



REPUBLIC OF KENYA



**Nguluu v Gachanja (Civil Case 41 of 2017)
[2023] KEHC 23034 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23034 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL CASE 41 OF 2017
CW GITHUA, J
SEPTEMBER 28, 2023**

BETWEEN

JOHN NZIOKA NGULUU APPELLANT

AND

MARTIN IRUNGU GACHANJA RESPONDENT

(Being an Appeal from the Ruling of the Kigumo Senior Magistrates Court delivered on 17th August 2017, in Kigumo SRMCC No. 119 of 2013 by Hon. A. Ogonda – Resident Magistrate)

JUDGMENT

1. The genesis of this appeal is the ruling of the trial court delivered on 17th August 2017 in which the learned trial magistrate, Hon. A. N. Ogonda (RM) dismissed with costs a Notice of Motion filed by the appellant dated 12th January 2017.

The substantive prayers in that application were as follows:-

- I. That there be a stay of further proceedings and or execution pending the hearing and determination of this application.
 - II. That this honourable court deems it fit to review and set aside the judgement and order given on 11th March 2016 and the defendants application dated 16th October 2015 be reinstated for hearing.
 - III. That this honourable court does make such orders or alternative orders as the court might deem it fit.
 - IV. That costs of this application be in the cause.
2. The background to the filing of the above application is rather confounding. Briefly, the respondent (then the plaintiff) sued the appellant in the lower court seeking general and special damages following



injuries he allegedly sustained on 19th April, 2013 in a road traffic accident whose occurrence was blamed on the negligence of the appellant's driver, agent or servant in driving motor vehicle registration number KAM 924Z owned by the appellant.

3. Although the appellant filed a defence denying liability as alleged by the respondent, the parties subsequently filed a consent on liability in the ratio of 75:25 in favour of the respondent against the appellant which was adopted as an order of the court on 27th March 2015. They agreed that assessment of damages be done on the basis of written submissions and a medical report which was to be annexed to the respondents written submissions.

The court record shows that both parties thereafter duly filed their respective written submissions on quantum.

4. Hardly a month later, the appellant filed a Notice of Motion dated 16th October 2015 seeking that the parties consent on liability adopted by the court about 7 months earlier and the order recorded on 24th September 2015 by consent of the parties on mode of hearing of assessment of damages be set aside. The appellant further requested that once those orders were set aside, the suit should proceed to full hearing.
5. A perusal of the court record shows that after several adjournments, the application was fixed for hearing on 15th April, 2016 in the presence of learned counsel holding brief for the appellant's counsel but on the hearing date, neither the appellant nor his counsel attended the court. The learned trial magistrate then dismissed the application for non attendance by the appellant and proceeded to fix a mention date to give him an opportunity to file written submissions on quantum as by that time, only the respondent had filed submissions.
6. On 18th June 2016, the appellant, through his advocates, filed his written submissions and final judgement was delivered on 26th August 2016. About six months later, the appellant filed the Notice of Motion dated 12th January, 2017 whose dismissal prompted filing of the instant appeal.
7. In his memorandum of appeal dated 7th August 2017 and filed on even date, the appellant advanced five grounds of appeal which are reproduced hereunder ;-
 - i) The learned trial magistrate erred in law by declining an application that was not opposed thus she did not exercise her discretion judiciously.
 - ii) The learned trial magistrate erred in fact and law by failing to set aside the previous proceedings while the factual substratum of the circumstances that led to the earlier proceedings was not controverted.
 - iii) The learned trial magistrate erred in fact and law by failing to carefully weigh the nature of application, the circumstances of the case and the constitutional rights of the parties.
 - iv) The learned trial magistrate erred in fact and law by failing to consider the fact that the claim before the court was being challenged on the question of genuineness and possibility of fraud which is gravely serious matter.
 - v) The learned trial magistrate erred in law by regarding the proceedings as spent while proceedings are sustainable as long as there is justiciable relief that a party can get before the court.



