



REPUBLIC OF KENYA



**Kahoro v Gachoki & 2 others (Civil Appeal 13 of 2022)
[2023] KEHC 3010 (KLR) (31 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 3010 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 13 OF 2022
LN MUGAMBI, J
MARCH 31, 2023**

BETWEEN

JANE WANJIRU KAHORO APPELLANT

AND

REAGAN MURIUKI GACHOKI 1ST RESPONDENT

CYRUS KARANI KIRAGU 2ND RESPONDENT

PETER GICHIRA 3RD RESPONDENT

*(Being an appeal from the Ruling/Order of the Honourable H. Nyakweba
Senior Principal Magistrate Embu Chief Magistrate Law Courts delivered
on the 2nd of February, 2022 in Embu CMCC Case No. 49 of 2011)*

JUDGMENT

1. The Appellant initiated this appeal after being dissatisfied with the Ruling/Order of the Honourable H. Nyakweba SPM, delivered on the 2nd of February, 2022.

Summary Pleadings

2. The Appellant (Plaintiff in the trial court) brought the suit against the Defendants on behalf of the estate of Benson Munene Waweru alias Benson Waweru Munene vide a Plaint dated 19th April, 2011 and filed on even date. The Plaint was amended on the 6th day of February, 2012. She averred that the deceased was a fare paying passenger in motor vehicle KAR 943D when the 2nd Respondent (2nd Defendant in the trial Court) negligently drove the said motor vehicle registration number KAR 943D causing the same to overturn along Embu-Mwea Road-at Nyamindi area as a result of which the deceased sustained fatal injuries leading to his death. She prayed for general damages under the Fatal Accident's Act for the benefit of the dependants of the deceased and those under the Law Reforms Act for his estate and costs and interests of the suit.



3. The Defendants filed their defence on the 28th of March, 2017 denying the particulars of negligence levelled against them in the Plaint and blaming the accident solely on the deceased. They urged the Court to dismiss the Plaintiff's suit with costs.
4. The suit was however dismissed due to the non-attendance of the Appellant on the 30th of September, 2021. This leads to the gravamen of the present appeal. The Appellant filed an application on the 8th of October, 2021 seeking to have the suit reinstated on the grounds that:
 - a. The matter was coming up for hearing on the 30th of September, 2021;
 - b. The suit was dismissed for non-appearance by the Plaintiff;
 - c. The Plaintiff's failure to attend court was not intentional, it was due to sickness which had not been anticipated and that position had been communicated to the defendant's counsel;
 - d. The Plaintiff had already acquired judgement in default of appearance against the defendant thus would not have possibly failed to attend or lose interest;
 - e. That the defendant shall not be prejudiced if the application is allowed;
 - f. That it is in the interest of justice that the parties be heard on merit.
5. The Respondents' reply to the application was filed out of time and thus disallowed by the Court.
6. The ruling on the application was delivered on the 2nd February, 2022 with the Court holding thus:

“...When the matter came up for hearing on the 30.09.2021, the Plaintiff Advocate was not ready to proceed because the Plaintiff was not present. She was said to be indisposed although the counsel did not have treatment notes. The application was declined due to the age of the matter and was dismissed for non-attendance. This application is based on the same reason for sickness. Surprisingly, no medical evidence to prove sickness on 30.09.2021 has been placed before me. In the circumstances I see no reason as to why the application should be allowed. Still, the absence of the Plaintiff in Court on 30.09.2021 has not been adequately explained and supported.

The Application dated 08.09.2021 has no merit and is hereby dismissed with no orders as to costs.”

