RMM v RWR (Matrimonial Cause E006 of 2022)
[2023] KEHC 18537 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18537 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MATRIMONIAL CAUSE E006 OF 2022

G MUTAI, J

MAY 31, 2023

BETWEEN

RMM ..... APPLICANT

AND

RWR ..... RESPONDENT

RULING

1. The application before the court is dated August 2, 2022. It seeks 5 orders to wit that:-
    1. Spent;
    2. The honourable court be pleased to order the reinstatement of the suit filed herein together with the application dated May 11, 2022;
    3. The honourable court be pleased to set aside, vary and or review the orders issued by the honourable court on the July 26, 2022;
    4. The honourable court be pleased to issue such further orders in the interest of justice; and
    5. The costs of the application be provided for.
2. The application arises out of the orders this court (per Onyiego, J) made on July 26, 2022. On the said date the then advocate for the applicant Mr George Egunza failed to attend court even though his application dated May 11, 2022 was due to be heard. He averred that he failed to do so as the court did not admit him into the Microsoft Teams online platform.
3. This court ruled that "the application dated May 11, 2022 is dismissed for want of prosecution and non-attendance of the applicant with costs to the respondent".
4. The application is based on the grounds, *inter alia*, that Mr Egunza was let into the online platform long after the matter was called and orders issued, that the failure on the part of counsel was an

excusable mistake which ought not to be visited upon his innocent client. It is also stated that this is one matter where determination should be made on merit and not on technicalities and that the applicant shouldn't be condemned without being heard. The applicant avers that this court has the necessary unfettered discretion to reinstate the suit and that courts should as much as possible seek to sustain suits, not to dismiss them, thereby prematurely terminating the same. Lastly it is also averred that the respondent won't be prejudiced if the instant application is allowed.

5. The application is opposed. The respondent filed grounds of opposition dated September 8, 2022 on September 16, 2022 *vide* which she objected to the application now before the court on 4 grounds to wit

    1. The same was brought under the wrong provisions of law and is thus incompetent and incurably defective hence fit to be struck off the record;

    2. The applicant was accorded an opportunity to be heard on July 26, 2022. He failed to attend court to prosecute the application;

    3. The allegation made by counsel that he attempted to log into the court's online portal on the said date was unsubstantiated. The exhibit relied upon was not credible; and

    4. The applicant's counsel took too long to file the application now before the court.

6. Since the provisions of the law under which the application was brought have been question I find it necessary to set them here. They are order 16 rule 5 of the *Civil Procedure Rules* (on time, place, and purpose of attendance to be specified in the summons) sections 1, 1A, 3A and 63(c) and (e) of the *Civil Procedure Act* (on title, objective of the *Civil Procedure Act*, inherent powers of the court and supplemental proceedings). The other provisions that were quoted were quite humdrum/boiler plate and need not be rehashed.

7. When this matter came before me on March 13, 2023 I gave directions that the same be canvassed by way of written submissions. I gave parties timelines within which this was to be done.

Submissions of the Applicant

8. The applicant's counsel submitted that the then counsel wasn't admitted into the online portal on time. He argued that the said failure, and the excusable mistake on the part of the said counsel, shouldn't be visited upon an innocent litigant. The court was referred to article 159 of the *Constitution* and the overriding objectives of the *Civil Procedure Act*. It was urged that section 3A of the *Civil Procedure Act* gives this court inherent powers to make such orders as may be necessary for the ends of justice to be met. The applicant further argued that the court's discretion to set aside an order of the nature of dismissal order is intended to avoid an injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. I was referred to the decision of Madan JA in *Belinda Murai & 9 others v Amos Wainaina* [1979] eKLR. The applicant also cited the decision Apaloo JA in *Philip Chemwolo v Augustine Kubende* (1982-1988) KAR and *John Nahashon Mwangi v Kenya Finance Bank Ltd (in Liquidation)* [2015] eKLR.

9. The applicant thus urged me to exercise my discretion and to reinstate the application for hearing and determination on merits.

Submission of the Respondent

10. The respondent quite naturally, as would be expected, opposed the application. She identified 2 issues for determination by this court. These are whether the application is premised on the wrong provisions

of the law and if the consequence of negligence of the applicant's advocate should be visited on the respondent.

11. On the issue of the appropriate provision of the law she submits that the applicant ought to have relied on the provision of order 12 rule 7 of the *Civil Procedure Rules* which provides that:-

> " 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 respondent urged that after she filed her grounds of opposition the applicant had the opportunity to rectify his application as appropriate. The respondent therefore prayed that the application be struck of the record.

13. On the question as to whether the negligence of the applicant's advocates should be visited on the respondent her counsel referred me to the latin maxim "*res inter alios acta alteri nocere non debet*" which expressed in english means that "things done between strangers ought not to affect a third person, who is a stranger to the transaction". It was submitted that what is disclosed in the application would, if true, amount to professional negligence on the part of the advocate then on record. In those circumstances it was urged that the respondent ought not to be made to shoulder the negligence of the applicant's advocates. In the present circumstances the respondent argued that the applicant had a cause of action against his then advocate for professional negligence.

14. I was referred to the cases of *Charles Omwata Omwoyo v African Higlands & Produce Co Ltd* [2002] eKLR for the proposition that parties ought to bear the consequences of the negligence of their own counsels.

15. The respondent thus urged me to dismiss the application.

Issues for Determination

16. I am in agreement with the counsel for the respondent that 2 issues ought to be decided by this honourable court. These are:-

    1. Whether the application was brought under the wrong provision of the law; and

    2. Whether the negligence or mistake on the part of counsel sought to be excused by this honourable court.

Synthesis of the Law and the Facts

17. It is a common ground that the applicant's then counsel, Mr George Egunza failed to log in when the application dated May 11, 2022 was due for hearing. The consequence of that failure was that the application was dismissed. Whether the said failure was inadvertent or deliberate and who should bear the consequence of the failure, are issues the parties are unable to agree on. I shall look at both of these, together with the technical question as whether the right provision of the rules was relied upon below. I shall begin with the latter.

Did the Applicant rely the wrong provision of the Law in his Application?

18. I have previously referred to the provisions of the law under which the application was brought. It is clear, beyond dispute that the applicant relied on the provisions of the rules that were inapplicable. Should this court therefore close the doors of justice to him due to this failure? I think not. I say so for the following reasons.

19. The *Constitution* of Kenya, 2010 brought about a paradigm change in the practice of law and also on exercise of judicial authority by the courts. Article 159(2) of the *Constitution* lists down principles that should guide courts when exercising judicial authority. These are given as:-

> " In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
>
> (a) justice shall be done to all, irrespective of status;
>
> (b) justice shall not be delayed;
>
> (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
>
> (d) justice shall be administered without undue regard to procedural technicalities; and
>
> (e) the purpose and principles of this Constitution shall be protected and promoted."

20. The *Constitution* does this as the people of Kenya saw substantive justice, that is ordinarily available upon trial on merits, as being ideal. In this constitutional dispensation procedure, as important as it is in giving parties fair opportunity to present their respective cases, was seen as a handmaiden of justice, and not its mistress. Thus where it is possible to discern a case being presented by a party courts should not, in my humble view, use procedural or technical lapses to foreclose justice. Thus whereas I agree with the respondent that the application filed herein should have been brought under order 12 rule 7 of the *Civil Procedure Rules* I do not see how that lapse has prejudiced her.

21. I note that the *Constitution* in article 22 permits, in respect of enforcement of the bill of rights, proceedings commenced on the basis of informal documentation. Although this is not a constitutional matter nor a cause for enforcement of the bill of rights I would be most reluctant to fetishize procedure and to deny a party a seat at the table of justice on the ground that there was a minor procedural lapse.

Should The Mistake On The Part Of Counsel Be Visited On The Innocent Respondent?

22. The applicant submits that his lawyer was unable to log in as he wasn't admitted by the court. This particular contention wasn't well articulated. I note that online proceedings require courts to admit litigants and or their counsels. Where a litigant or his counsel isn't admitted he/she is unable to attend the relevant proceedings. Was this the case in this matter? I am unable to tell as the respondent's counsel failed to adduce evidence by way of replying affidavit that would have enabled the court to make a determination. I say so with knowledge of the difficulty she would have had in any case as the court is the custodian of the log-in logs. That notwithstanding proof of the failure, or the lack thereof, of the applicant's previous advocate is important. It is entirely possible that the applicant's counsel wasn't admitted, as he alleges. If the failure was caused by the court's own negligence then it would be most unfair to penalize the applicant for it.

23. Even if the applicant's counsel was negligent should the error be visited on his client? I have been referred to the latin phrase "res inter alios acta alteri nocere non debet". I understand this maxim as applying in the realm of the contract law.

24. I have looked at the authorities that the respondent has referred to in *Charles Omwata Omwoyo v African Highlands & Produce Co Ltd* [2002] eKLR the issue before the court was whether the High

Court could transfer a case which was filed in a court without jurisdiction to another court. Ringera J (as he then was) ruled that it couldn't. The other case cited by the respondent is that of *Alice Mumbi Nganga v Danson Chege Nganga* [2006] eKLR. In the said case the plaintiff had several opportunities to prosecute her case. She didn't do so. In the matter before the court on the other hand there was a single instance of non-attendance. Should the applicant be denied the opportunity to present his case on account of this one failure? I think not. I am guided by the following cases.

25. In *Belinda Murai & 9 others v Amos Wainaina* [1979]eKLR Madan JA stated as follows:-

> " The former advocate's belief was a mistake on a point of law however wrong he might have been in his belief. No one has said that it was a deliberate act. On the contrary, his obstinate adherence to his wrong belief shows that he genuinely, though mistakenly, believed his view was correct.

A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of the years since the decision was delivered so requires. It is all done in the interests of justice."

26. The above holding binds this court.

27. The foregoing speak to the proposition that a mistake on the part of counsel, will in most cases be excused unless to do so will result in an injustice. Where there is negligence, as opposed to a mistake, the court may be persuaded to foreclose further action and to leave the litigant to pursue a cause in negligence against his advocate.

Disposition

28. The upshot of the foregoing is that I find that the application has merit. I allow the application dated August 2, 2022 and make the following orders:-

    1. The application dated August 2, 2022 is hereby allowed
    2. The application dated May 11, 2022 is hereby reinstated
    3. This matter shall be mentioned on June 12, 2023 for directions.

29. Costs shall be in the cause.

Orders accordingly.

DELIVERED, DATED, AND SIGNED THIS 31ST DAY OF MAY 2023 AT MOMBASA VIA MICROSOFT TEAMS

.....

GREGORY MUTAI

JUDGE

In the presence of :-

No appearance for the Applicant

No appearance for the Respondent

Ms. Winnie Migot – Court Assistant