Serem v Tarus (suing as the Administrator of the Estate of Margaret Kimoi Koimugul, Deceased) & another (Civil Appeal 2B of 2021) [2022] KEHC 12113 (KLR) (22 June 2022) (Judgment)

Neutral citation: [2022] KEHC 12113 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 2B OF 2021

OA SEWE, J

JUNE 22, 2022

BETWEEN

CYRIL KIPRUTO SEREM ..... APPELLANT

AND

FANCY TARUS (SUING AS THE ADMINISTRATOR OF THE ESTATE OF MARGARET KIMOI KOIMUGUL, DECEASED) ..... 1ST RESPONDENT

AUTO CATS INTERNATIONAL LIMITED ..... 2ND RESPONDENT

(Being an appeal from the Ruling and Order of Hon. C.A Kutwa, Senior Principal Magistrate, delivered on 16th December 2020 in Iten SPMCC No. 24 of 2019)

JUDGMENT

[1] This is an interlocutory appeal from the Ruling and Order of the Senior Principal Magistrate's Court (Hon. C.A. Kutwa) made on 16th December 2020 in Iten Senior Principal Magistrate's Civil Case No. 24 of 2020: Fancis Tarus (suing as the Legal Representative of the Estate of the late Margaret Kimoi Koimugul v Cyril Kipruto Serem & Another. Before the lower court, the respondent had sued the appellant on her own behalf and on behalf of the estate and dependants of the deceased Margaret Kimoi Koimugul. Her cause of action was that the deceased was travelling as a fare paying passenger aboard Motor Vehicle Registration No. KCH 108L, Toyota Matatu, along Iten-Kabarnet Road when the 1st defendant so negligently drove the said motor vehicle that he caused it to roll down the cliff, thereby occasioning the deceased fatal injuries.

[2] In the premises, the respondent prayed, *inter alia*, for general damages under the *Fatal Accidents Act*, Chapter 32 of the Laws of Kenya for the benefit of the entire estate of the deceased as well as damages under the *Law Reform Act*, Chapter 26 of the Laws of Kenya. The lower court record shows that interlocutory judgment was entered against the two defendants; and that the matter was thereafter fixed for formal proof on 6th April 2020; on which date the parties entered into a consent with a view

of reopening the suit to hearing on the merits. Hearing was thereafter fixed for 30th September 2020. The proceedings of 30th September 2020 show that on that day, Mr. Kibet attended court on behalf of Ms. Bii for the defendant and sought for adjournment on the ground that Ms. Bii was indisposed, and therefore unable to attend court for hearing. The magistrate was not convinced and therefore declined the application. He proceeded to hear the plaintiff's case and treated the defence case as closed. He then fixed the suit for mention on 28th October 2020.

[3] In the meantime, counsel for the defendant filed an application dated 19th October 2020 under a Certificate of Urgency seeking that the *ex parte* proceedings be set aside so as to give the defendants a chance to ventilate their case for a decision on the merits. The application was urged by way of written submissions; after which the lower court pronounced itself thereon in the impugned ruling dated 16th December 2020. The subordinate court was not convinced that sufficient cause had been shown for reopening the case. Here is the view taken by the magistrate of the matter:

> ...the court notes that from the onset, the plaintiff's Advocate alerted the court that he was ready to proceed with three witnesses. When the case proceeded Mr. Kibet Advocate holding brief for Bii Advocate was in court. The date of 30th September, 2020 was taken by consent and all parties new [*sic*] of the date. Further the defendants' counsel's submissions that she was sick has no merit. The Advocate who is a resident of Nairobi/Kisumu opted to travel all the way to Kericho for treatment, leaving several hospitals that were within reach. I have also perused the consent order dated 27th April 2020. In the consent the defendants were to pay Kshs. 5000 within 30 days in default the *ex parte* judgment was to revert and matter to proceed for formal proof. As at 30th September 2020 when the case proceeded the Defendant had not complied with the terms of the consent order...The discretion of this court shall not be exercised to assist a party who seeks to frustrate the Plaintiff's quest to accessing justice. The evidence on record show that the defendant was represented by an able Advocate. The Advocate chose not to cross-examine and/or call witnesses. In the premises, I find the application herein devoid of merit and dismiss it with costs to the Plaintiff/respondent..."

