Kawamara v Glajoes Enterprises Limited & another (Civil Appeal 88 of 2013) [2022] KEHC 12138 (KLR) (23 May 2022) (Ruling)

Neutral citation: [2022] KEHC 12138 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 88 OF 2013

OA SEWE, J

MAY 23, 2022

BETWEEN

SWEETBAT KAWAMARA ..... APPELLANT

AND

GLAJOES ENTERPRISES LIMITED ..... 1ST RESPONDENT

WAMBUA MASENO ..... 2ND RESPONDENT

RULING

[1] Before the Court for determination is the Notice of Motion dated August 13, 2021. It was filed herein 17th August 2021 by the appellant/applicant pursuant to sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, and Order 12 Rule 7 and Order 51 Rules 1 and 2 of the *Civil Procedure Rules*, 2010, and all enabling provisions of the Law, for the following orders: -

[a] That this Honourable Court be pleased to reinstate this Appeal for hearing and disposal, and

[b] That costs of this Application be in the cause.

[2] The application is premised on the grounds that this appeal was dismissed on December 17, 2018 during the service week for want of prosecution; and that the appellant did not learn of the dismissal until August 6, 2021 when he visited the Registry for the purpose of filing his written submissions in respect of the appeal. The appellant further contended that he filed his Record of Appeal on December 14, 2018 and had his written submissions prepared for filing as of September 25, 2020, but that the court file could not be traced. He averred that he will suffer immensely if the application is not allowed. He added that, on the other hand, respondent will not suffer any prejudice at all that cannot be compensated by way of costs.

[3] The application is supported by the affidavit of Joseph Karanja Kanyi, Advocate, sworn on 17th August 2021, in which it was averred that the Record of Appeal was prepared and filed on December 14, 2018;

and that thereafter they prepared the appellant's written submissions for filing but were unable to file the same because the court file was missing. He annexed a copy of the submissions as Annexure "JKK-1" to the Supporting Affidavit. He added that it was not until August 6, 2021 that their clerk traced the court file and, on perusal, he noticed that the appeal had been dismissed by Hon. Odunga, J. on December 17, 2018 during the service week. Mr. Kanyi further averred that the appellant will suffer immensely if the application is not allowed.

[4] The application was opposed by the respondent and a Replying Affidavit to that effect, sworn by Mr. Mcmillian E. Jengo, Advocate, filed on August 15, 2021. He deposed that the appeal was filed in March 2013 and that the Record of Appeal was yet to be served on him as of August 24, 2021 when he made the deposition. He therefore averred that there is no way the appellant could have prepared submissions for filing in September 2020 without serving a Record of Appeal; and without taking directions in the appeal as required under the rules of procedure. He further averred that no evidence in the form of letters to court and copied to him was presented by the applicant to prove that the file was missing for a period of three years or that there was an attempt at tracing it. He therefore asserted that the allegation is hollow and does not account for the delay of 5 years between March 2013 and December 17, 2018 when the appeal was dismissed for want of prosecution.

[5] In respect of the instant application, Mr. Jengo pointed out that even the delay of 3 years from December 17, 2018 when the appeal was dismissed and August 17, 2021 when the application was filed has not been explained. He therefore asserted that the application is an abuse of the process of the court.

[6] Mr. Maundu for the applicant relied on the application, the grounds stated on the face thereof and the Supporting Affidavit in urging the court to allow it and grant the orders sought by the appellant. Mr. Hamisi for the respondent, on the other hand, filed written submissions on November 11, 2021, in which he reiterated the respondent's stance that there is no justification for the delay in prosecuting the appeal; and therefore that the order of dismissal of December 17, 2018 ought not to be overturned. He submitted that there is no evidence in form of correspondence between the appellant's counsel and the court to indicate that the file was missing. He urged the court to note that the Advocate concerned did not state why he did not attend court on the December 17, 2018 although served with a Notice to Show Cause for that date. Thus, counsel relied on *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another* [2014] eKLR and *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2020] eKLR to support his argument that it was imperative for the delay to be satisfactorily explained as it would otherwise amount to abuse of the process of the Court to reinstate the appeal without a justifiable cause.

[7] Lastly, it was the submission of Mr. Hamisi that a period of 11 years has elapsed since the matter was filed in the subordinate court; and that it would be prejudicial to the respondent to be dragged back to court three years after the dismissal of the appeal. He relied on the maxim "Justice delayed is justice denied" in urging the court to dismiss this application with costs.

