



**Musyimi & 2 others v Mulinge & another ((Sued in their capacity as
Legal Representative of the Estate of Mulewa Mulinge (Deceased)) (Civil
Application 316 of 2018) [2022] KECA 404 (KLR) (4 March 2022) (Ruling)**

Neutral citation: [2022] KECA 404 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 316 OF 2018
DK MUSINGA, JA
MARCH 4, 2022**

BETWEEN

**MUSA MUSYIMI 1ST APPELLANT
ERASTUS MUIA MUSYIMI 2ND APPELLANT
MUTIE MUSYIMI 3RD APPELLANT**

AND

**MARTIN MATI MULINGE 1ST RESPONDENT
JOSHUA MUEKE MULINGE 2ND RESPONDENT
(SUED IN THEIR CAPACITY AS LEGAL REPRESENTATIVE OF THE ESTATE
OF MULEWA MULINGE (DECEASED))**

*(An application for reinstatement of Civil Application No. 316 of 2018 which
was dismissed for non-attendance on 25th February 2018 by D.K. Musinga, J.A.)*

RULING

1. On 25th February 2019 I dismissed the applicants' application dated 2nd November 2018 due to non-attendance of the applicants' counsel. On 8th March 2019 the applicants filed an application seeking reinstatement of the dismissed application. The applicants' advocate, Mr. Seth Ojienda, states that the hearing notice was served upon an Assistant in his office on 5th February 2019 but he forgot to diarise it. He urges the Court not to punish the appellants for the mistake of his office. The respondents opposed the application through an affidavit sworn by Joshua Mueke Mulinge, the 2nd respondent, who states, inter alia, that the applicants' Notice of Motion dated 2nd November 2018 was not served upon them until 25th March 2019, long after its dismissal on 25th February 2019; that they only received a hearing notice from the Court; and that the applicants' advocate has not shown that he was prevented by a



sufficient cause from attending court when the application came up for hearing. For those reasons he urges this Court to dismiss the application.

3. I have considered the applicants' application and the opposition thereto by the respondents. Under rule 102 of this Court's Rules, an application for reinstatement of an application has to be made within 30 days of the dismissal. This application was filed within 16 days from 25th February 2019. Secondly, the applicant has to show that he was prevented by a sufficient cause from appearing when the application came up for hearing.
4. The applicants' advocate has candidly stated that the hearing notice was served upon an Assistant in his office but inadvertently the hearing date was not diarised. I have no reason to disbelieve that statement under oath.
5. Mistakes in legal practice, and indeed in all areas of life, occur from time to time. A mistake per se should not automatically disentitle a party from seeking justice from a court of law. The Court needs to look at the matter holistically and consider, among other issues, the nature of the mistake, the extent and ramifications of the mistake; whether the innocent party can be compensated by an award of costs; and overall, the dictates of the wider interests of justice.
6. As Platt, J.A. put in *Philip Keiptoo Chemwolo & Another v Augustine Kubende* [1986] eKLR:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

7. I am inclined to exercise my discretion in favour of the applicants and hereby allow their application dated 8th March 2019. The applicants shall bear the respondents' costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

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