Wakhungu v Orange (Civil Appeal E112 of 2023)
[2024] KEHC 15965 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15965 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL E112 OF 2023

AC BETT, J

DECEMBER 19, 2024

BETWEEN

CAROL NAMUKI WAKHUNGU ..... APPELLANT

AND

JOSEPHINE ANYANGA ORANGE ..... RESPONDENT

RULING

Background

1. This is an application for reinstatement of an appeal which was dismissed on 8th February 2024 in pursuance of an earlier court order made on 19th October 2023 wherein the court observed that time was of essence and in default of the Appellant filing her Record of Appeal and Submissions within thirty (30) days from the said date, the appeal would stand dismissed.

2. The Appellant was aggrieved by the order of dismissal and filed a Notice of Motion on 20th March 2024 urging the court to set aside the orders of dismissal and to reinstate the appeal for hearing. The application is predicated on the grounds that the Appellant's previous advocate acted negligently in failing to comply with court orders leading to dismissal of the appeal, and that the said Advocate kept the Appellant in the dark regarding the appeal. The Appellant swore an affidavit in support of the application in which she stated that she had instructed her previous advocates to file an appeal on her behalf and the said advocate affirmed to her that all was well until she was called by the Respondent the week prior to the filing of the present application and threatened with execution. She averred that on inquiring from the court registry, she leant that her appeal had been dismissed on 8th February 2024 for failure by her advocate to comply with orders of the court. The Appellant entreats the court not to visit the mistake of her advocate upon her.

3. In response, the Respondent filed a Replying Affidavit in which she deponed that the Appellant and her advocate had a habit of not appearing in court. She further deponed that the application was a

delaying tactic by the Appellant who is intent on avoiding settlement of a decretal amount. According to her, the order directing the Appellant to make payment of Kshs. 500,000/= then Kshs. 100,000/= every month was largely in favour of the Appellant who instead wanted to pay Kshs. 30,000/= per month wherefore the Respondent would have to wait for close to four (4) years for justice to be served.

4. The court directed that the application be canvassed by way of written submissions.

Applicant's Submissions

5. The Appellant submitted that this court has power under Order 12 Rule 7 of the Civil Procedure Rules to set aside the orders of dismissal. She submits that she is yet to be heard on her appeal and is passionate on having it heard as she is ready and willing to prosecute it. The Appellant relies on Article 50 (1) of the *Constitution* which states that every person has a right to be heard in any dispute. The Appellant relies on the case of *David Bundi -v- Timothy Mwenda Muthee* [2022] eKLR where the court held as follows:-

> " For courts will determine disputes on the merit and lean on the principle of natural justice which guide courts, that is, a party in a dispute must be given an opportunity to be heard."

6. The Appellant further submits that the mistake of an advocate should not be visited upon an innocent party and refers the court to Article 159 (1) (d) which was reiterated in the case of *Directline Assurance Company Ltd -v- Macharia* [2023] KEHC 325 (KLR) where the court stated:-

> " To that end, i think that the present situation is one that can be cured by article 159(2) (a) of Constitution of Kenya that provides for administration of justice to all, without undue regard to procedural technicalities. Accordingly, I think the failure of counsel to attend court is excusable."

Respondent's Submissions

7. The Respondent on her part posits that while the Appellant seeks to set aside the orders dated 8th February 2024, she does not disclose to the court the order dated 19th October 2024 which states in part:-

> "(4) That time is of essence and if there shall be default to file a Record as aforesaid the Appeal shall stand dismissed from the date of default."

8. According to the Respondent, the Appeal stood dismissed on 20th November 2023 exactly 30 days from the date of the order dated 19th October 2023 and therefore the order that the Appellant seeks to dismiss is an affirmation of the dismissal.

9. The Respondent also submits that the Appellant approaches the court under the disguise of the advocate's mistake without any evidence to show that she made efforts to follow up the appeal and cites in support the case of *Habo Agencies Limited -v- Wilfred Odhiambo Musingo* [2015] eKLR where the court held thus:-

> " It is not enough for a party in litigation to simply blame advocates on record for all manner of transgressions in the conduct of the litigation Courts have always emphasized that parties have a responsibility to show interest in and follow up their cases even when they are represented by counsel..."

10. The Respondent further submits that the Appellant is in the habit to disobeying court orders and has failed to deposit a single cent towards the settlement of the decretal amount since the ruling ordering her to pay Kshs. 500,000/= was made more than a year ago. On the basis of the inaction by the Appellant, the Respondent contends that the Appellant is intent on denying the Respondent the fruits of the judgement. The Respondent relies on the cases of *BJ -vs- LKB* [2022] eKLR and *Awadh -v- Marumbu* [2004] KLR 458 and invites the court to find that its orders must be obeyed as it should never issue orders in vain. It is the Respondent's position that the court exercised its discretion judiciously in accordance with the *Constitution* and in ensuring that justice is not delayed.

Analysis

11. I am cognizant that under Section 1A, 1B, 3A and 3B of the *Civil Procedure Act*, the court is conferred with great latitude in the interpretation of the law in exercise of its discretion with the aim of achieving the overriding objective of the Act which is to do justice to the parties. The guiding principles in the exercise of judicial discretion have therefore been broadened to enable the court to do substantial justice to the parties in the manner envisaged by the *Constitution* which is the just, efficient and proportionate dispensation of the law without undue regard to technicalities but being careful to ensure that the rules of procedure are not entirely overlooked as that would create chaos in the judicial system.

