IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & MURGOR, JJ.A)

CIVIL APPEAL NO. 275 OF 2014

BETWEEN

THE POSTAL CORPORATION OF KENYA & ANOTHER ...APPELLANTS

AND

AINEAH LIKUMBA & 11 OTHERS …….....……..RESPONDENTS

(An appeal from the Ruling and Decree of the High Court of Kenya at Nairobi (Khaminwa, J.) dated 28th June, 2012

in

H.C.C.C. 688 of 2007)

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RULING OF THE COURT

The motion dated 5th May 2017 by the Postal Corporation of Kenya and its Post Master General (the applicants) as argued before us seeks in the main an order that this Court, though the motion erroneously (and in another era possibly fatally) speaks of the High Court do reinstate the applicants appeal. The said appeal was dismissed by this Court (Visram, Karanja & Koome JJ.A) under ***Rule 102(*1**) of the Rules of Court on account of the absence of counsel for the applicant.

In support of the motion one Della Mwihaki an advocate of the High Court of Kenya practising as such in the firm of Muthoga Gaturu & Co. Advocates, then on record for the applicant, swore in an affidavit on the said 5th May 2017. After giving a chronology of the appeal and various procedural steps taken including applications for stay of execution and for substitution of a deceased respondent, (the latter by consent), the deponent swore that she was served on 20th March 2017 with a notice of hearing for the same substitution application scheduled for 25th April 2017. She swore that on that date she checked the cause list of this Court online to no avail as it was not listed. She then went on to swear as follows;

> ***"10. That I therefore spoke to the advocate for the respondent to request him to take directions in view of the fact the application had already been disposed off.***
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> ***11. That on the same day 25th April 2017 I received a demand letter from the respondent advocate seeking a colossal sum of more than fifty seven million (Kshs. 57,727,926.09/=) of which there is an unjustified sum of Twenty One Million Kshs. 21,167,173.35/= million as***

interest. (Annexed hereto and marked "DM/5" is a copy of the letter.

12. That I subsequently learnt that the appeal was dismissed for non- attendance.

13. That my failure to attend court was inadvertent as I believed that what was coming up before the court was the application for substitution as indicated in the face of the notice. I did make attempts to attend court which were futile because the appeal was the first one called out and dismissed.

14. That the appeal has previously been listed for hearing on at least three other occasions and

I have always attended."

The deponent then proceeded to state that the applicant is a state corporation likely to be executed against for the sum Kshs. 57 million, most of it unjustified, thereby suffering great prejudice through no fault of its own. She attributed the dismissal to the inadvertent mistake of counsel.

Those averments did not move the respondents one bit. In a replying affidavit opposing the motion, **Fredrick Ondeng' Okello** who is the 3rd respondent, and swearing from information provided by the respondents? advocate, disputed, after a chronological prelude, the applicants? version of how the appeal came to be dismissed. He dismissed the applicants? explanation that its counsel believed that it is the application for substitution that was slated for hearing on the material date, as the same had been compromised and allowed by a consent that was adopted before Nambuye, J.A on 3rd March 2017. To him, there would have been no mistake as to what was for hearing on 25th April 2017, namely the appeal itself. He then stated as follows at paragraph 4;

" .... (vii) That counsel for the respondents additionally caused the said hearing notice to be served on the appellants. That the appellants never sought to clarify whatever misconception held by them is demonstration of bad faith and lack of diligence on their part.

(viii) That on the scheduled date for hearing the appeal, Ms. Della Mwihaki called the respondents counsel on record indicating that she was away on other matters as she had been served with a hearing notice for the application and not the main appeal. This was not factually correct."

Stating that the applicants have not been candid litigants and pleading that "the stream of justice ought to be kept pure and let to flow freely without hindrance or let" the deponent prayed that we dismiss the application.

At the hearing of the application, learned counsel **Mr. Maweu** and **Mr. Mungla** for the applicants and the respondents, respectively, relied upon and amplified the positions expressed in the rival affidavits. Mr. Maweu invited us to consider the notice of hearing served upon the applicant?s advocates and see that it referred to ***an application*** coming up for hearing. He reiterated that Ms. Mwihaki did have a conversation with Mr. Mungla in which she indicated that she understood that the matter was erroneously notified for hearing of the application and not the appeal but that her counterpart did not bring this to the attention of the learned Judges but instead pressed for the dismissal of the appeal.

Counsel pointed out that the applicants? advocates had attended court on all previous occasions when the appeal was adjourned to allow the parties to explore settlement and that the applicants are otherwise ready to have the appeal heard. Citing the case of ***SAVINGS & LOAN LTD vs. ONYANCHA BW'OMOTE [2014] eKLR***, he concluded that the applicants had shown sufficient cause for non-attendance and that having come to court with clean hands, they should not be punished for the mistakes of both its advocates and of the registry of this Court.

On his part, Mr. Mungla fired back that the absence of the applicants? advocates on 25th April 2017 "*was not out of mistake but premeditated and deliberate*." He conceded, however, that the hearing notice

served on the applicants? advocates did give the impression that it was an application coming up for hearing but took the view that it was a typographical error. He urged us not to exercise our discretion in favour of the applicants. When we pressed him on the averment in the replying affidavit that he had effected service of the hearing notice, he demurred and conceded that he had no evidence of any kind to demonstrate such service.