8. Relying on the above grounds, the appellant implored this court to set aside the impugned ruling and the judgement of the trial court and order that the suit be heard afresh. The appellant also sought to be awarded costs of the appeal and in the lower court.
9. The appeal was prosecuted by way of written submissions. The appellants filed his submissions on 3rd February, 2023 through his advocates Ms. Mbigi Njuguna & Co. advocates while those of the respondents were filed on his behalf on 16th February 2023 by Mr. Shem Kebongo Advocate.
10. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am fully aware of the duty of the first appellate court which was succinctly summarized by the Court of Appeal in *Selle & Another V Associated Motor Boat Company Ltd & others* (1968) E.A 123 as follows;-

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such appeal are well settled.

Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowances in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanor of a witness is inconsistent with the evidence in the case generally”.

11. Having considered the submissions filed by both parties and the material placed before the lower court record as summarized above, I find that this appeal turns on a consideration of whether the learned trial magistrate properly exercised her discretion in dismissing the application dated 12th January 2017.
12. I must begin at the outset by outlining the legal principles that guide an appellate court in deciding whether or not to interfere or to reverse an order made by a lower court in the exercise of its discretion which is what the appellant is asking this court to do. Those principles were well enumerated by the Court of Appeal in *United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd.* (1985) EA wherein it stated as follows;-

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly that he took account of consideration of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly that his decision, albeit a discretionary one is plainly wrong”.

13. Again , in *Caroline Elsa Anne Sturdy Vs John Greaves Hilder* (1984) eKLR, the Court of Appeal when quoting the celebrated case of *Mbogo Vs Shah* [1968] E.A stated thus;

“... I think it is well established that this court will not interfere with the exercise of its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted on or because it has failed to take into consideration and in doing so arrived at a wrong conclusion. It would be wrong for this Court to interfere with the exercise of the trial Judge’s discretion merely because this Court’s decision could have been different”



14. A close scrutiny of the appellants application dated 12th January 2017 reveals that it was basically seeking review and setting aside of the judgement delivered on 26th August 2016; the orders dated 11th March 2016 and that the Notice of Motion dated 16th October 2015 be reinstated for hearing.

The latter prayers were obviously predicated upon a successful outcome of the first prayer for review and setting aside of the judgement.

15. In the written submissions filed on his behalf, the appellant argued that in dismissing his application which was unopposed, the learned trial magistrate failed to exercise her discretion judiciously and failed to take heed to Article 159 of *the Constitution* which requires courts to administer substantive justice without undue regard to procedural technicalities. Reliance was placed on the case of Richard Murigu Wamai Vs Attorney General & Another (2018) eKLR in which the learned Judge relied on the decision in Patel Vs E.A. Cargo Handling Services Ltd (1974) E.A. 75 where it was held that the court's discretion to set aside judgement was

“ intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise , to obstruct or delay the cause of justice”.

16. The appellant further contended that after recording the consent on liability and before parties filed submissions on quantum, he had discovered new and damning evidence which pointed to fraud on the part of the respondent as it raised doubts whether the respondent had in fact been involved in the accident subject matter of the suit; that this issue ought to have proceeded for trial; that the appellant was not given an opportunity to prosecute his application dated 16th October 2015 due to no fault of his own as the application was dismissed for failure of his advocate to attend court on the hearing date; that mistakes of an advocate should not be visited on litigants.

17. On his part, the respondent urged me to find that the application dated 12th January, 2017 and this appeal were meant to delay enjoyment of fruits of his judgement and amounted to an abuse of the court process; that the object of Article 159 of *the Constitution* and the overriding objective stipulated in Section 1 (A) of the *Civil Procedure Act* was not to aid a litigant to defeat the ends of justice.

18. I have given due consideration to the written submissions filed by both parties and all the authorities cited as well as the reasoning of the learned trial magistrate in the impugned ruling. My reading of the said ruling shows that the learned trial magistrate thoroughly analyzed the appellants application and the context in which it was filed and the applicable law.

The learned trial magistrate properly addressed her mind to the provisions of Order 45 Rule 1 of the Civil Procedure Rules (CPR) which governs the circumstances in which a court could lawfully review its previous orders or judgement which is what the application required the trial court to do.