12. In the case of *Nicholas Kiptoo Arap Korir Salat -v- IEBC & others* [2013] eKLR, Kiage J. stated as follows:-

> "...I am not in the least persuaded that Article 159 of the *Constitution* and the Oxygen principles which both command Courts to do substantial justice in an efficient, proportionate and cost effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for all in the administration of justice. This Court, indeed all Courts, must never provide succour and cover to parties who exhibit scant respect for rules and timeliness. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and shifting of goal posts for, while I apprehend that it is in the even-handed and dispassionate application of rules that Courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."

By dint of the aforesaid holding, the court must be careful to be guided by the relevant statutes and case law in making its decision as to whether or not to reinstate the appeal.

13. While the court has unfettered jurisdiction in the exercise of its discretionary powers, the court has inherent powers to give orders which are necessary to meet the ends of justice or to prevent the abuse of the process of the court as provided by Section 3A of the *Civil Procedure Act*.

14. Order 12 Rule 7 of the *Civil Procedure Rules* upon which the Appellant's application is founded states as follows:-

> "Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

The dismissal of the appeal for want of compliance amounts to a judgement as was held by the Court of Appeal in the case of *Njue Njagi -v- Ephantus Njiru & Another* [2016] eKLR. Therefore, the

Appellant's application is similar to an application to set aside a judgement entered in default of attendance by the Appellant or his advocate.

15. In this matter, it is said that the mistake was due to the negligence of the advocate. This excuse has not been accepted by the Respondent who discerns mala fides in the Appellant's conduct reason being that the Appellant, who had proposed to be paying a monthly instalment of Kshs. 30,000/= since the impugned order was made by the trial court, has not made a single cent towards the repayment more than one year down the line. The Respondent is of the view that since the Appellant is in defiance of a valid court order, which I hasten to say, was not stayed by the court, she should not benefit from the discretion of this court.

16. It is long settled that the court's discretion to set aside ex parte order is unlimited. In *Patel -v- E.A Cargo Handling Services Ltd* [1974] E.A 75, the court held that:-

> " There are no limits or restrictions on the Judge's discretion except that if he does vary the judgment he do so on such terms as may be just. The main concern of the court is to do justice to the parties, and the Court will not impose conditions on itself to fetter the inside discretion given to it by the rules."

17. The question is whether in light of her conduct and the entire circumstances of the case, the court should exercise its discretion in favour of the Appellant.

18. The appeal that was dismissed is an appeal against an order to liquidate a decretal sum which arose from a money decree, by instalment. I have perused the file. Although none of the parties have availed the decree to this court, there is an uncontested Affidavit lodged by the Appellant on 27th September 2023 in opposition to the Appellant's application for stay of execution in which she stated that the money owed is Kshs. 1,018,767/= since 2017. In July 2023, the Respondent rejected the Appellant's application to settle the decretal sum in equal monthly instalments of Kshs. 30,000/= stating that it would take her over 3 ½ years to recover the decretal amount if the plea was allowed. From the initial decretal sum of Kshs. 1,018,767/=, the Appellant paid only Kshs. 200,000/= and since filing the appeal has not made any effort whatsoever to make payment.

19. It is against the backdrop of the default in settlement of the decree and default in prosecuting the appeal that the Appellant seeks the intervention of the court on account of her advocate's mistake.

20. The Appellant did not explain in what way her advocate was negligent. If the negligence of the advocate was the failure to prepare and lodge the Record of Appeal within the stipulated time, then the Appellant should have at least, contemporaneously with the filing of this application, lodged the said Record of Appeal considering the nature of the decree and the order appealed against.

21. Further, the duty to follow up a case lies in the litigant as well as their advocate. A litigant is under obligation to monitor his case at all times. In the case of *Rajesh Rughani -vs Fifty Investment Ltd & Another* [2005] eKLR, the Court of Appeal had this to say:-

> " It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy."

22. It is quite evident that once the Appellant filed the appeal, she forgot her pledge to liquidate the decretal sum by monthly instalments of Kshs. 30,000/= and went to sleep, relying on the existence of the appeal, to ignore the import of the decree and the subsequent order that she pays a sum of Kshs. 500,000/= immediately and thereafter Kshs. 100,000/= per month till final settlement. The court discerns bad

faith in the Appellant's inaction for at the very least, she should have been paying the Kshs. 30,000/ = monthly that she had deponed she could afford to pay, in view of the fact that the appeal was not against the entire judgement and decree. In the circumstances, I find that the Appellant is not deserving of this court's discretion.

23. In the case of *Habo Agencies Ltd -v- Wilfred Odhiambo Musingo* (*Supra*), Waki J.A cited the case of *Bains Constructions Ltd -v- John Mzare Ogowe* [2011] eKLR where the court held that:-

> " It is to some extent true to say mistakes of counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties and does not perform it, surely such principal should bear the consequences."

24. It is trite law that the discretion of the court must be exercised judiciously. I have taken into account the circumstances of this case and I find that the application must fail. The appeal stood dismissed thirty (30) days after the court's directions and that is how it should remain. A party should not be allowed to use the court to deny a successful party the fruits of its judgement. The application is therefore dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF DECEMBER 2024.

A. C. BETT

JUDGE

In the presence of:-

Ms. Masakhwe for the Appellant/Applicant

No appearance for the Respondent

Court Assistant: Polycap