SGU v RMG (Suing as mother and next friend of SK, CW & FW) & another (Civil Appeal E094 of 2024) [2024] KEHC 16291 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16291 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E094 OF 2024

FN MUCHEMI, J

DECEMBER 19, 2024

BETWEEN

SGU ..... APPELLANT

AND

RMG (SUING AS MOTHER AND NEXT FRIEND OF SK, CW & FW) ..... 1ST RESPONDENT

SK ..... 2ND RESPONDENT

RULING

Brief facts

1. The application for determination is dated 14th March 2024 seeks for orders of reinstatement and readmission of this appeal.

2. The respondents filed a Replying Affidavit dated 18th July 2024 in opposition to the application.

The Applicant's Case

3. The applicant states that he was the defendant in Ruiru Principal Magistrate Court Children Case No. E026 of 2022 where the matter was heard and determined and judgment delivered on 20th January 2022. Being aggrieved with the decision of the magistrate's court, the applicant instructed his advocates Messers Kimani Charagu & Co. Advocates to lodge an appeal against the entire judgment. Consequently, the said advocates filed a Memorandum of Appeal dated 5th March 2022.

4. The applicant states that the current advocates, E.W. Kamuyu & Co. Advocates failed to expedite the said appeal which prompted the respondents' advocates to apply for dismissal of the appeal through a formal application. The applicant further states that the said advocates failed to oppose the said application and neither did they inform the applicant that there was such an application that has been

filed. According to the applicant, his advocate failed to attend court for hearing of the application despite having been served by the respondents' advocates which led to the dismissal of the appeal for want of prosecution.

5. The applicant argues that if the execution proceedings are allowed to proceed, his appeal which has high chances of success might be rendered nugatory and he shall suffer irreparable loss and damage.

The Respondents' Case

6. The respondents state that the applicant from the onset had no real intention of prosecuting the appeal to its conclusion but instigated it in order to buy time and frustrate the respondent in her respondent efforts to hold him accountable for child maintenance.

7. The respondents aver that the applicant has not fallen out with his counsel as the said counsel continues to represent the applicant in other matters such as MCCR/E615 of 2022 whereby the applicant has entrusted the counsel to safeguard his rights and liberties.

8. The respondents state that the predicament the applicant finds himself in is of his own making as to date he remains in contempt of the court orders issued by the trial court. Further, the applicant has not made any payments towards maintenance of the children as ordered by the trial court and remains in contempt of the court's orders dated 25th August 2021 and the judgment delivered on 20th January 2022. As a result, the respondents state that they filed a Notice to Show Cause dated 4th April 2024 in the lower court for the amount of Kshs. 1,401,450/- being the outstanding amount the applicant owes as unpaid maintenance but the NTSC was by the court.

9. The respondent argues that the appeal was rightfully dismissed on 15th November 2022 due to the deliberate inactions of the applicant and his respective counsels and thus the applicant cannot claim to be at risk to suffer any prejudice or injustice having failed as a litigant to follow up on his own matter.

10. The respondents aver that the award of maintenance is well within the applicant's ability to pay and the same will ensure that the 1st respondent is able to meet the basic needs of the children.

11. The respondents state that the applicant has done all that is humanly possible to harass and frustrate all efforts to educate and maintain the children causing irreparable harm to the children and them.

12. The respondents argue that the application is devoid of legal substance and offers no real evidence other than conjecture as to the inordinate delay in filing his application seeking review of the honourable court's order to have the appeal dismissed.

13. The respondents argue that allowing the current application will amount to condoning the laxity of the applicant in handling the appeal and infringing upon the rights accorded and secured by the previous orders/decree that seek to act in the best interests of the children.

14. The respondents further argue that the current application is a ploy to further waste the honourable court's time and in the process deny and frustrate any recourse that the children are entitled to as the aggrieved parties. The respondents urge the court to consider the best interests of the children and order the applicant to discharge himself of contempt of court orders to the tune of Kshs. 1,600,000/- being the amount currently owed as unpaid child maintenance.

15. The respondents state that it is the duty of the honourable court not to condone deliberate disobedience of court orders nor waive from its responsibility to deal decisively and firmly with contemnors and as such the honourable court do find that the applicant lacks audience before the

court and not granted leeway to continue making a mockery of the judicial system through the current application.

16. Parties put in written submissions.

The Applicant's Submissions.

17. The applicant relies on Order 12 Rule 7 and Order 42 Rule 21 of the *Civil Procedure Rules* and the case of *John Nahashon Mwangi vs Kenya Finance Bank Limited (in liquidation)* [2015] eKLR and submits that he stands to suffer a lot of injustice if the appeal is not reinstated and heard on merit. The applicant submits that it is not his mistake that led to the dismissal of the appeal, but rather that of his counsel. Thus, he argues that it would be unfair to visit the mistake of his counsel on him by denying him a hearing and determination of the appeal on merit. To support his contentions, the applicant relies on the cases of *Belinda Murai & Others vs Amos Wainaina* (1978) LLR 2782 (CALL) and *HAM vs SOS* [2021] eKLR.

18. The applicant further submits that the hearing date on which the appeal was dismissed was the first hearing of the appeal and therefore it is not correct noting that his advocates had notoriously failed to appear in court on preceding hearing dates.