[4] Being aggrieved by the ruling and the ensuing orders, the appellant filed the instant appeal on 19th January 2021 on the following grounds:

(a) The learned magistrate erred in law and misdirected himself on both points of law and fact when he failed and/or denied the appellant's prayer for the setting aside the ex parte proceedings;

(b) The learned magistrate erred in law and misdirected himself on both points of law and fact when he failed and/or denied the appellant's prayer to reopen the respondent's case;

(c) The learned magistrate erred in law and misdirected himself on both points of law and fact when he failed to consider the assertion that his counsel was indisposed and therefore unable to attend court;

(d) The learned magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law; and has occasioned a miscarriage of justice;

(e) The learned magistrate erred in denying the appellant's prayer to reopen the respondent's case, a decision which was wholly erroneous, considering the fact that in the remote event that counsel made a mistake, the same ought not to have been visited on the innocent litigant;

(f) The learned magistrate erred in denying the appellants a chance to comply with Order 11 of the *Civil Procedure Rules* as the matter was certified ready for hearing in the absence of the defendant's counsel; a decision which was wholly erroneous;

(g) The learned magistrate erred in failing to acknowledge the fact that the defendant had complied with the conditions of the consent dated 27th April 2020 by paying thrown away costs of Kshs. 5000/= on 2nd October 2020;

(h) The learned magistrate misapprehended and misunderstood the extent and severity of locking out the defendant's counsel's submissions with regard to the reasons adduced for failure to attend court, thereby resulting in a miscarriage of justice;

(i) The learned magistrate misapprehended and misunderstood the extent and severity of locking out the defendant from participating in the trial of a matter of such a nature, thereby occasioning a miscarriage of justice.

[5] In the premises, the appellant prayed that his appeal be allowed and the ruling delivered by Hon. Kutwa on 16th December 2020 in Iten Civil Suit No. 24 of 2019 be set aside in its entirety; and the suit be reopened for hearing and determination on the merits. He also prayed that the costs of the appeal be awarded to him.

[6] The appellant filed a Supplementary Record of Appeal, with the leave of the Court, to avail the proceedings held by the lower court after the appeal was filed and an interim order of stay granted to the appellant. Those proceedings culminated in a Judgment dated 10th February 2021, a copy whereof appears at pages 18-25 of the Supplementary Record.

[7] The appeal was canvassed by way of written submissions, pursuant to the directions given herein on 6th July 2021. Accordingly, counsel for the appellant filed written submissions on 20th September 2021 proposing the following issues for determination:

(a) whether the appellant had made out a good case for the setting aside of the *ex parte* proceedings;

(b) Whether the appellant stands to suffer any prejudice if the appeal fails; and,

(c) Whether the appellant has demonstrated sufficient cause warranting the setting aside of the ex parte proceedings.

[8] Counsel for the appellant relied on Order 10 Rule 11 and Order 12 Rule 7 of the *Civil Procedure Rules* as well as the cases of *Esther Wamaitha Njihia & 2 Others v Safaricom Ltd* [2014] eKLR and *Shah v Mbogo* [1967] EA 166 to support the argument that setting aside of *ex parte* proceedings and judgment is in the discretion of the Court; and that the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. He submitted that one of the considerations is whether sufficient cause was shown for failure by the appellant's counsel to attend court.

[9] At paragraph 13 of the appellant's written submissions, counsel pointed out that the reason for failure by counsel to attend court was well explained before the lower court and documents exhibited to demonstrate that counsel was indisposed; and therefore that a reasonable award in costs would have sufficed to compensate the respondent for the inconvenience and the missed opportunity for hearing, had the lower court granted the appellant adjournment. Counsel further submitted that indisposition is not by design and cannot be preempted. He added that the issue of non-compliance with the consent order dated 27th April 2020 was a non-issue, granted that he had given instructions to his bank to make the payment; and that although there was a delay, the said sum was ultimately paid on 2nd October

2020. The Court's attention was, consequently directed to the remittance advice at page 58 of the Record of Appeal, marked as Annexure JB-1 to the Further Affidavit sworn on 10th November 2021 in proof of payment.

[10] Counsel further explained that the suit was coming for hearing for the first time; and that the appellant had never before sought for adjournment. He consequently submitted that a plausible explanation had been given to the lower court to warrant the postponement of the hearing. He cited *Famous Cycle Agencies Ltd v 4 Others v Masukhlal Ramji Karia* [1995] IV KALR 100, a decision by the Supreme Court of Uganda to support the proposition that the decision as to whether or not to grant adjournment should be exercised in a reasonable manner; and that where there is no negligence adjournment would not normally be refused.

[11] Article 50 of the *Constitution* was also cited to support the submission that, when faced with an application for adjournment such as was the case before the lower court, a balance ought to be struck between the expedient disposal of the suit *vis-à-vis* the locking out of a litigant from the trial altogether. In this regard, counsel relied on the following authorities:

(a) *H.K. Shah & Another v Osman Allo* [1946] 14 EACA 45;

(b) *Japheth Pasi Kilonga & 7 Others v Mombasa Autocare* Ltd [2015] eKLR;

(c) *Lawrence Muturi Mburu v Dalago Tours Ltd* [2019] eKLR;

(d) HCCA No. 123 of 2018: *S M v H G E*

[12] Lastly, counsel submitted that the subject application was filed without unreasonable delay; and that upon its dismissal, the appellant promptly lodged this appeal. The cases of *Patel v East Africa Cargo Handling Services Ltd* [1974] EA 75; *CMC Holdings Limited v James Mumo Nzioki* [2004] eKLR and Civil Appeal No. 120 of 1992: *Savannah Development Company Ltd v Mercantile Company Ltd* were likewise cited in support of the appeal.

