Mandu v Washiali & another (Civil Appeal E056 of 2024)
[2024] KEHC 11342 (KLR) (27 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11342 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL E056 OF 2024

AC BETT, J

SEPTEMBER 27, 2024

BETWEEN

MR. ALLOYS G. MANDU, CHAIRMAN MUMIAS CANE FARMERS CO-OPERATIVE UNION ..... APPLICANT

AND

WASHINGTON SILVANUS WASHIALI ..... 1ST RESPONDENT

MUMIAS CANE FARMERS CO-OPERATIVE UNION ..... 2ND RESPONDENT

RULING

1. Before the court is the Appellant's application dated 5th July, 2024 seeking the following reliefs:
    i. Spent
    ii. Spent
    iii. That the Honourable Court be pleased to review and/or set aside its ruling delivered on 27th June, 2024 dismissing the appeal herein.
    iv. That the Appeal herein be reinstated and the court do proceed to enter Judgment based on the records and the submissions filed.
    v. That the costs of the application shall be in the cause.
2. The application is supported by the Applicant's Counsel's Supporting Affidavit sworn on 5th July, 2024.
3. The Application is opposed by the 1st Respondent through his Replying Affidavit dated 15th July, 2024. The 2nd Respondent never filed any response however.

Applicant's Case

4. The Applicant avers that there is an apparent error on the face of the record owing to the fact that the court struck out this appeal on 27th June, 2024 for failure to comply with the orders of 3rd April, 2024 whereas he had in fact complied with said orders.

5. The Applicant contends that the orders of 3rd April, 2024 were only availed to them on 12th April, 2024 owing to a delay in posting them on the part of the Court on its Case Tracking System Portal(CTS).

6. Further, the Applicant asserts that the delay in procuring was apparently occasioned by the fact that application giving rise to the orders on 3rd April, 2024 had been filed during the Easter Vacation.

7. That be that as it may, when the matter was finally addressed she promptly paid for the order on 4th April, 2024 but the same was only availed on Monday 15th April, 2024 though it was signed on 12th April, 2024.

8. Consequently, the Applicant pleads that his application be allowed as prayed.

Respondent's Case

9. The 1st Respondent on his part avers that the Appellant has never complied with the directions of court issued on 3rd April, 2024.

10. Noteworthy, the Respondent avers that the Applicant never filed the record of appeal within 45 days as earlier directed by this court. That he was only served with the record of appeal on 10th July, 2024 fourteen days after this Appeal was struck out.

11. The Respondent further claims that an earlier appeal by the Appellant had previously been dismissed for failure to abide by the court's orders. In support of this assertion, the Appellant attached an Order dated 6th December, 2022 issued in Kakamega High Court Civil Appeal no. E048 of 2021.

Issues for determination

12. It is manifest that the substantive order sought by the Applicant in the instant application is an order reviewing and/or setting aside the findings of the court vide its Ruling dated 27th June, 2024.

13. As such, the Court discerns the main issue for determination as follows:Whether the Applicant is entitled to a grant of orders setting aside and/or reviewing the Ruling and Order of the Court issued on 27th June, 2024.

14. The Applicant inter-alia submitted that as of 27th June, 2024 he had duly filed his record of appeal. As such, he contends the fact that the court proceeded to give effect to the orders of 3rd April, 2024 constitutes an apparent error on the face of the record.

15. The Respondent on his part refutes this and asserts that granted the Applicant never complied with the directions of 3rd April, 2024, the court was right in its determination.

16. The Respondent also contends that even if the Applicant filed his record of appeal on 31st May, 2024, as claimed, it was filed out of time as the timelines given by the court meant that the leave granted to the Applicant lapsed on 18th May, 2024.

17. On his part the Applicant argued that the orders of 3rd April, 2024 were only availed to them on 12th April, 2024 owing to a delay in posting them on the part of the Court on its Case Tracking System

(CTS) which delay had been exacerbated by the fact that the application had been filed during the Easter Vacation.