The Appeal

7. Being dissatisfied with the decision of the trial Court, the Appellant lodged the Memorandum of Appeal dated 7th February, 2022. She however amended the same and filed an Amended Memorandum of Appeal dated 27th October, 2022 on the 28th of October, 2022 listing the grounds of appeal as:
 - a. The Learned Magistrate erred in law and in fact by denying the Applicant a fundamental constitutional right of the law a chance to be heard;
 - b. The Learned Magistrate failed in law and in fact by failing to look at the evidence on record at all particularly that the Plaintiff had not occasioned any delay or absenteeism in the suit;
 - c. The Learned Magistrate erred in law and in fact by dismissing the Plaintiff claim on the issue of age and failed to observe that the Plaintiff had diligently



conducted the hearing a judgement of KShs. 3,041,000 entered in favour of the appellant and the Plaintiff only allowed by consent to set aside the judgement unconditionally so that there would be a fair hearing to all parties only for the magistrate to dismiss the suit;

- d. The Learned Magistrate erred in law and in fact by failing to consider that the Plaintiff had never failed to attend or prosecute her case and it is only once the Plaintiff was absent that the Learned Magistrate capitalised on;
 - e. The Learned Magistrate erred in law and in fact by holding that in the new norm for one to be sick one must produce medical records;
 - f. The Learned Magistrate erred in law and in fact by failing to recognize that any delay in prosecution had not been occasioned by the Plaintiff but the Defendants;
 - g. The Learned Magistrate failed in law and in fact by dismissing the plaintiff's application for re-instatement which was not challenged by any party;
 - h. The Learned Magistrate erred in law and in fact by failing to recognize that the whole life and dependency of the Plaintiff relied on this suit which is deceased husband estate only benefits;
 - i. The Learned Magistrate's order resulted in a miscarriage of justice.
8. The Appellant urged this Court to find merit in her appeal, allow the same by setting aside the order made by the trial court and order that the matter be reinstated and parties heard on merit.
 9. On the 21st July, 2022, the appeal was admitted for hearing and on the 24th of October, 2022 the Court directed that the same be canvassed by way of written submissions. The Record of Appeal was filed on the 6th of July, 2022.

Appellant's Submissions

10. The Appellant filed his submissions on the 28th of November, 2022. The Appellant introduced her submissions by stating that the order dismissing the suit, Order 12 Rule 1, was not applicable in the circumstances as the record will reflect that the parties were present. She submitted that she was the administrator of the estate of her husband and that at the time of his death, the deceased had no other fixed assets. That judgement was entered in her favour for KShs. 2,880,000 on the 4th of November, 2013. That the Defendant applied to have the judgement set aside and that in the interest of justice, they consented to have the said judgement set aside and the judgement was set aside on the 2nd of September, 2019. The Appellant submits that soon after, COVID set in and despite several mentions, the matter did not kick off until 2021 when the same was dismissed.
11. That the application to have the suit reinstated was filed without undue delay and the same was unopposed. That the suit was barely two years after the consent recorded in the year 2019 and that the Court capitalized on the only time the Plaintiff was absent without considering other issues like the Defendants delaying the execution and effect of the third parties who came in to file applications to be enjoined in the suit. That the Court allowed a judgment that had been in place for 5 years to be set aside but quickly dismissed the suit when the Plaintiff failed to attend in barely two years. She submitted further that the magistrate failed to consider that in the prevailing COVID era it was normal for a sick person to avoid seeking medical help in order to avoid isolation. She stated that it was because of this that she did not have the medical records the Court needed.



12. The Appellant submitted further that the decision by the magistrate resulted in a miscarriage of justice and is condemning her to a life of misery by denying her the right to her husband's estate. That more importantly, the said order was not based on any sound foundation or proper law. The Appellant relied on the following cases:
- a. High Court of Kenya at Kakamega Catherine Kigasia vs. Earnest Ogesi Kivai & 4 others Civil Suit No. 20 of 2018 (2021) eKLR;

“...Though the Learned Judge was not convinced am not entirely convinced by the Plaintiff to explain her non-attendance in court as and when is required...I shall give her a second chance...”
 - b. In the Environment and Land Court at Nairobi ELC Civil Suit No. 177 of 2017, Gold Lida Limited vs. NIC Bank Limited & 2 others (2018) eKLR: where the Court held,

“Blunder will continue to be made time to time and it not allow that because a mistake has been made a party should suffer the penalty of not having his case heard on merit...unless there is fraud or intention to overreach there is no error or default that cannot be put right by payment of costs.”
 - c. In the High of Kenya at Embu, Civil Suit No. 131 of 2009, Jim Rodgers Gitonga Njeru vs. Al Husnain Motors Ltd & 2 others (2018) eKLR, the Court held thus:

“...irreparable prejudice must refer to something more than a disadvantage caused by loss of evidence...