19. The applicant submits that the respondents have alluded several untrue statements as to their relationship asserting that he has been trying to frustrate her business yet she has previously claimed that she has no means of catering for her part of the responsibilities. The applicant argues that those are some of the arguable points that the appeal presents if reinstated.

20. The applicant submits that he has continued to comply with the other orders such as paying school fees despite having preferred an appeal against the whole ruling. The applicant further argues that the respondent should not delve into the merits of the appeal but should leave that to the substantive hearing and determination of the same.

The 1st Respondent's Submissions

21. The 1st respondent relies on Order 42 Rule 35 of the *Civil Procedure Rules* and submits that the applicant's advocates did not attend court on the hearing date nor did they oppose the application for dismissal thus demonstrating a clear lack of diligence. The applicant's inaction reflects a disregard for the court's time and the rights of the respondents particularly the minors involved in the suit.

22. The 1st respondent submits that the applicant has not demonstrated any substantial prejudice that would arise from the dismissal of the appeal. Conversely, allowing the appeal would unjustly prolong the matter which would adversely affect the interests of the minors. The 1st respondent argues that the rights and interests of the children are paramount over the applicant. Furthermore, the applicant has not been compliant with the orders of the trial court.

23. The 1st respondent submits that the appeal has no chances of success. Although the applicant claims that the appeal has high chances of success, the respondent argues that mere assertions without substantiating evidence do not suffice. The burden is on the applicant to provide a credible basis for the appeal and to demonstrate that the underlying issues warrant the court's consideration.

24. The 1st respondent relies on the case of *Mbuvi vs The Attorney General* [2019] eKLR and submits that the applicant's advocates' failure to take necessary actions reflects a lack of responsibility and delay in making an application clearly demonstrates the applicant's laxity in concluding his matter.

The Law

Whether the applicant is entitled to an order setting aside dismissal of the appeal for want of prosecution.

25. The law concerning dismissal of an appeal for want of prosecution is contained in Order 42 Rules 35(1) & (2) of the *Civil Procedure Rules* which provides as follows:-

> Unless within three months after the giving of directions under Rule 13 the appeal shall be set down for hearing, the respondent shall be at liberty to either set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.
>
> If within one year after service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.

26. It is trite law that the court's discretion to set aside the order of dismissal of the appeal for want of prosecution is unfettered. In *Richard Ncharpi Leiyagu vs IEBC & 2 Others* [2012]eKLR, it was held that the court's discretion to set aside an ex parte order or judgment for that matter is intended to avoid injustice, or hardship resulting from an accident, inadvertence or inexcusable mistake or error, but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

27. In an earlier case of *CMC Holdings Limited vs Nzioki* (2004) eKLR 173 the court held that:-

> The discretion must be exercised judiciously.....In law, the discretion that a court of law has, in deciding whether or not to set aside exparte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong in principle.....the answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so, she drove the appellant out of the judgment seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant.

28. Therefore, the issue that arises is whether the failure to attend court by the applicant and his counsels on 15/12/2022 and opposing the application for dismissal constituted an excusable mistake or it was meant to deliberately delay the cause of justice. The applicant contended that he failed to attend the hearing of the application for dismissal as his advocates failed to notify him of it and neither did they attend court for its hearing.

29. From the record, the applicant lodged his appeal Kiambu HCCA No. E035 of 2022 on 9th March 2022 vide his memorandum of appeal. On 17th May 2022, the applicant filed an application for stay of proceedings in Ruiru SPMC Children's Case No. E026 of 2021. The said application was not prosecuted by the applicant. The court then issued a notice to show cause to both parties since none attended court on 25th May 2022 when the matter came up for hearing. On 26th September 2022, the respondent filed an application for dismissal of the appeal for want of prosecution and the court directed that the applicant be served and further granted the applicant ten (10) days to file his response. The application came up for hearing on 15th December 2022 and there was no appearance by the applicant. The respondent made her application for dismissal and upon being satisfied that the applicant was served both physically and through his advocates through email dismissed the appeal.

30. On further perusal of the record, it is evident that the applicant has never filed his record of appeal since he lodged it on 9th March 2022. While acknowledging that the mistake of counsel should not be visited on a client, it should be remembered that a litigant has a paramount duty to pursue his case his appeal in court. The reasons given by the applicant for failing to attend court are not convincing and neither are they plausible. This is not a case for the court to exercise its discretion in favour of the applicant. The conduct of the applicant in this appeal demonstrate lack of interest on the part of the applicant or a deliberate decision to abandon the appeal. This appeal was dismissed after about one year from the date of filing. The appellant has shown all signs of an indolent litigant. Being a children's matter, the parties were obligated to fast-track this appeal.

31. I have perused the memorandum of appeal. I am of the considered view that the grounds of appeal do not raise arguable points of law or fact. As such, the appeal ha very limited chances of success.

32. The applicant has not given plausible reasons to warrant the court to exercise its discretion in his favour to set aside the orders of dismissal of the appeal made on 15th December 2022.

33. Accordingly, the application dated 14th March 2024 lacks merit and is hereby dismissed with costs to the respondent.

34. It is hereby so ordered

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 19TH DAY OF DECEMBER, 2024.

F. MUCHEMI

JUDGE