18. That be that as it may, when the matter was finally addressed she promptly paid for the order on 4th April, 2024 but the same was only availed on Monday 15th April, 2024 though it was signed on 12th April, 2024.

19. I have duly considered the parties' rival affidavits and submissions. I note that the Applicant largely predicated his application on an assertion that there was an apparent error on the face of the record.

20. I am however apprehensive that the Applicant's contention that there was an apparent error on the face of the record may not be arguable noting that on 27th June, 2024, the issue the court grappled with had to do with whether the Applicant had complied with the directions of 3rd April, 2024 which inter-alia required him to file and serve his record of appeal and submissions within 45 days.

21. Even if the Appellant's explanation that, he only managed to get the court's orders and directions on 15th April, 2024, is to be believed; the Applicant cannot still run away from the fact he never served it, or at least there is no evidence on record that the same was served within the set timeline.

22. Moreover, I have perused the court record and I cannot find the Appellant's submissions canvassing the Appeal. I cannot thus help but conclude that the Applicant never filed his submissions as directed in the court order, aforesaid.

23. Would it then be proper for the Applicant to claim that this court's decision to dismiss the appeal for failure to comply with its earlier orders constituted an apparent error on the face of the record? My answer is a resounding 'No'.

24. In any event, it is trite law that for a plea of review on account of the existence of an apparent error on the face of the record, the omission must be self-evident and should require an elaborate argument to be established as was determined by the Court of Appeal in *National Bank of Kenya Ltd V Ndungu Njau* CA 211/96 where it was inter-alia held:

> "...A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law misconstruing a statute or other provision of law cannot be ground for review". ...The learned judge made a conscious decision on matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it would be a good ground for appeal but not for review. Otherwise we agree that the learned judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.

25. For the above reason, I dismiss the Applicant's plea of review in so far as it was premised on a contention that there exists an apparent error on the court's record.

26. Be that as it may, I would be minded to allow the Applicant's application if only, to avoid visiting undue prejudice, hardship and injustice to the Appellant who will have been forever driven from the seat of justice were this application be declined.

27. This is in line with the overriding objective of Civil Procedure as spelt out under sections 1A & 1B of the *Civil Procedure Act* and Article 159 of *the Constitution*.

28. In making this determination, the Court is fortified by the findings of the Court of Appeal in *Abdirahman Abdi v Safi Petroleum Products Ltd & 6 others* [2011] eKLR where it was held:

> " The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantial justice. It is however, not a principle the court may invoke without giving the parties an opportunity of being heard on the matter. In the matter before us the parties were given an opportunity to express their views. Mr. A.B. Shah, was however, reluctant to express a view on the matter because he did not think he needed to do so in absence of an application for extension of time to serve a notice of appeal.
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> That was despite the fact that the court urged him more than once to do so. In situations as the one before us what a court is obliged to do is to give a party an opportunity to be heard. If for whatever reason the party concerned does not avail himself of that opportunity, he should not complain that he was denied a hearing. In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of sections 3A and 3B of the *Appellate Jurisdiction Act*, Cap 9 Laws of Kenya, and later, Article 159(2)(d) of *the Constitution* of Kenya, 2010, changed the position.
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> The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2)(d) of *the Constitution* makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion".

29. In view of the foregoing, the Court is inclined in exercise of its inherent power and discretion to allow the Appellant's application dated 5th July, 2024 subject to the following terms:

    i. The Orders of June 27, 2024 are hereby set aside.

    ii. The Applicant's Appeal is hereby reinstated for hearing and determination on its merits.

    iii. The parties are granted leave of seven (7) days, apart; to file and serve their respective written submissions canvassing the appeal.

    iv. Costs shall be in the cause.

30. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 27TH DAY OF SEPTEMBER, 2024.

A. C. BETT

JUDGE

In the presence of:

Ms. Chesire holding brief for Ms. Rauto for Applicant

Respondent present in person

Court Assistant: Polycap