Guardian Coach & another v Ojijo (Civil Appeal 15 of 2021)
[2023] KEHC 20840 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20840 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

CIVIL APPEAL 15 OF 2021

JR KARANJA, J

JULY 27, 2023

BETWEEN

THE GUARDIAN COACH ..... 1ST APPELLANT

HENRY MACHARIA ..... 2ND APPELLANT

AND

PHAUSTINE ONGACHI OJIJO ..... RESPONDENT

JUDGMENT

1. The Memorandum of Appeal is dated April 21, 2021 and arose from the ruling delivered on the same day by the Principal Magistrate at Kericho in CMCC No 345 of 2018, dismissing the appellant's application dated January 6, 2021.

2. The appeal was thus brought on the basis of the seven (7) grounds set out as follows;

    1. That the learned magistrate erred in law and in fact in dismissing the Application dated January 6, 2021 without any valid reasons.

    2. That the learned magistrate erred in law and fact by refusing to set aside Exparte proceedings of December 9, 2020 upon the appellants' non-attendance at the hearing when the Appellants had shown that their non-attendance was caused by no fault of their own.

    3. That the learned magistrate erred in law and fact by refusing to reinstate the motion dated April 30, 2020 for hearing on merit despite there being overwhelming evidence that the Appellants non-attendance in court on December 9, 2021 was caused by no fault of their own.

    4. That the trial court erred in summarily determining the application dated January 6, 2021 without considering the gravity of the triable and arguable issues raised thereby arriving at an erroneous decision.

5. That the learned trial magistrate erred in law and in fact in disregarding the Appellant's averments in the application dated January 6, 2021 and their written submissions thereto.

6. That the learned trial magistrate misdirected himself on the facts and the law by basing his findings on irrelevant considerations and exercised his discretion capriciously and or improperly.

7. That the learned trial magistrate erred in law and in fact by holding that the Appellant's application dated January 6, 2021 seeking to set aside exparte proceedings of December 9, 2021 and reinstatement of the application dated April 30, 2021 lacked merit thereby occasioning a miscarriage of justice.

3. It is therefore the appellants' prayer that the appeal be allowed with the setting aside of the impugned ruling delivered on April 21, 2021 together with the ex-parte proceedings of the December 9, 2020. Further, that the application dated April 30, 2020 be re-instated for hearing on merit.

   On the outset, the impugned ruling of the April 21, 2021 is the foundation of this appeal and ought to have been included among the documents forming the record of appeal but it was not. This was a serious error on the part of the appellants. They never even attempted to correct the error by inclusion of the impugned ruling in their written submissions filed herein on June 20, 2023. This is sufficient enough reason for this appeal to be dismissed for being defective and incompetent.

4. Be that as it may, the respondent having noticed the appellant's omission annexed a copy of the impugned ruling to her written submissions dated April 26, 2023. And, without giving undue regard to procedure technicalities this court deemed it necessary to consider the appeal on merit by revisiting the impugned application dated January 6, 2021 with a view to arriving at its own conclusions without disregarding the evidential facts placed before the trial court and its conclusion of the same.

5. The bone of contention in this appeal is whether the impugned ruling delivered on April 21, 2021 ought to be set aside. Indeed, this is the basic issue for determination and would be the determining factor for prayers of setting aside the ex-parte proceedings of the December 9, 2020 and the reinstatement for hearing on merit the application dated April 30, 2020.

6. The application which resulted to the impugned trial was the Notice of Motion dated January 6, 2021 which sought orders including to set aside an ex-parte Judgement and stay its execution pending the determination of an application dated May 27, 2020, to set aside the ex-parte orders dismissing that application and to reinstate the application dated April 30, 2020.

7. The trial court considered the application on the basis of the averments contained in both the supporting and responding/replying affidavits together with the respondent's written submissions, the applicants having failed to file their submissions despite being given adequate opportunity to do so.

8. It is clear from the record that the application was filed to take the place of an application dated December 16, 2020 which was withdrawn. It was presented before the court under certificate of urgency on January 12, 2021 when it was slated for inter-parties hearing on January 27, 2021 when it was fixed for mention on February 3, 2021, on which date both parties were present and agreed to have the application canvassed by way of written submissions. Thereafter, it was fixed for mention to confirm filing of submissions on February 10, 2021, on which date both parties appeared and whereas the respondent/plaintiff confirmed filing of their submissions through learned counsel M/s Keter, the applicant/defendant through learned counsel M/s Cheruiyot, indicated that they had not filed their submissions but were ready for a ruling on the application.

9. The ruling indeed came on the April 21, 2021 and is the one now being challenged by the applicant under the present appeal. In arriving at the ruling, the trial court re-traced the events unfolding since the inception of this case upto the time of the impugned ruling and relying on several decisions of the superior courts cited in the body of the ruling, it rendered itself thus;

> ' These transactions discussed herein from the records renders most of the depositions of the applicant in the present case false, inaccurate without due diligence and designed to defeat justice to the Respondent. Multi-filing of an application for the same orders all over including in the high court without disclosure is putting this court at the risk of issuing conflicting orders which is detrimental to the Respondent's long overdue fruits in the judgment. Although this Applicant has dwelled so much on its predicament in attending the hearing of the dismissed application and desperately pleaded for the direction of court in reversing its process to his favour, he says nothing about missing the hearing of the suit itself. He has said nothing convincing at all on whether there is a defense to offer in the first place. In paragraph 4 of this judgement in force, this court did not miss to note that the Applicant failed to participate in this trial from the word go, lagged on compliance of the pre-trials and never filed or served statements of its proposed witness'

10. The trial court concluded by stating that: -

> ' Summarily in the present case, I must agree that I am bound by the decision of the judges in the case laws referred to in this decision that the Applicant is not only bent on buying time, frustrating the Respondent, deliberately stolen a match in the circumstances but also has no forthcoming defence to this suit the result of which the Application fails for want of merit with costs to the Respondent'.

This court having reconsidered the application as was duty bound as the first appellate court could not agree more with the conclusion and findings reached by the trial court which are hereby affirmed and upheld.

11. In effect, this appeal alongside its supporting grounds and submissions is clearly wanting on merit and has demonstrated that it was yet another of the appellant's tactics to delay justice to the respondent and indeed, enjoyment of the fruits of her judgment. In sum, the appeal is hereby dismissed with costs to the respondent.

Ordered accordingly

[Delivered, dated and signed at Kericho this 27th day of July, 2023.]

J. R KARANJAH

JUDGE