19. Order 45 Rule 1 of the Civil Procedure Rules is clear and categorical that in order to deserve an order for review, an applicant must demonstrate to the satisfaction of the court that either of the following circumstances existed in his case;-

- i. That he had discovered new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made; or
- ii. That there was a mistake or error apparent on the face of the record; or
- iii. For any other sufficient cause, and;



- iv. That the application was filed without unreasonable delay.
20. In dismissing the application, the learned trial magistrate carefully rehashed all the events in the trial that led to the filing of the application and concluded that the appellant had failed to meet the threshold for review as set out in Order 45 Rule 1 of the C PC especially the requirement that applications for review should be filed without unreasonable delay.
21. The learned trial magistrate made a finding that the appellant had not offered a reasonable explanation for filing the application about one year after judgement was delivered. She relied on the authorities of Abdulraham Adam Hassan Vs National Bank of Kenya and KenFreight E.A. Limited Vs Star East Africa Company Limited where the Court found that a delay of even three months was inordinate and unreasonable.
22. Whereas there is no universally accepted test of determining what amounts to inordinate or inexcusable delay and each case must be determined on its own merit, I am unable to fault the learned trial magistrate for her finding even if there may have been some miscalculation regarding the length of the delay between the time judgement was delivered and the time the application was filed since the finding was largely based on facts contained in the court record.
23. The appellant in his submissions emphasized that the learned trial magistrate erred by failing to set aside the judgement to give him an opportunity to be heard on the application dated 16th October 2015 that sought setting aside of the consent orders on liability even after his learned counsel explained the reason for failing to attend the court and after the court was informed that new evidence had been discovered showing that the respondent may be a fraudster as there was a possibility that he was not involved in the accident in question.
24. It is however important to note that the appellant did not offer any explanation why he chose to wait for the final judgement to be delivered in order to seek reinstatement of the aforesaid application. The judgement was delivered on 26th August 2016 while the application was filed on 12th January 2017 about five months later.
- These period of delay was not explained whatsoever as well as the period between the date the application was dismissed and the date judgement was delivered.
25. It is also noteworthy that in his submissions, the appellant claimed that the discovery of evidence that the respondent's claim was fraudulent was made before the parties filed their submissions on quantum. If this was true, one wonders why the appellant knowing this position chose to participate in progressing conclusion of the suit by filing written submissions on quantum instead of taking immediate steps to seek reinstatement of the application dated 16th October 2015. By filing his submissions on quantum, the appellant by implication validated the respondent's claim. It defeats logic that the appellant would participate in assessment of damages for injuries the respondent claims he sustained in the accident only to turn around after judgement on quantum was delivered to question the authenticity of his claim and to seek reinstatement of the application seeking to set aside the consent order on liability which had been dismissed way before parties filed submissions on quantum.
26. Lastly, the appellants contention that the trial court ought to have been guided by substantive justice and allowed the application in order to have the issue of fraud addressed in a full trial in my opinion has no merit because if the evidence suggesting fraud in the respondent's claim existed, the appellant and or his counsel could have obtained such evidence before recording the consent on liability or before judgement was delivered if they had exercised due diligence.



27. In my view, the appellants conduct taken as a whole gives an impression that the application dated 12th January, 2017 may not have been filed in good faith. It appears to have been an afterthought meant to delay the appellant's day of reckoning by further delaying enjoyment by the respondent of fruits of his judgement.
28. Although I fully agree with the appellant that *the Constitution* at Article 159 decrees that courts shall apply substantive justice in determining disputes before them, substantive justice is applicable to all parties to a dispute and cannot be one sided. It cannot be applied to aid an indolent party who was evidently intent on obstructing the cause of justice in a manner that would cause prejudice to the opposite party.
29. Having scrutinized the impugned ruling, I am satisfied that the learned trial magistrate considered all relevant factors including the appellants conduct and came to the conclusion that he was not deserving of exercise of the court's discretion in his favour.
30. There is nothing on record to indicate that in arriving at her decision, the learned trial magistrate applied wrong legal principles or misapprehended the facts presented before her. And whereas it is indeed true that in appropriate cases, mistakes of an advocate should not be visited on his or her client, the unfortunate circumstances that led to the filing of the application dated 12th January 2017 depicted either lack of diligence on the part of the appellant and his counsel or a deliberate plan designed to defeat the ends of justice as opposed to an innocent or an inadvertent mistake. I am thus convinced that the learned trial magistrate properly exercised her discretion in dismissing the application.
31. Flowing from the foregoing, I have come to the conclusion that this appeal is devoid of merit and it is hereby dismissed with costs to the respondent

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 28TH DAY OF SEPTEMBER 2023.

C. W. GITHUA

JUDGE