We have considered the application carefully and paid due attention to the rival positions propounded by the parties herein. We think that the matter is a simple one: all we need to decide is whether the applicants? advocate was prevented by sufficient cause from attending court on the day the appeal was dismissed. The beginning point is the notice of hearing that was served upon the said advocate. The first thing that stands out is that the number of the proceedings was rendered as; **"Civil Appeal (Application) No. 275 of 2014."**

That numbering is clearly erroneous and misleading because it notifies the recipient that the notice of hearing relates to an application in the appeal and not the appeal itself.

That error is compounded by the description or narrative regarding the proceedings which the registry in issuing the notice expressed thus;

> ***"Being an application for substitution of a deceased party in our appeal from the ruling and decree of the High Court at Nairobi Khaminwa, J. Dated 28th June 2012 in HCCC No. 688 of 2017."***
>
> (Our emphasis)

This, too, notified that it was not just an application, but specially one for substitution that was coming up on the date being notified.

It gets worse. Immediately after and under the title of „Notice of

Hearing?, the narrative is as follows;

> ***"Take notice that the above appeal (application) will be heard in Nairobi on Tuesday the 25th Day of April 2017 at 9.00am ...."***

(Our emphasis)

Now, notwithstanding that the penultimate line of the notice warns that in default of appearance „*the appeal may be heard and determined in his absence*," there can be no denying that the titling, narrative and notification contained in the notice of hearing very clearly and unequivocally notifies of a substitution application coming up for hearing. It is this information that **Ms. Mwihaki**, an officer of the Court, swore to have based the belief that there was an error of listing since the said substitution application had previously been settled and granted by consent duly recorded and adopted as an order of the Court before Nambuye, JA. She swore, which Mr. Mungla hardly controverted, that she did call Mr. Mungla and did speak to him about the confusion which was the main reason why she did not attend court. She also swore to not having sighted the matter on the Court?s online cause list.

Given those circumstances, we cannot possibly agree with the hardline position taken by Mr. Mungla and his clients to the effect that Ms. Mwihaki deliberately chose not to attend court and that the applicants were coming to court with unclean hands.

We think it to be clear to see that the Court registry fell victim of the cut and paste culture of the computing age and ended up issuing a notice of hearing that was patently misleading and succeeded only in sowing confusion. It is not clear to us how the cause of justice would be served by a mechanistic and unrealistic blaming of an advocate and a party that were misled by the Court itsel, in circumstances such as we have set out.

We think, with respect, that Mr. Mungla, having spoken to Ms. Mwihaki who mentioned the confusion we have set out, did owe a duty of candour to the Court. He should have done the honourable thing that professional integrity demanded and disclosed to the Court the cognitive puzzle his counterpart had been thrown into. At the very least he should have brought to the attention of the Court, as its officer expected at all times to provide assistance to it and be an honest guide, the fact that the notice of hearing as framed was at best ambiguous and capable of misleading, as it did in fact, misled Ms. Mwihaki. It is neither an answer nor an excuse for him to have coldly concluded that she ought not to have been misled as she knew the substitution application had previously been disposed of.

We think therefore, with respect, that Mr. Mungla did not exhibit the finest moment of honesty and honour in advocacy at the bar when he boldly and unflinchingly, and without reference to the conversation he had held with his counterpart, applied that the Court do dismiss the appeal for non-attendance.

It is made no better that he had since maintained the same extremist position even during the hearing of the application before us even when gently invited to consider that the specific hearing notice could plausibly mislead an advocate served with it.

In the circumstances, and bearing in mind that courts exist to do justice and not to merely engage in regimental stick-wielding, we have no hesitation in holding that the applicants were prevented by sufficient cause from attending court on 25th April 2017 when their appeal was dismissed. We do cognizant that dismissals of appeals, as of suits, on account of defaults of attendance at the hearing due to inadvertence or mistake, without the intention to overreach, ought to be reversed where the justice of the case warrants it. See ***SOLOMON K. NJUGUNA vs. KENYA SAVINGS & MORTGAGES LTD & ANOTHER*** **[1997] eKLR.**

We are also fully persuaded by the sentiments of Apaloo J.A in ***CHEMWOLO & ANOTHER vs. KUBENDE*** **[1986] KLR 492** at P 502 which are a sobering reminder of the correct approach that courts should take when dealing with procedural defaults and their place vis-à-vis substantive justice;

> ***"When I asked counsel for the respondent what loss or damage would result to him if this suit were admitted to a hearing on the merits, he said nothing that I think should inhibit the court from allowing this suit to be heard on its merits. I recorded counsel as saying that a court's discretion should not be exercised in favour of a negligent applicant. I think the charge that the appellants were negligent is one that can be questioned. But counsel seems to think the defendants are deserving of punishment and must be shut out for their negligence.***

I think a distinguished equity judge has said:

> *'Blunders will continue to be made from time to time and 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 merits.'*
>
> ***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****."*

For those reasons the motion dated 5th May 2017 succeeds and is allowed. We accordingly order that Civil Appeal No. 2014 be reinstated forthwith. The stay of execution granted pending its hearing and determination shall in consequence, and quite naturally, be restored as well. We direct that the appeal be listed for hearing and disposal on priority basis.

Given the intransigence of the respondents in this matter, and costs being at our discretion, we order that each party shall bear its own costs of the motion.

Dated and delivered at Nairobi this 8th day of December, 2017. R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

……..……..

JUDGE OF APPEAL

A. K. MURGOR

……..…..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR