Njoroge v Smep Micro Finance Bank Limited (Civil Appeal 124 of 2019) [2023] KEHC 2925 (KLR) (Civ) (28 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2925 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 124 OF 2019

JK SERGON, J

MARCH 28, 2023

BETWEEN

CALVINCE KAMAU NJOROGE ..... APPELLANT

AND

SMEP MICRO FINANCE BANK LIMITED ..... RESPONDENT

RULING

1. The appellant/applicant in this instance has brought the Notice of Motion dated November 12, 2021 supported by the grounds set out in its body and the facts deponed in the supporting affidavit. The applicant sought for the substantive order that this court set aside order issued on July 22, 2021 by Hon SJ Chitembwe, dismissing the appeal and reinstate the same for hearing and determination on merit.

2. The respondent opposed the Motion by filing the replying affidavit sworn on January 13, 2022.

3. The application was disposed of by way of submissions.

4. I have considered the grounds laid out on the body of the Motion; the facts deponed in the affidavits supporting and opposing it; and the submissions and authorities cited.

5. In his affidavit filed in support of the motion dated November 12, 2021, the applicant stated that he filed the Memorandum of Appeal herein which was dismissed on July 22, 2021 for want of prosecution after issuing a Notice To Show Cause which was not properly served on him nor the firm of advocates on record on his behalf that is Messrs Gichuki Karuga & Co Advocates.

6. He avers that the delay in filing his record of appeal inadvertent and not in any way attributed to his recklessness or negligence or that of his advocate on record but due factors beyond their control or reasonable foreseeability.

7. In his submissions the applicant submitted that the applicant was never served with the Notice to file a Record of Appeal or the Notice To Show Cause wherefore, the doctrine of Res Ipsa Loquitor is applicable.

8. The applicant urges the court to apply substantive justice and reinstate the appeal taking into consideration that the appellant came to this Court to seek justice as his main suit in the lower court was also dismissed in a technicality. On this the applicant relied on the case of *Joseph Karanja Chege v Stanley Muchiri Chege (2017) eKLR* Justice Joel Ngugi (as he was then) held that:

> 'Indeed, this humanistic ethos was present in our jurisprudence even in the pre-2010 period. It is evinced by the Court of Appeal in Phillip Keipto Chemwolo & another V Augustine Kibende [1986] KLR 495 where the Court stated 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 having his case determined on its merits.'
>
> 3. Similarly, across the border, the Ugandan Supreme Court has, in *Banco Arabe Espanol V Bank of Uganda [1999] 2 EA 22*, remarked, in similar vein, that:
>
> The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuant of his rights and unless lack of adherence to rules renders the appeal process difficult and inoperative. It should seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered.
>
> 4. It is only for the principle stated in these cases – the principle that Courts evince a strong policy preference to determine cases on their merits whenever possible – that I have ultimately granted the Applicant in this case leave to file his appeal out of time.

9. In response, the respondent stated that applicant alleges that his advocates on record was informed that the matter had been dismissed while pursuing the matter through several correspondences with the Civil registry but he has not attached any evidence to show the letters that were received by the Deputy registrar in the High Court of Kenya.

10. The respondent avers that the applicant has no valid excuse for the delay thus the court must guard itself against the danger of being led away by sympathy and the appeal should be dismissed.

11. I have given due consideration to the parties' respective positions as deposed. Order 12 Rule 7 of the *Civil Procedure Rules* under which the Application is brought 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'.

12. The orders sought are discretionary. I am likely to accept the applicant's explanation that the Notice to Show Cause and the Notice to File a Record of Appeal were never served on him. Additionally, the applicant claims that the primary cause of the delay is the backlog of typing the proceedings, which was made worse by the Corona virus pandemic.

13. That the applicant has since gotten the Certified copies of the proceedings from the registry, prepared a Record of appeal and therefore wishes to have the matter expeditiously disposed of by way of submissions which if allowed will file them within 14 days.

14. In an application for reinstatement of a dismissed suit or appeal, an applicant appeals to the discretion of the Court. The Court must caution itself not to exercise its discretion in a manner that will result in an injustice. This position is fortified in the case of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR*, where the Court of Appeal stated:

> ' We agree with those noble principles which go further to establish that the court's discretion to set aside an exparte judgment or order 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. I have considered the reasons that were offered by the appellant regarding their failure to attend court on the April 1, 2022 with anxious minds. I have asked myself whether failure to attend court on April 1, 2022, constituted an excusable mistake, an error of judgment or was it meant to deliberately delay the cause of justice.'

15. The circumstances of this case are sufficient to persuade the Court that the non-attendance by the applicant at the mention of Notice to show cause, was not a deliberate attempt to obstruct or delay justice. Accordingly, he should not be denied a hearing.

16. In the case of *Monica Wambui Kamau & Another v Golden Sparrow Trading Company Limited & 3 Others (2019) eKLR* Justice Munyao Sila held that:-

> ' Turning to the main prayer of the motion, I have actually no evidence of service of the hearing notice upon counsel on record for the applicants. I have no reason to doubt the deposition that the law firm representing the applicants was never served with the hearing notice for 4 December 2018. Without service, there was no way that counsel for the applicants would have known that the matter was coming up for hearing. In my view, the absence of the applicants and their counsel in court on 4 December, 2018 is well explained. I have also seen from the record that the applicants have actively been pursuing the matter and I do not think that it can be said that they have been indolent.'

17. In the premises, I find merit in the application dated November 12, 2021 which I hereby allow and set aside the orders of July 22, 2021 dismissing the appeal and reinstate the same to hearing on merit. Costs shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 28TH DAY OF MARCH, 2023.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant/Applicant

.....for the Respondent