



**Karimi (Suing as a legal administrator of the Estate of Peter Ng'ang'a Ngugi) v Mwangi & another
(Civil Appeal E098 of 2022) [2023] KEHC 27444 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 27444 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E098 OF 2022
DO CHEPKWONY, J
NOVEMBER 23, 2023**

BETWEEN

**EUNICE NYAWIRA KARIMI (SUING AS A LEGAL ADMINISTRATOR OF
THE ESTATE OF PETER NG'ANG'A NGUGI) APPELLANT**

AND

JAMES KAMAU MWANGI 1ST RESPONDENT

THADDEAS EGESA MAIGA 2ND RESPONDENT

JUDGMENT

1. By way of background in order to provide context in this case, it will be noted that the Appellant herein instituted the suit before the trial court on behalf of her deceased husband Peter Nganga Ngugi who died following a road traffic accident on 13th July, 2016 after he was knocked down by Motor Vehicle Registration Number KBU 248F. The Appellant filed the Complaint on 21st May, 2019 and later sought and was granted leave to file Amended Complaint which was filed on 14th November, 2019.
2. The matter was then fixed for Mention on 6th February, 2020 for pretrial conference on which date there was no appearance from either party and the court fixed the matter for hearing on 12th March, 2020. On this date, there was still no appearance from either party and the court dismissed the suit for want of prosecution.
3. This dismissal prompted the Appellant to file a Notice of Motion Application dated 16th February, 2022 wherein she sought to set aside the court orders of 12th March, 2020 which dismissed the matter for want of prosecution and for the validity of summons to enter appearance to be served upon the Defendant/Respondent to be extended.
4. In that application, the Appellant has relied on the ground that the non-prosecution of the suit was occasioned by improper communication by her advocates on record but she was ready and willing to prosecute the matter.



5. The trial court considered the application and held that it was upon the Appellant to find out from her Counsel on the progress of the matter as she was the one with an interest in the matter and not her counsel. The trial Magistrate also observed that the Appellant had not provided proof that she followed up with the advocate the progress of the case and for that reason she declined the application.
6. On the other prayers for reissuance of Summons or extension of Summons which had expired, the trial court held that Under Order 5 Rule 2 of the Civil Procedure Rules, there is no provision of reissuance of Summons which have expired. The trial court held then that it could not resuscitate the dead summons and proceeded to dismiss the Appellant's application with no orders as to costs.
7. Aggrieved by the dismissal of the application dated 16th February, 2022, the Appellant filed a Memorandum of Appeal dated 18th May, 2022 which is based on the following grounds:-
 - a. That the Learned Trial Magistrate erred in law and in fact by failing to pay undue regard to technicalities in visiting the Appellants advocates mistake on the Appellant.
 - b. That the Learned Trial Magistrate erred in law and in fact by failing to consider that the Appellant had raised triable issues in Amended Plaintiff and had an arguable case and deserved to be heard and therefore should not be thrown out from the seat of justice.
 - c. That the Learned Trial Magistrate erred in law and in fact by failing to find that the Appellant has been condemned unheard.
 - d. That the Learned Trial Magistrate erred in law and in fact by dismissing he Appellant's application dated 16th February 2022.
 - e. That the Learned Trial Magistrate erred in law and in fact by failing to consider the fact that the Appellant has always been diligent and in attendance of the court proceedings but has been misdirected by her Advocates on record.
 - f. That the Learned Trial Magistrate erred in law and in fact by failing to exercise its discretion judiciously and failed to consider the overriding objective of the [Civil Procedure Act](#) and the interest of the Appellant and her children.
8. The Appellant is therefore seeking the following orders:
 - i. That this Honourable court allows the Appeal.
 - ii. That the Ruling of the Lower court delivered on 5th May, 2022 be reviewed / set aside/varied as this Honourable court may deem fit.
 - iii. That the cost of this Appeal be borne by the Respondents.
9. The Court directed the application be disposed of by way of written submissions which were filed on 8th December, 2022 raising two issues for determination:-
 - a. Whether the mistake/error on the part of the Counsel should be visited upon the client?
 - b. Whether the draft claim raises triable issues.