No prejudice would befall the defendants that cannot be remedied by costs and that to the contrary, it is the Plaintiff who would be greatly prejudiced by being driven from the seat of justice without a hearing.”
13. The Appellant concluded her submissions by urging this Court to allow the appeal and that the Appellant be allowed to prosecute her case within 60 days and any other conditions that the Court may impose.

The Respondent's Submissions

14. The Respondent filed their submissions on the 16th of January, 2023. They outlined a sequence of the dates and times that the parties were required to appear before the trial and submitted that the Appellant lost interest to prosecute the suit at the trial court after the irregular *ex parte* judgement was set aside. The Respondent referred this Court to pages 106 to 108b of the Record of Appeal as evidence of the times the Appellant and/or her counsel failed to attend court. That on the 30th September, 2021 when the matter was fixed for hearing, the Appellant's counsel attended court and informed the Court that she was not ready to proceed with the hearing because the Appellant was unwell. That no document was adduced in Court to prove the allegations hence the trial court's decision to dismiss the suit under Order 12 (1) of the Civil Procedure Rules. That the said evidence was not provided when the Appellant filed her application to reinstate the suit.
15. The Respondents averred that this Court lacks jurisdiction to hear the present appeal because the Appellant did not obtain the leave of court to bring the same as required under Order 43 rule 2. They



relied on the case of Isaac Mbugua Ngirichu vs. Stephen Gichobi Kaara (2021) eKLR where the Court stated thus:

“The consequence of failure to seek leave of the Court to file an appeal is explained in the Court of Appeal decision of Nyutu Agrovot vs. Airtel Networks Ltd (2015) eKLR where a five judge bench held that where there was no automatic right to an appeal as stipulated under section 75 of the *Civil Procedure Act* and Order 43 of the Civil Procedure Rules, then the appellate court had no jurisdiction to hear or determine an appeal unless such leave was sought and obtained.

From the above decision the omission in this instance touches on the jurisdiction of the Court, and this Court is guided by the aforesaid decision which was also held that “... the right to appeal is conferred by statute and cannot be inferred.”

Jurisdictional issue are not matters that fall in the category of procedural technicalities and it is this courts considered view that invoking of the provisions of Article 159(2)(d) cannot salvage an instant appeal as jurisdiction goes to the root of the matter...”

16. The Respondents contend that failure to seek leave to file this appeal by the Appellant renders it incompetent and the same ought to be struck out. They further relied on the case of Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 others (2013) eKLR where the Court of Appeal observed that:

“The right of appeal goes to jurisdiction and is so fundamental that we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159(2)(d) of *the Constitution*. We do not consider Article 159 (2)(d) of the Constitutions to be a panacea, nay a general white wash, that cures and mends all ills, misdeeds and defaults of litigation.”

17. They submitted further that the absence by the Plaintiff at the hearing had not been explained noting that the suit is an old matter and the Appellant failed to attend court on five separate occasions. That the Appellant is undeserving of orders of reinstatement of their suit. They relied on the case of Josephat Muthui Muli vs. Ezeetec Ltd (2014) eKLR where the Court held thus:

“In my considered view, I consider whether the Counsel for the Applicant has adduced sufficient evidence as to why he as well as the Claimant did not appear on the hearing date. I have a free hand in the exercise of my discretion in favour of the Applicant should I be so minded. However, in doing so I must ensure that I do not aid a party who is undeserving of the exercise of that discretion.

Justice cuts both ways. There are rights that have accrued to the Respondent and on the basis of Shah vs. Mbogo I would be misplaced to exercise my discretion as there was no excusable mistake or error. Counsel was well aware of the matter and failed to attend or provide representation....”

18. That no justifiable reason was given by the Appellant to warrant reinstatement of the suit and that the decision by the trial court was sound, merited, justified, fair and reasonable in view of the evidence on record and that the Court did not err in its finding. The Respondents urged this Court to uphold the said decision and dismiss the appeal with costs.



Determination

19. From the pleadings and submissions, the following issues arise for determination:
 - a. Whether this court has jurisdiction to handle the appeal;
 - b. Whether the appeal is merited; and
 - c. Who pays for the costs of the appeal?

20. Before dealing with the main issue of the appeal it is important that the issue of jurisdiction is addressed hence the first issue herein. The Respondent has submitted that this court has no jurisdiction to handle the present appeal because the Appellant did not seek leave of court to have the same filed as prescribed under section 75 of the *Civil Procedure Act* and Order 43 Rules 1 and 2. The issue of seeking leave to appeal forms a foundation of a court's jurisdiction and when leave is not sought in the circumstances that it should have been sought, then that strips the court handling the appeal of jurisdiction to deal with the matter. Without jurisdiction, a court is forced to down its tools because jurisdiction is everything. This was stated in the classic case of *The Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd (1989) KLR 1*, where Nyarangi J.A. held as follows:

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

21. The Respondent avers that the court's order to dismiss the suit was based on Order 12 (1) of the Civil Procedure Rules and the said Order was not one of those listed under section 75 of the *Civil Procedure Act* and Order 43(1) for appeals without leave. The order dismissing the suit was made on the 30th of September, 2021 with the Court ordering thus:

“This is a very old matter filed in the year 2011 and is still pending 10 years later. Both parties appear to be working together to delay this hearing. The Court will not condone this kind of practise. I have not been convinced that there are sufficient reasons to warrant an adjournment. The same is hereby declined. I have been informed that the Plaintiff is not present. Since the Defendant admits no part of her claim. The suit is hereby dismissed for want or prosecution due to non-attendance in accordance with the provision of Order 12 Rule 1 of the Civil Procedure Rules, 2010. No orders as to costs.”

22. In making the order, the trial court expressed that it based that decision on the provisions of Order 12 Rule 1, yet this rule provides for dismissal when neither party has attended Court. The proceedings of the 30th of September confirm that the representatives of the parties were present and only the Plaintiff was missing (page 108 of the Record of Appeal). This dismissal therefore ought to have been based under Order 12 Rule 3(1). The Appellant made an application to have the said order varied or set aside under Order 12 Rule 7 which the trial Court dismissed on 2nd February, 2022 and is thus the subject of this appeal.



23. Section 75(1) of the *Civil Procedure Act* outlines the instances when an order can be appealed without the leave of court. The section provides thus:

“An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted:

- a. an order superseding an arbitration where the award has not been completed within the period allowed by the court;
- b. an order on an award stated in the form of a special case;
- c. an order modifying or correcting an award;
- d. an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
- e. an order filing or refusing to file an award in an arbitration without the intervention of the court;
- f. an order under section 64;
- g. an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
- h. any order made under rules from which an appeal is expressly allowed by rules.

24. The aforementioned section is augmented by Order 43 Rule 1(1) which outlines the specific orders from which appeals shall lie as of right. It provides thus:

43 (1) (1) An appeal shall lie as of right from the following orders and rules under the provisions of Section 75 (1) (h) of the Act.

- a. Order 1 (parties to suits);
- b. Order 2 (pleadings generally);
- c. ...
- d. ...
- e. ...
- f. ...
- g. ...
- h. Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);

25. This appeal emanates from a decision of the court made under Order 12 hence it falls within the realm of Order 43 Rule 1(1) (h). The Appellant was not required to apply for leave prior to lodging this appeal. This Court finds that it has jurisdiction to handle the appeal. I thus venture to determine whether this appeal has merit.

