**Kenya Power and Lighting Company Limited v Mwangi (Civil Appeal Suit E012 of 2023) [2024] KEHC 16128 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16128 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYERI**

**CIVIL APPEAL SUIT E012 OF 2023**

**MA ODERO, J**

**DECEMBER 20, 2024**

**BETWEEN**

**KENYA POWER AND LIGHTING COMPANY LIMITED ..... APPELLANT**

**AND**

**ALICE WANJIRU MWANGI ..... RESPONDENT**

## JUDGMENT

1. The Appellant Kenya Power & Lighting Company have filed this Memorandum of Appeal dated 24th February 2023, challenging the Ruling delivered by Hon. James Macharia Muriuki, Senior Principal Magistrate on 31st January 2023.

2. The Appellant prayed for Orders. THAT

> "i. The court set aside the ruling of the lower court and substitute the same with a ruling of the allowing Appellant's application or alternatively that the honourable court substitute the lower court ruling with a such a ruling/order as the court may deem fit and just and expedient."

3. The Respondent Alice Wanjiru Mwangi opposed the appeal.

### Background

4. The Respondent Alice Wanjiru Mwangi, filed this suit against the Appellant Kenya Power & Lighting Company vide the plaint dated 17th August 2020.

5. The matter came up for hearing on 28th August 2022. On that date counsel for the plaintiff was in court. Despite having had notice of the hearing date counsel for the Defendant was absent. The matter proceeded Ex-Parte. The plaintiff testified after which her case was closed. The court also closed the Defendants case.

6. The Appellant then filed an application dated 19th September 2022 seeking orders that the plaintiff be re-called for purposes of cross-examination and that the Defendant be granted an opportunity to tender evidence in the case.

7. The learned trial Magistrate considered that application and dismissed the same vide the Ruling delivered on 31st January 2023.

8. Being aggrieved by that ruling the Appellant filed this Memorandum of Appeal which was premised upon the following grounds:-

   (1) The Learned Trial Magistrate erred in law and in fact in failing to consider that the Appellant has at all times participated and been present in court through its advocates.

   (2) The Learned trial magistrate erred in law and in fact in failing to consider that the circumstances which caused the Appellant's advocates not to be present in court for the hearing on 23rd August 2022 were an excusable mistake and sufficient reason has been shown.

   (3) That the Learned magistrate erred in law and in fact in failing to consider the Defendant's evidence by way of submissions on record that the mistake on the part of the Appellant's Advocates should not be visited on the Appellant.

   (4) That the Learned magistrate erred in law and in fact in failing to consider the Defendant's evidence by way of submissions on record on what the law provides under Section 146(4) of the *Evidence Act* Cap 80 Laws of Kenya, Order 18 Rules 10 of the Civil Procedure Rules and Articles 50(1) and 159(2) of *the Constitution*.

   (5) That the Learned magistrate erred in law and in fact in driving away the Appellant from the set of justice without according it a hearing.

**Analysis And Determination**

9. I have carefully considered the appeal before this court, the submissions filed by both parties as well as the record of proceedings before the lower court.

10. The only issue for determination is whether the Appellants prayer to have the proceedings re-opened to enable them participate in the trial ought to be allowed.

11. It is common ground that both parties in this matter were represented by counsel. The record indicates that several mentions took place before the matter was finally ripe for hearing.

12. On 21st June 2022, the trial court set the main suit for hearing on 23rd August 2022. Although counsel for Defendant was not present on that date, the Defence later admitted that they were aware of the hearing date.

13. On 23rd August 2022 which was the hearing date the plaintiff and her Advocate were in court but there was no appearance for the Defence.

14. In their Affidavit in support of the application dated 19th September 2022 counsel for the Defendant confirmed that they were aware of the hearing date and had even instructed an Advocate Mr. Mbau to handle the matter on their behalf.

15. That on the morning of 23rd August 2022 one DAMARIS MWENDE was present in court with the office file awaiting to pass on the same to Mr. Mbau.

16. The court after mentioning the matter gave a time allocation of 10.30 am. Counsel for the defendant informed Mr. Theuri Advocate of this instructing that Mr. Mbau avail himself in court at 10.30am

17. However when the matter was called out at 10.30 am there was no representation for the Defendant and therefore the matter proceeded Ex parte.

