IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NAMBUYE, JA - IN CHAMBERS)

CIVIL APPLICATION NO. 316 OF 2018

BETWEEN

MUSA MUSYMI ....1ST APPLICANT

ERASTUS MUIA MUSYIMI...2ND APPLICANT

MUTIE MUSYMI ....3RD APPLICANT

AND

MARTIN MATI MULINGE... 1ST RESPONDENT

JOSHUA MUEKE MULINGE ....2ND RESPONDENT

Sued in their capacity as legal representative of the estate of MULEWA MULINGE

(Being an application for reinstatement of Civil Application No. 316 of 2018 which was dismissed for nonattendance (D. K. Musinga, J.A) dated 25th *February, 2018*

RULING OF THE COURT

Before me is a notice of motion dated 8th March, 2019, under **Article 159** of the Constitution of Kenya, 2010, **Rule 4**, **Rule 102(1)(3)** of the **Court of Appeal Rules 2010** and other **enabling provisions of the law,** substantively seeking an order of the court granting reinstatement of Civil Application Number 316 of 2018 erroneously described in the prayer as Civil Appeal No. 316 of 2018, together with an attendant order that costs of and incidental to this application do abide the results of the said application also erroneously described as **"appeal"**.

It is supported by grounds on its body, a supporting affidavit sworn by **Seth Ojienda** instructed by the firm of **Ojienda & Co. Advocates** on record for the applicants together with annextures thereto.

It has been opposed by a replying affidavit sworn by **Joshua Mweke Mulinge** the 2nd respondent on his own behalf and on behalf of the co-respondent. It was canvassed through rival pleadings and sole written submissions filed by the applicant in the absence of the respective parties and without oral highlighting.

Supporting the application, the applicants aver and submit that they filed Civil Application No. 316 of 2018 (UR 257/18) dated 2nd November, 2018 under **Article 159** of the Constitution of Kenya, **Rule 4** of the **Court of Appeal Rules**, **2010** and other enabling provision of the law substantively seeking leave of the Court to extend time limited for filing of the notice of appeal therein. That application was supported by grounds on its body, a supporting affidavit of **Seth Ojienda,** similarly instructed and on record for applicants in the said application. It had not been opposed.

The application dated 2nd November, 2018 was placed before **Musinga, J.A** on 25th February, 2019 as a single Judge for hearing and disposal. The learned Judge made orders as follows:

> **"The applicants counsel is not present to prosecute the application dated 2nd November, 2018, which has even been served upon the respondent's advocate. The applicants counsel was served with today's hearing notice on 5th February, 2019. Consequently, that application is dismissed for want of prosecution."**

It is the above order that triggered the filing of the application under consideration. Supporting the application, the applicants concede that

the application dated 2nd November, 2018 was dismissed for want of prosecution due to the advocate's failure to attend court for the hearing of the same on 25th February, 2019, occasioned by the advocates' secretary's failure to diarize the hearing date. It is, therefore applicants' contention that mistakes of counsel should not be visited against an innocent client.

To buttress the above submissions, the applicants rely on **Rule 102** of the **Court of Appeal Rules** and the case of the **Hon. Attorney General vs. The Law Society of Kenya & Another [2017] eKLR** and **Wilson Cheboi Yego vs. Samwel Kipsang Cheboi [2019] eKLR** in support of their submissions that they have proffered sufficient cause; or good cause to warrant granting of the relief sought. Also relied upon is the case of **Philip Keipto Chemwolo & Another vs. Augustine Kubende [1986] eKLR** for the proposition that "**Blunders will continue to be made from time to time and that it does not follow that because a mistake has been made by a party that party should suffer penalty of not having his case determined on merit. That unless fraud or intention to overreach there is no error or default that cannot be put right by payment of costs especially when it is trite that Courts exists for the purpose of deciding the rights and not for the purpose of imposing discipline.**"

In rebuttal, the 2nd respondent on his own behalf and on behalf of the correspondent simply set out the background to the application under consideration and then asserted that on the basis of the said background no good and or valid reasons had been given as to why there was no attendance on the part of the applicants to prosecute the application they now seek to reinstate and on that account prayed that the application under consideration has no merit and should therefore be dismissed.

My invitation to intervene on behalf of the applicants has been invoked under the provision of law cited above. **Article 159** of the Constitution which enshrines the now constitutionally entrenched non technicality principles enjoins the Court not to render justice based on technicalities but on substantive justice. Also cited is **Rule 102(2)** of the **Court of Appeal Rules** which I find was cited out of context as it applies to substantive appeals dismissed for want of prosecution. It was therefore cited erroneously. The proper and corresponding rule should be **Rule 56** of the Court's **Rules**. It provides:

> **56(1) If on any day fixed for the hearing of an application, the applicant does not appear, the application may be dismissed, unless the Court sees fit to adjourn the hearing.**
>
> **.............**
>
> **3. Where an application has been dismissed under sub-rule (1) or allowed under sub-rule (2), the party in whose absence the application was determined may apply to the Court to restore the application for hearing or to re-hear it, as the case may be, if he can show that he was prevented by any sufficient cause from appearing when the application was called out for hearing.**
>
> **4. An application made under sub-rule (3) shall be made within thirty days of the decision of the Court, or in the case of a party who would have been served with notice of the hearing but was not so served, within thirty days of his first hearing of that decision.**
>
> **................**

My take on **rule 56** of the Court's **Rules** is that it donates a discretionary power in the Court seized of an application of this nature to grant or withhold the exercise of that discretionary power. The parameters for exercise of judicial discretion have now been crystallized by case law. I take it from the case of **Githiaka vs. Nduriri [2004] 1 KLR 67**. These are namely that such judicial discretion should be exercised judiciously that is to say with reason and not whim, caprice or sympathy with the sole aim being to do justice to the parties before court.

The reason advanced for the request for the exercise of the Court's discretion in the applicants favour is inadvertence on the part of the advocate who pleads that this should not be visited against their innocent clients. In **Owino Ger vs Marmanet Forest Co-Operative Credit Society Ltd [1987] eKLR**; **CFC Stanbic Limited vs John Maina Githaiga & another [2013] eKLR**; **Lee G. Muthoga vs Habib Zurick Finance (K) Ltd & Another**, **Civil Applications No. NAI 236 of 2009**; and **Catherine Njoguini Kenya & 2 other vs Commercial Bank of Africa Ltd Civil Application No. Nai 366 of 2009**, the court declined to visit the wrongs of an advocate against his client where there was sufficient demonstration that instructions for the defaulted process had been given timeously and that it was the advocate's fault that the procedural steps resulting in the application giving rise to the above decisions had not been followed.

Applying the above threshold to the rival position herein, it is my view that the advocate having accepted full responsibility for the mistake that led to his client's application dated 2nd November, 2018 being dismissed for want of prosecution on 25th February, 2019, visiting that default on the client will be highly punitive. I am, therefore satisfied that **"sufficient cause"** or, **"good cause"** has been shown to warrant exercise of the Court's discretion under **Rule 56** of the Court's **Rules** in favour of the applicants. The respondent will sufficiently be compensated by an award of costs.

In the result, I proceed to make orders as follows:

> **1. The application dated 8th March, 2019 be and is hereby allowed.**
>
> **2. The application dated 2nd November, 2018 be and is hereby reinstated for merit hearing and disposal on priority basis before any Judge other than Musinga, J.A. considering its age.**
>
> **3. Costs of the application to the respondents, to be paid personally by the advocate on record for the applicant.**

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021

R. N. NAMBUYE

…………………………………..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR