Karinga v Indimuli (Miscellaneous Application E891 of 2023)
[2024] KEHC 11285 (KLR) (Civ) (25 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11285 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

MISCELLANEOUS APPLICATION E891 OF 2023

JN MULWA, J

SEPTEMBER 25, 2024

BETWEEN

JOSEPHAT KARINGA ..... APPLICANT

AND

EDWARD INDIMULI ..... RESPONDENT

RULING

1. This ruling is in respect of two applications before the court dated 30/9/2023 and 9/11/2023 brought by the Applicant herein.

2. The first Application dated 30/9/2023 is premised upon Section 3A, 79G and 95 of the *Civil Procedure Act* (CAP 21) Rule 22(1), (2), (3), Order 40 Rule 1(a), rule 4(1), (2), Order 50 Rule 5, Order 51 Rule 1 and 3 of the *Civil Procedure Rules, 2010* and all other enabling provisions of the law. It is grounded on the sworn affidavit of Jullie A. Ogola, Advocate for the Applicant herein.

3. The Applicant seeks seeks two main orders; leave to file appeal out of time from judgment of the trial court delivered on 20/6/2023. The applicant also seeks an order of stay of execution of the said judgment pending hearing and determination of the intended appeal.

4. The second application dated 9/11/2023 is brought under the provisions of Article 50(1) and 159 (2) (a),(b), (d) & (e) of the *Constitution* of Kenya 2010, Order 51 Rules 1 and 15 of the Civil Procedure Rules, 2010, Section 1A, 1B and 3A of the *Civil Procedure Act*, and all other enabling provisions of the law. The Applicant seeks numerous orders but on the main:

    a. An order to set aside, review and/or vary the order made on 8/11/2023 by this Honourable Court dismissing the Application dated 30/9/2023 and reinstatement of the same for hearing.

b. Stay of execution of the judgment of the trial court pending hearing and determination of the intended appeal.

5. It is supported by an affidavit sworn by Julie Ogola, Advocate for the Applicant and the grounds on its face, and opposed by a Replying Affidavit sworn on 12/3/2024 by the Respondent.

6. By nature of the two applications, I find it appropriate to interrogate and determine them simultaneously flagged issues for determination as follows;

1. Whether the orders made on 8/11/2023 by this court ought to be set aside.

2. Whether the prayer for reinstatement of the application dated 30/9/2023 is merited

3. Who should bear the costs of the application.

7. The Applicant seeks an order to set aside, review and/or vary the order made on 8/11/2023 dismissing the Applicant's application dated 30/9/2023. The Applicants case is that at the time his advocate was drafting the application dated 30/9/2023 he had not yet obtained a copy of the judgment delivered in Milimani Civil Suit No. 2183 of 2022 and therefore omitted to seek leave to file an appeal out of time. The applicant contended that the mistake of his advocate should not be visited upon him.

8. The Respondent on its part in opposition states that the Applicant's application for review of the orders made on 8/11/2023 has no is not merited as no good reasons or at all have been advanced.

9. Section 80 of the *Civil Procedure Act* stipulates as follows:

> " 80. Any person who considers himself aggrieved-
>
> i. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> ii. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

10. Order 45 Rule 1 of the *Civil Procedure Rules 2010* provides for the grounds upon which review may be granted as follows;

> " (1) Any person considering himself aggrieved—
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> a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

11. From the foregoing provisions, it is clear that a review may be granted by the court if there is a discovery of new and important matter or evidence; if there is a mistake or error apparent on the face of the record; or for any other sufficient reason, provided that the application is made without unreasonable delay.

12. What constitutes an error on the face of the record was aptly spelt out by the Court of Appeal in *Nyamogo & Nyamogo v Kogo* [2001] EA 174, as follows: -

> " Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal." [My emphasis]

13. In *Kanyabwera v Tumwebaze* [2005] 2 EA 86, the court stated that:

> " In order that an error may be a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its correctness. It must be an error so manifest and clear, that no court would permit such an error to remain on the record. The "error" may be one of fact, but it is not limited to matters of fact and includes errors of law." [My emphasis]

14. The Applicant states that this current application is based on errors made by his advocates, who failed to seek leave to appeal out of time since he had not yet obtained a copy of the judgement delivered in Milimani Civil Suit No. E2183 of 2022.

15. In the case of *Belinda Muras & 6 Others v Amos Wainaina* [1978] KLR Hon Madan JIA (as) he then was defined what constitutes a mistake as follows:

> " A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate." [own emphasis

16. 18. On 18/11/2023 the application dated 30/9/2023 was listed for hearing before this court. Both parties were represented by counsel. The applicant's advocate Ms Ogola told the court that she was not aware of the date of judgment as he was absent from the trial court. He did not tell the court why there was no representation of the applicant by advocate save to state in the affidavit in support that at the time of drafting the application, the advocate did not have a copy of the judgment, and further that as at 8/11/2023 when she files the second application, she too had not obtained a copy of the judgment without further reasons as why she had not obtained the judgment. In essence, no plausible reasons can be seen from the Affidavit in support because in my view, none existed save for what I would call laxity and negligence, and the very casual manner of arguments before the court on the issues in support of her supporting affidavit.

17. It cannot be that a court, upon no reasons of advocate's failure to take appropriate action, and simply and casually tells the court that the mistake or error was on the part of the advocate and not caused by the indolence on the part of her client and as a result, the court would excuse the mistake and set aside or vary its orders. There must be cogent and real reasons to persuade a court to set aside its orders.

18. In the case of *Martha Wangari Karua v IEBC* Nyeri Civil Appeal No.1 of 2017 the Court of Appeal held as follows: -

> " The Rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be..."

19. The Applicant was accorded a fair hearing on 8/11/2023 by his Advocate. Additionally, no reasons were advanced for failure to obtain a copy of the judgment delivered on 20/6/2023, after about three months of its delivery.

20. The Applicant's prayer for reinstatement is grounded on the averments of his counsel in the application that on 8/11/2023 when the suit was coming up for interparties hearing, they were yet to obtain the copy of the judgement delivered in the trial court.

21. The principles governing reinstatement of a suit, were stated in the case of *John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR as follows:

> " The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the *Constitution* . Article 50 coupled with article 159 of the *Constitution* on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such a matter of reinstatement of a suit which has been dismissed by the court."

22. In an application for reinstatement of a dismissed suit or application, an applicant seeks the discretion of the Court. The Court must caution itself not to exercise its discretion in a manner that will result in an injustice. This position is fortified in the case of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR, where the Court of Appeal stated:

> " We agree with those noble principles which go further to establish that the court's discretion to set aside an exparte judgment or order.."

23. At the end this court is not persuaded to allow the Applicants prayers firstly to set aside its dismissal orders of the application dated 8/11/2023 nor to reinstate the application dated 30/9/2023 for hearing.

24. The two applications dated 30/9/2023 and 9/11/2023 are devoid of merit and are dismissed with costs to the Respondent.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF SEPTEMBER, 2024.

JANET MULWA

JUDGE.