18. From the above narration it is clear to this court that not only were the Appellants Advocates fully aware of the hearing date but they did take all steps to ensure that an Advocate was in court to represent the Defendant in the matter.

19. The explanation by Mr. Mbau that he had left his phone at home and therefore was not able to receive any communication from Defence counsel is not totally outlandish It is a common occurrence for persons to forget their mobile phones at home more so in the busy and fast paced Life that many professionals live.

20. The decision on whether or not to allow an application to recall a witness is largely discretionary. Section 146 (4) of the *Evidence Act*, Cap 80, Laws of Kenya grants the Court general powers to recall a witness. It provides thus:

> "(4) The Court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively."

21. Similarly, Order 18 Rule 10 of the Civil Procedure Rules grants the Court powers to recall any witness who has been examined. It provides thus:

> "10. The Court may at any stage of the suit recall any witness who has been examined, and may, subject to the Law of evidence for the time being in force; put such questions to him as the Court thinks fit."

22. The decision whether or not to re-open an on-going case is left purely to the realm of judicial discretion. This discretionary power is to be exercised judiciously and in the interest of justice. The principles on interfering with judicial discretion were laid down in the case of Price and Another v Hilder [1996] KLR 95 as follows:

> "In considering the exercise of judicial discretion, as to whether or not set aside judgment the court considers whether in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment. The court will not interfere with the exercise of discretion by an inferior court unless its satisfied that its decision is clearly wrong, because it has acted on matters on which it should not have acted or because it has failed to take into consideration and in doing so arrived at a wrong decision."

23. In the Canadian case of OAKLEY v Royal Bank of Canada {2013} ONSC 145 {2013} OJ NO. 109 SC it was held that:-

> "the Court requires the parties to mitigate to bring forward their whole case, in both civil and criminal matters, the crown or plaintiff must produce and enter in its own case all clearly relevant evidence it has. On the other hand, a trial judge has the discretion to permit a plaintiff to re-open its case. This discretion however must be exercised judicially. It must

involve a scrupulous balancing of the accountability of counsel for decisions regarding the prosecution of its case and the interest of justice." [emphasis my own]

24. The Appellant pleaded that if the orders sought were not granted then their right to be heard was likely to be curtailed. They also urged that the mistakes of an Advocate ought not be visited upon the client.

25. The right to be heard is a basic tenet of our legal system. This is not a situation where the Advocate failed and or declined to appear in court out of laxity, indifference or capriciousness. The Defendants Advocate made arrangements to have the defendant represented in court but despite his best efforts the Advocate who was to hold brief did not appear in court. This failure cannot be blamed on the Defendant or his advocate.

26. In his judgment the trial court found that the conduct of the defendants Advocate was negligent and indicated that he had taken a casual approach to the conduct of the defence.

27. With respect I do not agree that the conduct of the defendants advocate smacked of negligence and a casual approach. As has been stated earlier the Defendants Advocate took all steps necessary to ensure that an Advocate was present in court for the hearing. The fact that said Advocate failed to attend court cannot amount to casuality or negligence.

28. As a general rule courts ought to be slow to shut out a litigant unless it is clearly shown that said litigant was indolent. The right to be heard is sacrosanct.

29. In the case of Kalemera -vs- Salama Estates [1971] E.A 284, the court stated as follows.

> .....The test to be applied under section 101 which speaks of "the ends of justice" is wider in its terms and permits a greater discretion. Poverty of the excuse is not the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally it should always be remembered that to deny the subject a hearing should be the last resort of a court. (Emphasis supplied).

30. Similarly in the case of: Philip Chemowolo & Another v Augustine Kubede, [1982-88] KAR 103 at 1040 Apalo, J.A (as he then was) stated as follows:

> " Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. 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 the purpose of imposing discipline." [own emphasis]

31. In my view failure of the Appellants Advocate to appear in court on the hearing date was neither intentional nor indolent. It was the result of an excusable error/mistake which should not result in the denial of the defendant's right to be heard.

32. Finally I allow this appeal and make the following orders.

    (1) The plaintiff is to be re-called for purposes of cross- examination.

    (2) The Defendant is to be granted an opportunity to present their defence in this matter.

    (3) Costs of this appeal will be met by the Appellant.

**DATED IN NYERI THIS 20TH DAY OF DECEMBER 2024.**

**MAUREEN A. ODERO**

**JUDGE**