REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL 186 OF 2011

1. PATRICK MUTUNGA MWILU MUMO KITHUSI (alias **MBOONI)**

2. SAMMY KINYILI MWILU

3. KITHEKA KULUKUA KAILU

4. MWANGI JOHN MACHARIA

5. JOHN NTHIWA MANG'ENG'E

6. FREDRICK JUMA KYALO

7. PETER NYAMAI KIMWELI

8. KENNEDY MULINGE MWANDIKU

9. REUBEN MULWA MWATHE

10. MICHAEL NZEMBEI NANDU

11. JOSEPH SIVE MUTHEI……...APPLICANTS

VERSUS

1. MARY KATUA

2. SALOME SIMON

3. TERESIA MULE ……..…….....DEFENDANTS

(Being an appeal against the ruling and order in Makindu Principal Magistrate Court PMCC No. 25/2010 by Hon. by Hon N.N. Njagi, P.M on 27.10.2011)

RULING

The application dated 9th February, 2012 and which is the subject of this ruling was filed by the applicants. It seeks in the main that this court's order issued on 2nd February, 2012 dismissing the application dated 25th November, 2011 be set aside and that the said application be reinstated for hearing and determination on merit. They also pray that the order of stay of execution which had been issued in the same application be reinstated.

The application is expressed to be brought under sections 1A (1), (2) (3), 1B (a) and 3A of the Civil Procedure Act, Order 51 rules, 1,3,4,6,10,12,15 & 16, Order 43 rule 1(1) (X)& (4) of the Civil Procedure rules and all other enabling provisions of the law. The gist of the application is that the applicants' counsel was absent from court on 2nd February, 2012 when the dismissed application dated 25th November, 2012 was scheduled for *interpartes* hearing. However, the applicants' counsel now explains that his absence was due to justifiable and excusable reasons. He had travelled to Mutomo Law Courts in compliance with orders and or directions issued by this court on 30th January, 2012, in H.C. Miscellaneous Application No. 280 of 2011 which required him to physically attend the lower court in respect of Mutomo Cr. Case No. 315 of 2011 and thereat make an oral application for stay of the criminal proceedings. The order of this court aforesaid necessitated that he personally makes such an application. Therefore it was not, as put to this court on 2nd February, 2012 that he was merely required to serve the court order. Accordingly the full and correct facts relating to his absence were not brought to the attention of the court by the advocate whom he had dispatched to hold his brief and to **O.N. Makau Advocate** who appeared for the respondent on that date. It was further not disclosed to court that on 1st February, 2012, the applicants' advocate and one, **Mr. Mulei esq**, an advocate with **O.N. Makau Associates,** seized of the matter for the respondents at the material time had discussed the matter and agreed to an adjournment in view of the engagement elsewhere by the advocate for the applicants. With that agreement the advocate for the applicants had an honest expectation that the indulgence reached with **Mr. Mulei** would be honoured. It was therefore apparent that either **Mr. O.N. Makau Advocate** who attended court for the respondent on that day had not been made aware of the agreement for an adjournment with his associate, **Mr. Mulei**, or fully aware, chose to ignore the same and thereby misled the court into unfairly dismissing the application. The applicants conclude by asserting that, it is in the best interest of justice and so as to avoid irreparable or serious mischief and extreme prejudice to them who are not guilty for the circumstances surrounding their advocates absence on 2nd February, 2012 to grant this application so as not to render their appeal nugatory for no fault of their own and when mistakes of their advocate should not be visited upon them.

The respondent through the 2nd respondent have countered the applicants' assertions by claiming that the application was frivolous, vexatious and an abuse of the process of court aimed at denying them the fruits of their judgment. It should be dismissed therefor. The dismissal order was well founded in law, that no consent to adjournment was given in writing by the counsel and that the ruling in H.C Misc Application 280 of 2011 did not direct that the order be served by the applicants' counsel personally. Even though the advocates for both parties had initially talked, it was still incumbent upon the advocate for the applicants to show good reason for adjournment and his failure to do so cannot be blamed on the respondents' counsel. The prayers sought were discretionary. The applicants had not met the threshold for invoking the exercise of the discretionary powers of the court.

When the application came before me on 14th March, 2012 for *interparte*s hearing, **Mr. Mbithi** and **Mr. Mulei**, both learned counsel for the applicants and respondents respectively agreed to canvass the same by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities.

At this juncture, perhaps it is necessary to give a brief background of the dispute. The application which was dismissed on 2nd February, 2012 had been filed by the applicants in which they sought stay of execution of the judgment and decree passed in Makindu PMCCC No. 25 of 2010 against them pending the hearing and determination of the appeal which they had filed. Interim *exparte* stay of execution of the decree was duly granted by **Dulu,J** on 28th November, 2011. The application was then fixed for *interpartes* hearing on 9th December, 2011. However, the court did not sit on that day whereupon the application was then fixed for hearing on 2nd February, 2012.

On 2nd February, 2012 when the application came up for hearing, **Mr. Mbindyo** held brief for **Mr. Mwania** counsel for the applicants, whereas **Mr. Makau** appeared for the respondents. **Mr. Mbindyo** sought an adjournment on behalf of **Mr. Mwania** on the ground that **Mwania** was away in Mutomo Law Courts to serve on that court personally an order of court staying the criminal proceedings and which criminal proceedings were scheduled for that day. That application was opposed by **Mr Makau** on the

insufficiency of the grounds advanced and on the basis that the hearing date had been fixed by consent. The court declined the application and proceeded to dismiss the application. It is this order of dismissal that triggered the instant application.

The applicants in seeking to reverse the order of dismissal claim that the absence of their counsel which precipitated the order of dismissal was excusable and was not a slight or disrespect to this court. He had proceeded to Mutomo Law Court's on the business of this court which had directed him vide court orders issued in HC Misc. Application No. 280 of 2011 that effectively required him to physically appear in that court and thereat make an oral application for stay of criminal proceedings against his client, the accused therein. However, I have perused the alleged Order and I have not come across such directives. The Order basically granted leave to the applicant to apply for an order of *prohibition* and further ordered that the application be served on the respondents and the Attorney General. There was nothing whatsoever in that order that required counsel to physically attend the lower court. That being the case, the alleged reason by counsel for his failure to attend this court on the material day on the face of it does not appear to be genuine. Nonetheless I have perused the proceedings in Mutomo SRM's Court Cr. Case No. 315 of 2011 for that day that were annexed to the supporting affidavit of the applicants. They show that indeed counsel for the applicants was in attendance and although he does not appear to have made the application for stay of proceedings, the court nonetheless proceeded to stay the criminal proceedings until the hearing and determination of the Misc Application No. 280 of 2011 pending in this court. The only conclusion I can draw in the circumstances is that counsel proceeded to Mutomo Court not pursuant to a court order or directives but out of his preference for reasons best known to him. Thus by trying to tie his appearance in Mutomo Court on unknown court order or directives, counsel was being less than candid to this court. In matters where a court is being called upon to exercise its discretion in determining an application, lack of candour is certainly a factor and or a consideration.

Counsel for the applicants has stated that having been placed between a rock and a hard place, so to speak, either to attend Mutomo Court or this court and having elected to proceed to Mutomo took precautionary measures nonetheless with regard to the application then before this court. He wrote to the respondents' counsel about the foregoing and secondly, secured the concurrence of **Mr. Mulei esq**, who had instructions to act in the matter on behalf of the respondents to have the application taken out. That concurrence it would appear was even struck out in the presence of another counsel, **A.K. Mutua**. It is instructive that these depositions have not been countered effectively by the respondents. All that the respondents have retorted is that there was no such concurrence and even if there was, it was not in writing. What has placed on record by the applicants however, confirm that indeed an agreement had been reached to have the application taken out. I do not think that it is within counsel to swear to something he knows does or did not exist. I know ofno legal requirement that an agreement between parties as to taking out a matter from the hearing list must be reduced in writing. What has become of the old adage an advocates' word is his bond? The Respondents too on this account are guilty of lack of candour.

Finally, I come to the question whether the indiscretions of counsel should be visited upon a client. The general principle and which I agree with is that a litigant should not be punished for the sins of his counsel. The court must guard against undue hardship or irreparable loss being caused to a litigant due to his counsel's negligence and or in advertence, particularly when he had no hand or role to play in matters leading to his advocate's omissions. He should in the circumstances not be punished for such omission (s). This is the 2nd reason why I should allow this application.

Ideally, this application ought to have been brought under Order 45 of the Civil Procedure rules. It was not. However, I will not hold it against the applicants bearing in mind, the overriding objective in civil litigation as encapsulated in sections 1A and 1B of the Civil Procedure Act. On applications to set aside orders and or judgments, the court has unfettered discretion to do justice between the parties and to avoid hardship or injustice arising from inadvertence or mistake on the part of the applicant. However the discretion should not be exercised to assist anyone out to delay the course of justice. *See* **Waweru vs Ndiga [1983] KLR 236.**

In the circumstances of this case, the applicants cannot be accused of seeking to delay the hearing of

the appeal. Indeed when their application for stay was dismissed as aforesaid, they wasted no time in mounting the instant application. Indeed they filed it eight days later. The applicants clearly brought that application without undue or inordinate delay.

In the above circumstances, I do exercise my discretion and allow the application dated 9th February, 2012 in terms of prayer 2 on its face. As the applicants and or their counsel are solely to blame for this imbroglio, they will meet the costs of the application to the respondents.

RULING DATED, SIGNED and **DELIVERED** at **MACHAKOS** his **6TH** day **JULY,** 2012.

ASIKE -MAKHANDIA
JUDGE