



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mburu v Mwangi (Civil Appeal E92 of 2021)  
[2023] KEHC 1406 (KLR) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1406 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E92 OF 2021  
LN MUGAMBI, J  
FEBRUARY 28, 2023**

**BETWEEN**

**SAMUEL MUNGAI MBURU ..... APPELLANT**

**AND**

**SAMUEL NDERITU MWANGI ..... RESPONDENT**

*(An Appeal from the ruling of the Senior Principal Magistrate's Court at Ruiru delivered on May 21, 2021 in Ruiru SPMCC number 32 of 2020 by Hon C K Kisiangani- SRM)*

**RULING**

1. This appeal arises from the ruling made in Ruiru SPMCC no 32 of 2020 of Senior Principal Magistrate's Court by Hon C K Kisiangani SRM delivered on May 21, 2021.
2. A brief background of this appeal is that the appellant herein filed a suit against the defendant in the lower court and the matter was set for hearing on February 24, 2021. The appellant and his counsel failed to appear in court on the hearing date and the trial magistrate dismissed the suit. The appellant filed an application dated February 25, 2021 seeking reinstatement of the suit and the setting aside of the orders issued by court.
3. Parties were directed to file submissions to the application which the appellant failed to do hence the application was dismissed. He has now appealed to this court.
4. The appellant who is the plaintiff in the lower court raised the following grounds in his Memorandum of Appeal dated January 26, 2021:
  - a. The learned magistrate erred in law and fact in dismissing the plaintiff/appellant's suit in Ruiru SPMCC no 32 of 2020 for want of prosecution.
  - b. The learned magistrate erred in law and in fact in dismissing plaintiff/appellant's application dated February 25, 2021.



- c. The learned magistrate erred in law and in fact in failing to appreciate the long-established principle of stare decisis thereby reaching an erroneous finding/conclusion.
  - d. The learned magistrate erred in law and in fact in failing to consider and appreciate the weight of the evidence tendered in support of the plaintiff/appellant's application dated February 25, 2021.
  - e. The learned magistrate erred in law and in fact in disregarding substantive justice and proceeded to dismiss the suit on the first hearing date hence condemning the plaintiff/appellant unheard.
  - f. The learned magistrate erred in law and in fact by dismissing the plaintiff's application February 25, 2021 which was not opposed.
  - g. The learned magistrate erred in law and fact in visiting an inadvertent omission/mistake of counsel upon the client, the plaintiff/appellant herein.
  - h. The learned magistrate erred in law and fact in dismissing the suit in its entirety thus subjecting the plaintiff/appellant to suffer grave injustice and loss.
  - i. The learned magistrate erred in law and fact in considering uncontested matters and/or issues that did not lie for the determination of the court in the application.
  - j. The learned magistrate erred in law and fact in presuming that plaintiff/appellant was unwilling to comply with any intended conditional court orders.
5. The appellant prayed that the ruling by the trial court delivered on May 21, 2021 and the orders therein be set aside. He asked that the plaintiff's suit in Ruiru SPMCC no 32 of 2020 be reinstated and the same be set down for hearing and determination on its merits.
6. Directions were issued by this court on May 5, 2022 that the appeal be heard by way of written submissions.

### **Appellant's submissions**

7. The appellant filed his written submissions on July 6, 2022 where he raised the single issue of whether the appellant's suit should be reinstated. He submitted that his counsel gave reasons and even made steps to ensure that the honourable court was informed of the reason why he was unable to attend the hearing that was scheduled for February 24, 2021. He submitted on the test for dismissing a matter for want of prosecution and cited the case of *Moses Muriira Maingi & 2 others v Maingi Kamuru & Another* Civil Appeal no 151 of 2010, which adopted the decision of Chesoni, J (as he then was) in the Ivita case where it was held that: -

“...The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the



plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time..."

8. It was the submission by the appellant that he made reasonable and prompt steps, without inordinate delay to have the suit that was dismissed on February 24, 2021 be reinstated by filing the application to reinstate on February 25, 2021.
9. The respondent did not oppose the application as they had been informed of the reason why counsel for the appellant could not attend the hearing on that day.

### **Respondent's submissions**

10. The respondent put in his written submissions on September 27, 2022 and raised two issues for determination. On whether the appellant's suit SPMCC no 32 of 2022 should be reinstated. He submitted reinstatement of a suit is discretionally power which discretion ought to be exercised judicially, fairly and not capriciously as was held in *Bilba Ngonyo Isaac vs. Kembu Farm Ltd & another & another* (2018) eklr which echoed the decision of the court in *Shah vs Mbogo & another* (1967) EA 116 (Harris J), where the court stated as follows in regard to discretion:

"...The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice..."

11. He continued that the appellant has not been keen on prosecuting his case going their failure to attend court or failing to send a proper representative on the date of the hearing.
12. Their failure to file submissions to their application dated February 25, 2021 in seeking to reinstate the suit as had been ordered by the court is a further testament that the plaintiff and his advocate had demonstrated inexcusable laxity in prosecuting this case.
13. He stated that he stands to be prejudiced if the appellant's suit is reinstated as he has lost contact with his witnesses after two years and would incur cost and time not to mention mental anguish of having the case over their shoulders for an unnecessary long period. It was his submission that it is unjust that he has been dragged through endless litigation and that this appeal should be dismissed.

### **Analysis and determination**

14. I have read and considered the submissions together with the memorandum and record of appeal and the law applicable. The main issue for determination is whether the appeal is merited. Order 12 Rule 7 of the *Civil Procedure Rules* provides:

"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".

15. The orders the appellant is seeking before this court are discretionary and the reasons why a court may reinstate a suit vary from case to case. The appellant has said that his counsel had reached out to the respondent and explained that they would not be in position to proceed with the hearing of the suit. The suit was dismissed for non-attendance on the day of the hearing because the advocate issued with those instructions failed to inform the court about his brief. The appellant has claimed that that was the first time the suit had been set down for hearing and dismissing it condemned him unheard.



16. On page 52 of the Record of Appeal, I notice that the Appellant had informed the respondent that they will not be in a position to proceed with the hearing and they were not opposed. The said acknowledgment email was sent on February 23, 2021, a day to the hearing of the main suit.
17. While the appellant missed the first hearing of the suit he is seeking to reinstate, he also failed to file submissions to the application dated February 25, 2021 after the court directed that he does so. He has not explained why he failed to put in his submissions in time.
18. The respondent did not contend the fact that he was aware of the applicant's predicament on that day. Nevertheless, he opposes this application on account that he would be prejudiced should the suit be reinstated as he has lost contact with his witnesses.
19. Courts are always cautioned to be careful not to exercise their discretion in a manner that could likely lead to miscarriage of justice. The cornerstone of any sound justice process is that that a party who comes to court should be heard. As was held in the case of *Philip Chemworo & Anor vs Augustine Kubende* (1982-88) KAR 103 at 1040, unless there is fraud or overreach, there is no error that cannot be put right by payment of costs. Apaloo J A as he then was remarked:

“...Blunders will continue to be made from time to time and it does not follow that because a mistake has been made 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 for the purpose of imposing discipline...”
20. While this might be true, that the defendant might experience some difficulties in tracing its witnesses, it has not been said that those witnesses are no longer available or cannot be found. It is possible that given sufficient time the respondent can bring its witnesses to Court.
21. Given the measures taken by the appellant to inform opposite counsel as well as his disclosure that he unsuccessfully made efforts to seek an advocate to convey his predicament to the court, I do not think that the appellant's non-attendance and failure to file his submissions was deliberate or geared towards delaying or obstructing the process of justice. The worst-case scenario in my view would most probably have been to condemn him to pay adjournment fees considering that the other side had been aware of the genuine reason that compelled his non-attendance on that day. The only mistake that occurred was that the court was not duly notified.
22. In *Shah vs Mbogo & Anor* 1967 (EA) 116, it was held that discretion is intended to be exercised to avoid injustice, inadvertence or excusable error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.
23. In the present case, the appellant has demonstrated that he was not deliberately evasive or in any way trying to obstruct the cause of justice but that his failure to attend court was prompted by a genuine reason that required urgent personal attention. He had to attend to his ailing elderly mother who needed medical attention. This was clearly an excusable reason. (paragraph 9 of the supporting affidavit to notice of motion dated February 25, 2021).
24. In light of the foregoing, I find that the trial court improperly exercised its judicial discretion and drove away the appellant from the seat of justice unfairly. The consequence thereof is that:
  - a. That the trial court ruling dated May 21, 2021 and the orders therefrom are hereby set aside.



- b. That the plaintiff's suit in Ruiru SPMCC number 32 of 2020 be and is hereby reinstated.
- c. That the suit in Ruiru SPMCC Number 32 of 2020 be set down for hearing on merits by the court within 30 days from the date of this ruling.

Each party shall bear their own costs of appeal.

**RULING DATED AND DELIVERED VIRTUALLY THIS 28TH DAY OF FEBRUARY, 2023.**

**L N MUGAMBI**

**JUDGE**

**In Presence of:**

**Coram-**

**Court assistant- Annette**

Appellant-

Respondent-

Appellant advocate-

Respondent advocate-

**Ruling delivered digitally to be transmitted by the deputy registrar to the parties Advocates on record through their respective email addresses.**

**L N MUGAMBI**

**JUDGE**

