



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**HIGH COURT CRIMINAL APPEAL CASE NO. 67 OF 2019**

**PAUL NGILA.....1<sup>ST</sup> APPELLANT/APPLICANT**

**WATHE MBENIA.....2<sup>ND</sup> APPELLANT/APPLICANT**

**-VERSUS-**

**MUSILI MALONZA & MAKASI MUSILI(Suing as the**

**administrators of the Estate of the late Isika Musili (Deceased).....RESPONDENTS**

**RULING**

1. Before me, is a Notice of Motion dated 24<sup>th</sup> May, 2021 lodged by the appellants/applicants herein asking for the following orders namely: -

*i. Spent*

*ii. That this court be pleased to grant orders setting aside the proceedings of 17.05.2021 marking the appeal herein as withdrawn with no order as to costs.*

*iii. That the appeal be reinstated and heard*

*iv. Costs be provided.*

*v. This Hon. Court be pleased to make any other such orders as it deems fit.*

2. The grounds upon which this application is made are as follows: -

*a) That the appeal came up before this court on 17.05.2021 for directions.*

*b) That the appellants advocate had instructed Mr. Mwendwa advocate to hold his brief but Mr. Mwendwa failed to do so.*

*c) That the Respondent's Counsel made an incorrect impression that the decretal sum had been paid which in their view was not true.*

*d) That the matter was marked as settled.*

*e) That the appellants are desirous of being heard and have a right to be heard.*

3. This application is based on an affidavit sworn on 24.05.2021 by applicant's counsel Bruno W. Situma. The learned Counsel has blamed the woes facing the appellant on Mr. Alfred Mwenda Advocate whom he avers it did not affect instructions he had given him. He avers that the said advocate failed to act despite instructions. He however has not annexed an affidavit from the said Alfred Mwenda advocate stating that he had been requested to hold brief. He however has exhibited evidence of a SMS message sent to xxxxxxxxxx.

4. The applicants contend that unless the orders sought are granted their constitutional right to appeal will have been denied and has urged this court not to penalize them on account of counsel's mistake.

5. In their written submissions through counsel, the applicants contend that they were unrepresented in court on 17.5.2021 when their appeal was marked as withdrawn. They have cited the provisions of **Order 25 Civil Procedure Rule** arguing that the procedure stipulated therein was not adhered to. They submit that their appeal was not properly withdrawn and have urged this court to exercise its discretion in their favour arguing that they have a good appeal where pertinent issues have been raised.

6. The Respondents have opposed this appeal through a joint replying affidavit sworn on 8.6.2021.

7. The respondents aver that the applicants have frustrated them by denying them fruits of their judgement.

They aver that the applicants refused to pay after Justice Mutende dismissed their application for stay of execution on 26.05.2020.

8. They contend that they filed a declaratory suit which was not defended and that it applied for warrants which made the applicants to pay vide remittance advise which they claim was later fraudulently stopped. They fault the applicants for not acting in good faith and using all the tactics with sole intention of defeating/or delaying enjoyment of fruits of their judgement.

9. This court has considered this application and the response made. I have perused through the proceedings of 17.05.2021 and the order made. It is quite apparent that this court made the order marking the appeal as withdrawn, when the appellants failed to turn up in court and when the respondents made it clear that they had been paid the entire sum and thereby creating an impression that the matter had been settled which could explain why the appellants were not in court either by themselves or through counsel.

10. It has now transpired that the reported payment was not a reality because the respondents have stated in their affidavit that the payment was stopped. This court does not wish to go into whether the stopping was fraudulent or in bad taste at this juncture. What is clear and obvious is that the withdrawal of the appeal was based on a wrong presumption.

In the premises this court find that the application dated 24.5.2021 is merited.

I will use my discretion to set aside the orders made in this court on 17.05.2021 and reinstate the appeal.

I will direct parties to take directions forthwith for purposes of timely disposal of the same. Costs of the application shall be in the main appeal.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 9TH DAY OF MARCH 2022.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**



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