. The respondent submitted that the advocates acting for the appellant are not properly on record as they came on record by way of consent filed on 2/10/2015 between them and the appellants former advocates. It was reiterated that the appellants have not given any sufficient reason to warrant review of judgment and the conditions under Order 45 of the Civil Procedure Rules have not been met.

12. The first issue to deal with in this application is whether the advocates for the applicants are rightly on record. Order 9 of the Civil Procedure Rules provides that;

> *When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—*
>
> > *(a) upon an application with notice to all the parties; or*
> >
> > *(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.*

13. There is a notice of change of advocates in the court file dated 2/10/2015 indicating that the firm of Mohamed Madhani & Company Advocates took over the matter on behalf of the appellants from the firm of Kairu McCourt & Advocates pursuant to a consent dated 1/10/2015. Although the consent is not in the court file but the respondent advocate has not dispute its existence. Therefore, according to the provisions of Order 9(9)(b) of the Civil Procedure Rules, the advocates for the appellants are rightly on record.

14. The applicant relies on Order 45 Rule 2, Order 51 Rule 1, Sections 1A, 1B, 3A of the Civil Procedure Rules, Article 159(2)(d) and Article 50(1) of the Constitution.

15. Order 45 Rule 1

> *(1) Any person considering himself aggrieved—*
>
> > *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
> >
> > *(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.*

16. In the case of ***PANCRAS T. SWAI VS KENYA BREWERIES LIMITED [2014] eKLR*** the court held:-

> *Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limbs therein stated or "for any sufficient reason." The appellant did not bring his application within any of the limps nor did he show that there was any sufficient reason for review to be granted.....*"

17. Order 42 Rule 13(1) provides that:-

> *On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions*

by a judge in chambers.

18. The applicants seek that the orders delivered on 23/9/2015 striking out the appeal be reviewed on grounds that their advocate at the time entered into a consent with the respondent's advocate to dispose of the appeal by way of written submissions before filing the record of appeal.

19. It is contended that the law firm previously acting for the appellants realized the error after they were served with written submissions by the respondent. It is claimed that by the time the error was discovered, the court file had already been removed from the registry for purposes of preparing the ruling and as such the appellants advocates could not take remedial action.

20. The appellants have not demonstrated that it unsuccessfullyto trace the court file not even by annexing a letter to the Deputy Registrar. Had the error been realized at submission stage in June 2015, I suppose the applicants could have brought it to theattention of the court or that of the Deputy Registrar without delay. It is important to note that the court was on vacation in August and part of September 2015. The ruling was delivered on 23/09/2016 as scheduled. However, the application was filed within two weeks after the ruling. There wastherefore no delay in lodging this application.

21. The appellants have not demonstrated that there *wasdiscovery of new and important matter or evidencewhich, after the exercise of due diligence, was not within their knowledge or could not be produced by them atthe time the decree was passed or the ordermade, or on account of some mistake or error apparenton the face of the record, or any other sufficient reason, to warrant the review sought.*

22. This was a serious mistake which led the court to act on the assumption that the record of appeal had been filed. Order 45 refers to a mistake or error apparent on the court record but not to one by an advocate. The applicants have not satisfied the court on the threshold of Order 45.

23. The applicant has vehemently argued that the mistake of counsel should not be visited upon the applicants. A party who ha instructed an advocate to represent him puts his trust in him in all aspects of the case. The advocate knows the law and the procedure applicable in all aspects of the case.

24. Every client expects proper advice from his counsel on how to prepare for the case. In this application the counsel on record bears the blame for the omission to file the record of the appeal and for proceeding to record a consent on how to dispose of the appeal while the procedure had not been complied with.

25. The respondent's counsel who took part in the consent is not without blame. He knew very well that he had not been served with the record of the appeal and that the said appeal was yet to be admitted.

26. Order 42 Rule 13 provides that directions for hearing of an appeal shall be taken only after the record of appeal has been filed. The record is a critical component of an appeal and must take its place before any steps are taken towards the hearing of the appeal.

27. There was, therefore, a grave mistake which occurred in this matter and which in the interests of justice requires to be rectified.

28. It is only on this solid ground that I find merit in the application which I hereby allow on the following terms:-

(i) That the orders made on 23/09/2016 striking out the appeal are hereby set aside.

(ii)That the interlocutory orders of stay of execution pending determination of the appeal are hereby reinstated.

(iii)That the applicant shall file the record of appeal within 21 days of this ruling in default of which the appeal shall stand dismissed.

(iv)That the applicants shall meet the throw-away of this application assessed as Kshs.25,000/=.

29. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF SEPTEMBER, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Wmbugu for Kisinga for Appellants

Mr. Kamunyori for Respondent