[8] I have given careful consideration to the application as well as the written submissions made by Mr. Hamisi for the respondent. I have likewise perused the court record; and it confirms that that this appeal was filed on 31st July 2013 from the decision of Hon. Gacheru PM, delivered on July 5, 2013 in Mombasa CMCC No. 1933 of 2010: Sweetbat Kawamara v Glajoes Ltd & another. The appellant had raised 7 grounds of appeal as hereunder:

[a] That the learned magistrate erred in law and in fact in failing to consider the consent of the parties on liability, and the effect thereof;

[b] That the learned magistrate erred in law and in fact in failing to consider the totality of the evidence adduced by the appellant;

[c] That the learned magistrate erred in law and in fact in failing to apply the correct principle in resolving conflicting evidence;

[d] That the learned magistrate erred in law and in fact in failing to consider the submissions made on behalf of the applicant;

[e] That the learned magistrate erred in both law and fact in holding that the appellant had failed to prove his injuries;

[f] That the learned magistrate erred in both law and fact in failing to award damages for pain and suffering;

[g] That the learned magistrate erred in law and in fact in failing to resolve the dispute between the parties.

[9] Thus, the appellant prayed that the judgment of the lower court dated July 5, 2013 be set aside; and that an order be made that this case be heard afresh before a different magistrate. In the alternative, the appellant prayed that this court do take up the submissions of the parties and/or reassess the evidence and make a determination thereon on the issue of general damages. He also prayed for costs of the appeal.

[10] The record further shows that a Cross Appeal was filed on behalf of the respondent on August 5, 2013 by the firm of M/s Jengo & Associates, on the following grounds:

[a] The learned trial magistrate erred in fact and in law in failing to consider judicial precedent, and arrived at a wrong decision in assessment of damages that were inordinately high;

[b] The learned trial magistrate erred in law and in fact in failing to consider the submissions of the cross-appellant on the issue of damages;

[c] The assessment and award of the general damages for pain, suffering and loss of amenities is inordinately high as to represent an entirely erroneous estimate;

[d] The learned trial magistrate in assessing general damages applied the wrong principles band by leaving out of account some relevant factors like precedent, hence arrived at an award of damages that was inordinately high and an erroneous estimate; and,

[e] That the learned trial magistrate misapprehended the evidence and so arrived at a figure of general damages that was inordinately high at to represent an erroneous estimate.

[11] On the basis of the foregoing grounds, the respondent prayed that the judgment of the lower court on assessment of general damages for pain, suffering and loss of amenities be set aside and that the Court do re-assess downwards the general damages for pain, suffering and loss of amenities.

[12] As neither the appellant nor the respondent took action to progress their respective appeals, this matter was listed for dismissal on 17th December 2018 for want of prosecution. A Notice to Show Cause to that effect was issued on served on both firms of Kanyi J. & Company Advocates and Jengo & Associates Advocates. When the matter came up before Hon. Odunga, J. on 17th December 2018, neither party was in attendance. Consequently, the appeal was dismissed for want of prosecution with no order as to costs pursuant to Order 42 Rule 35 of the *Civil Procedure Rules*; which provides that:

(1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

(2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal."

[13] There is no gainsaying therefore that indeed, there was delay of 5 years in the prosecution of the appeal in that neither party had taken any step herein by the time the Notice to Show Cause was issued by the Deputy Registrar. It is also the case that even after the dismissal of the appeal on December 17, 2018, the instant application was not promptly filed. Hence, the single issue for my determination is whether sufficient cause has been shown by the appellant for the exercise of the court's discretionary powers to set aside the dismissal order. In this regard, it was held in CMC *Holdings Limited -vs- Nzioki* [2004] 1 KLR 173 that:

> " In law, the discretion that a Court of law has, in deciding whether or not to set aside an ex-parte order...was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would...not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error..."

[14] The test to be applied in such cases was well-discussed in *Ivita v Kyumbu* [1975] eKLR thus:

> " ...the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time."

[15] The explanantion proffered by counsel for the appellant was that the file was missing; and therefore that they were unable to file written submissions or take any further step in the appeal. This, if anything, accounts only for the period between 2018 and 17th August 2021 when the instant application was filed. It does not account for the appellant's indolence during the period between 2013 and December 14, 2018 when the appellant filed his Record of Appeal. Moreover, as correctly pointed out by Mr. Hamisi, there is no proof at all that attempts were made by the appellant to follow up the issue of the missing file with the Deputy Registrar of the Court. Had he done so, correspondence in that regard would have been availed to back up the assertion. None was exhibited; leading to the inference that no follow up of any kind was made on behalf of the appellant.

[16] The foregoing notwithstanding, it is manifest that the last step taken herein was the filing of the filing of the Record of Appeal on December 14, 2018. It is also apparent that the Cross Appeal is still pending. That being the case, and in spite of the prolonged delay, I am convinced that it is in the interest of justice for the dismissal order to be set aside to enable the parties canvass their appeals for a determination on the merits. Indeed, in *Philip Chemwolo & another v Augustine Kubende* [1982-88] KAR 103, it was observed that:

> " ...the broad equity approach to these matters is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs..."

[17] In the premises, the application dated August 13, 2021 is hereby allowed and orders granted as hereunder:

[a] That the dismissal order of December 17, 2018 be and is hereby set aside and the appeal reinstated for hearing and disposal on the merits.

[b] That costs of the application be costs in the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF MAY 2022.

.....

OLGA SEWE

JUDGE