10. The court has considered the appeal by reading through the original record of proceedings, Appellant's Submissions and the authorities cited therein so as to evaluate the same and come up with its own decision. The main issue for determination then becomes whether this Appellate court should interfere with the findings of the trial court.

11. It is trite law that the duty of the Appellate court is as stated in the case of *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, which stated thus:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

12. In essence, a court can only interfere with the decision of the trial court where it finds that the same was based on an error in principle or on mis-application of the law.

13. In this case, the court agrees with the trial court that it is the duty of a litigant and not its advocate to follow up with his/her case from the moment the case starts to its conclusion. Therefore, it was upon the Appellant in this case to have followed up with the case, which she failed and cannot now blame the Advocate. On this, the court relies on Court of Appeal case of *Tana and Athi Rivers Development Authority –vs- Jeremiah Kimigho Mwakio & 3 Others* [2015] eKLR where it was stated:-

“...From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side. (See. *Halsbury's Laws of England*, 4th Edn, Vol 44 at p 100-101) and also *Re Jones* [1870], 6 Ch. App 497 in which Lord Hatherley communicated the court's expectations this way:

‘...I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned...’

Under this duty, counsel is unequivocally obliged to exercise candor and not aid a litigant in subversion of justice. Even though the determination of whether or not counsel has failed in this obligation is dependent on the circumstances of a case, as a custodian of justice, the court must always stay alive to the interests of both parties. This is of paramount importance. Thus, there is a corollary to the hallowed maxim that mistakes of counsel should not be visited on a client...Hence, the mistakes of Mr. Mouko's clerk became the mistakes of Mr. Mouko. This takes us back to the question, was the same excusable enough to warrant court's favour?

In determining whether to exercise the discretion in a party's favour, the court pays regard to the damage sought to be forestalled vis a vis the prejudice to be visited on the opposing party. In view of the age of this case and the timelines within

which the appellant has acted, we take the view that the appellant has been less than candid with the court and that the appellant's true intentions are the derailment of the suit.....The respondents were basically being held at ransom by the appellant's laxity in having the matter



laid to rest. .. As stated by this Court in the case of Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.” emphasis added.

14. On the issue of extension of Summons, it is not in dispute that the Summons to enter appearance had already expired without service and the Appellant has not shown any efforts she made to trace the Defendant. The Civil Procedure Rules provides for other modes of service including service by way of advertisement which the Appellant could have explored while the Summons were still valid.

15. For the court to consider an application for extension of summons, there must provided be good reasons and circumstances. On this, the court resonates with the case of Ethics and Anti-Corruption Commission -vs- Shaibu Hamisi Mgandi & Another; Commissioner of Lands (Interested Party) [2020] eKLR, Justice Munyao stated as follows: -

“...The court will of course consider all the surrounding circumstances of the case and make a decision whether or not to exercise its discretion in favour of the applicant. It is of course certainly prudent to apply for extension before the summons have expired, or shortly thereafter, for as more time lapses, the more difficult it will be to convince the court to extend the validity of summons, because avenues such as an application for substituted service can be explored, and further, the plaintiff runs the risk of having his suit dismissed if no application for extension is made 24 months after the issuance of the first summons...”

16. In the resultant, the court finds that the grounds raised are not sufficient to warrant the extension of the Summons.

17. Consequentially, this court finds that the trial court neither made any error in law or fact to warrant the interference of this court. The court proceeds to find the appeal herein lacking in merit and dismiss the same.

18. There shall be no orders as to costs.

It is so ordered.

RULING DATED AND SIGNED AT KIAMBU THIS 23RD DAY OF NOVEMBER, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Kamuyu counsel for Appellant

Court Assistant - Martin

