



Njihia v Nyoori (Suing as legal representative of the Estate of Peter Kungu Njuguna - Deceased) (Civil Appeal E054 of 2022) [2023] KEHC 105 (KLR) (19 January 2023) (Ruling)

Neutral citation: [2023] KEHC 105 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E054 OF 2022
RB NGETICH, J
JANUARY 19, 2023**

BETWEEN

FRANCIS NJIHIA APPLICANT

AND

WILLIAM NJUGUNA NYOORI (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF PETER KUNGU NJUGUNA - DECEASED) RESPONDENT

RULING

1. The motion before the court for determination is dated March 25, 2022 seeking the following orders:
 - a. Spent
 - b. Spent
 - c. The court be pleased to issue orders allowing the appellant's case to be re-opened so as to grant the applicant an opportunity to cross-examine the plaintiff and his witnesses.
 - d. The appellant be given an opportunity to defend the suit in the trial court unconditionally.
 - e. The costs of this application be provided for
2. The grounds on the face of the application are that the defence raises triable issues and the defendant should be allowed to ventilate the issues in the trial court to enable the court to reach a just determination.
3. The application is supported by an affidavit sworn by Francis Njihia, the appellant herein. He deposed that the plaintiff filed suit against the defendant on December 15, 2016 and the defendant filed defence on December 3, 2018 through his then advocates Kamende DC & Co advocates after decree dated March 6, 2018 was set aside by the trial court. He restated that reason for failure to attend court when



- the matter came up for hearing on October 19, 2020 and urged this court to give him opportunity to effectively and completely adjudicate upon and settle all questions involved in the suit.
4. The plaintiff/respondent responded to the application by filing a replying affidavit sworn by Willian Njuguna Nyoori on June 20, 2022. He deposed the suit was filed on December 15, 2016 and together with the summons served upon the appellant/defendant who failed to file a response and the matter proceeded *ex parte* and judgment was delivered on February 12, 2018.
 5. The respondent further stated that judgment was set aside on August 8, 2018 and the appellant/defendant was allowed to ventilate the matter with the hearing date set for October 19, 2020 by the appellant's counsel in the absence of the plaintiff/respondent counsel for the plaintiff and counsel served a hearing notice. On October 19, 2020 the appellant and his advocate failed to attend court and the case proceeded for hearing in the absence of appellant/defendant and his counsel.
 6. The respondent further stated that he is interested in concluding the matter but the appellant is abusing the court process; he stated that he is old and sickly and the endless proceedings in the court continue to occasion him psychological distress and anguish.
 7. The court directed that the application proceeds by way of written submissions; the respondent opted not to file written submissions but rely on replying affidavit filed. The appellant/applicant filed written submissions.

Defendant's / Applicant's Submissions.

8. Counsel filed submissions on November 9, 2022 and submitted that the non-attendance to court on October 19, 2020 was not intentional but an omission on the part of his counsel by failing to diarize the matter; that counsel diarized the matter for 19th November instead of October 19, 2022.
9. He submitted that the applicant should not be penalized for the omissions of counsel and cited the case of *Philip Chemwolo & Anor v Augustine Kubede [1986] eKLR* where the court held that: -

“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.”
10. He further submitted that the defence raises triable issues and if the respondent's case is not re-opened, the applicant will be condemned unheard contrary to article 50 of the *Constitution* of Kenya 2010.
11. He urged this court to allow the application as prayed.

Analysis And Determination

12. I have considered grounds of the application, averments by parties herein and submissions by the applicant. What I wish to consider is whether the applicant has demonstrated reason to set aside the trial court proceedings and re-open the suit.
13. From the record, the plaintiff/respondent's suit was fixed for hearing by the applicant/defendants representative from the firm of F N Kimani Advocates. He served a hearing notice on the advocate for the plaintiff/ applicant. Applicant's argument is that the representative then diarized the matter for November 19, 2020 and when counsel became aware that the suit had proceeded in their absence, he filed an application date November 30, 2020 seeking to set aside the trial court proceedings. The trial court dismissed the application. The dismissal is the subject of the current appeal.



14. The appellant/Applicant contends that his counsel on record Mr Francis Ndathe Kimani died on February 19, 2020 and the office was under administration before appointment of another advocate. He urged the court not to penalize him for the mistake of a representative from his then counsel's office.
15. On the other hand, the respondent submitted that he was willing to accommodate the appellant in the trial court when he filed the application dated November 30, 2020 on the condition he paid throw-away costs, a condition the appellant/applicant declined.
16. Article 50 (1) of the Constitution of Kenya provide as follows: -

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.
17. The decision to set aside the trial court proceedings is a discretionary remedy which can be exercised if setting aside proceedings may not be seen to cause prejudice or injustice to either party. The discretionary remedy should be granted where there was an excusable error by either party, but not to a party who seeks to evade trial.
18. The Supreme Court of India in Sangram Singh v Election Tribunal, Kotah, AIR 1955 SC 664, at 711 as cited in the case of Gerita Nasipondi Bukunya & 2 others v Attorney General [2019] eKLR stated as follows: -

“There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”
19. The primary duty of the court is to dispense justice to all by allowing parties to be heard; the appellant's argument is that he has not been heard and reason is, his then advocate passed on and his representative mis-diarized the matter despite fixing the hearing date.
20. It is not disputed that the applicant's counsel passed on during the pendency of this matter in the trial court. This may have led to lapse in handling his files during transition after the demise of applicant's advocate. In my view the applicant should not be made to suffer from the misfortune of losing counsel to death. I also take note of the fact that the date which was mis-diarized was taken by the deceased advocate's representation which demonstrate that the applicant intended to participate in the proceeding save for mistake which has been sufficiently explained.
21. From the foregoing, it will be in the interest of justice to allow the applicant to participate in proceedings in the trial court. I however take note of the fact that this is the second time to set aside and will impose condition of payment of thrown away costs.
22. Final orders:
 1. I hereby set aside *ex parte* proceedings of the trial court to allow and participate in hearing on condition that the applicant pays to throw away costs of Kshs 30,000/=.
 2. Compliance with order 1 above within 30 days.
 3. Failure to comply with order 1 & 2 above, order one will stand discharged.



**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 19TH DAY OF
JANUARY,2023**

.....

RACHEL NGETICH

JUDGE

In the presence of:

Martin – Court Assistant

Ms. Kiaritha for appellant/applicant