26. On the second issue, the Appellant seeks to have the order of dismissal of the suit set aside to enable her prosecute the case in the trial court on merit. She contends that on the date of the hearing, that



is the 30th of September, 2021, she was unable to attend court as she was unwell, which predicament was told to the Defendants' advocates beforehand. In her supporting affidavit for the application for reinstatement and submissions on the appeal, the Appellant stated that she was having a terrible cough at the time and that she did not go to the hospital because COVID was still rife and she was afraid that she would have been detained and isolated if the doctors determined that she was indeed infected. The application was unopposed because the Respondent filed his reply out of the duration ordered by the trial court.

27. It should not be lost in mind that at the height of the Covid 19 pandemic this was a terrible period. There was fear and suspicion as people did not trust one another in so far as the spread of virus was concerned. A conspicuous sign that made others consider another an immediate threat was coughing or sneezing. It did not matter the intensity, or whether it was an allergic cough or from an infection, people around you would shun you anyhow. It is thus no surprise to me that a person with a cough at the time would refrain from travelling especially using public means where she would have been viewed with suspicion and exposed to stigma as a potential spreader of the Covid 19 virus. The fear expressed by the Plaintiff/Appellant was thus not far-fetched going by the situation that was obtaining at the time. It is a concern that the court needed to reflect on deeply particularly owing to the unique state of affairs at the time.
28. As for the history of Appellant/Plaintiff's conduct of the case, it is important to note that the matter was initially concluded in the year 2013 when judgement was entered in her favour on the 2nd of December, 2013 where she had availed herself and testified. The Respondents had to file an application to have the judgement set aside which was done six years later after the plaintiff and the defendants consented to the same. The fact that the plaintiff agreed to accommodate the defendants by unconditionally entering into a consent to set aside the *ex parte* judgment demonstrated her commitment and willingness to fairly and squarely face the defendants on merits. It is thus ironical that it was the plaintiff who ended up being pushed away from the judgment seat unheard.
29. For a person who had fully participated in the initial trial process to the point of securing a judgement, I do not think that she suddenly became disinterested in prosecuting this suit to its ultimate conclusion.
30. This is a matter that is now well over 12 years since it was filed. Her application to set aside the dismissal order was declined in 2019, almost four years ago. The Plaintiff/Appellant is still imploring this court to restore her right to be heard which was taken away four years ago. The bedrock of any proper functioning judicial process is the guarantee that persons coming to court in search of justice will be heard fully and fairly. Indeed, section 1A and 1B of the *Civil Procedure Act* obligates courts to ensure that substantive justice is done to the parties appearing before them. There are different options/conditions/means that the court can impose before sending away a party from the seat of justice. Dismissal should be considered a last resort in that pecking order. 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...”



31. I have considered the circumstances of the dismissal as discussed herein and it is my finding that this appeal has merit and thus succeeds.
32. I thus allow the appeal on the following terms:
- a. The ruling dated 2nd February, 2022 by the Trial Court dismissing the suit is hereby set aside;
 - b. The suit is reinstated and due its age, the trial court is directed to hear it on a priority basis by ensuring that it sets down the hearing within 45 days from the date of this order and issue notice to the parties accordingly.
 - c. Each party shall bear its own costs of this appeal.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 31st DAY OF MARCH 2023.

L.N MUGAMBI

JUDGE

In presence of:

CORAM (ON-LINE)

Before L.N. Mugambi, Judge

Appellant- absent

Respondent- absent

Advocate for Appellant- absent

Advocate for Respondent- absent

Court Assistant - Etyang

Court

This Judgement be transmitted digitally by the Deputy Registrar to the Advocates for the Parties on Record through their respective email addresses.

L.N. MUGAMBI

JUDGE