[13] On behalf of the respondents, written submissions were filed by Ms. Mibei on 21st September 2021. The first point taken was that the appeal is incompetent for having been filed outside the 30-day window provided for in Section 79G of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya. Counsel pointed out that the Memorandum of Appeal was not filed until 19th January 2021 yet the ruling was delivered on 16th December 2020. She therefore urged for the striking out of the appeal with costs to the respondent on the basis of the Notice of Preliminary Objection filed herein on 11th May 2021.

[14] On the merits of the appeal, Ms. Mibei took the view that since there were intervening circumstances that resulted in delivery of judgment by the lower court, the appeal against the ruling dated 16th December 2021 has been overtaken by events. She relied on *James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another* [2016] eKLR in urging the Court to consider whether useful purpose would be served by setting aside the Judgment that was regularly entered; and pointed out that the appellant was duly represented by an advocate who chose not to cross-examine the respondents and their witnesses. In her view, the matter could not be said to have proceeded *ex parte* in those circumstances.

[15] Further to the foregoing, it was the submission of Ms. Mibei that not all mistakes of counsel are excusable. She relied on *Samuel Kibutha Kamau v Catherine Chao Nyange* [2021] eKLR that the interests of both parties need to be balanced; and that an advocate who deliberately exposes his client to foreseeable risks should bear the responsibility by indemnifying his client where necessary. Counsel also referred to the case of *Shadrack Otuoma Khamla & 7 Others v Aniket Enterprises Limited* [2018] eKLR

and *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others* [2015] eKLR to support the proposition that counsel's duty is not limited to his client; but goes beyond that to encompass the duty owed to the Court in which he practices and even to his client's adversary at law.

[16] Lastly, it was submitted by Ms. Mibei that the appellant did not approach the lower court with clean hands; having failed to abide by the terms of the consent order by which the default judgment was set aside. She added that the appellant did not file a defence as directed; and therefore there is no issue to try, even if the judgment of the lower court were to be set aside. She therefore prayed that the appeal be dismissed with costs.

[17] I have given careful consideration to the appeal, and in particular the grounds set out in the Memorandum of Appeal as well as the written submissions filed herein by learned counsel on behalf of the parties. I am mindful that an appellate court ought not to interfere with the exercise of discretion by the trial court, even if, on the facts, it would have come to a different conclusion. Accordingly, the limited circumstances under which an appellate court can interfere with the exercise of discretion by the trial court were well articulated by Madan, JA (as he then was) in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A 898, 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 considerations 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."

[18] From a perusal of the original lower court record, it is manifest that Ms. Mibei's argument that no defence was filed by the appellant is unfounded, for there is on record a Defence dated 4th August 2020 which was filed at Iten Law Courts on 17th September 2020 following the Consent Order dated 14th May 2020. There is also a Remittance Advice at page 58 of the Record of Appeal to confirm that, indeed, the amount of Kshs. 5,000/= ordered to be paid by the appellant as thrown away costs *vide* the Consent Order dated 14th March 2020 was indeed paid; albeit belatedly.

[19] That said, the main issue for determination is whether the subordinate court erred in dismissing the application to set aside the *ex parte* proceedings held by it on 30th September 2020. However, before engaging in a discussion of that issue, it is imperative that attention be paid to the Notice of Preliminary Objection dated 10th May 2021. The respondent had thereby contended that:

(a) The appeal was filed out of time without the leave of the Court;

(b) The appeal has been brought to this Court in clear disregard of the law;

(c) The Court lacks the requisite jurisdiction to handle the appeal herein; the same having been filed out of time without leave of the Court.

[20] It is trite that jurisdiction is everything; and that where it is raised, the Court must settle the issue and be satisfied that it has the requisite jurisdiction before taking any further step in the matter before it.

Hence, in the *Owners of Motor Vessel "Lillian S" v Caltex Oil (K) Ltd* [1989] KLR 1 the Court of Appeal held that:

> Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction." (Per Nyarangi, JA)

[21] Needless to say that the issue of jurisdiction can be raised at any stage of the proceedings, including on appeal. The Court of Appeal made this clear in *Kenya Ports Authority v Modern Holdings [E.A] Limited* [2017] eKLR thus:

> We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:
>
> ....at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself - provided only that where the Court raises it *suo motu,* parties are to be accorded an opportunity to be heard."
>
> (See *All Progressive Grand Alliance (APGA) v. Senator Christiana N.D. Anyanwu & 2 others*, LER [2014] SC. 20/2013 Supreme Court of Nigeria). We agree with these authorities and, hold that the question of jurisdiction was properly raised before this Court because, as they say in Latin, *ex nihilo nihil fit* (out of nothing comes nothing)."

[22] The question of whether or not the appeal was filed within time is one that can easily be ascertained from the Memorandum of Appeal. It is therefore an issue that does not require adduction of evidence or further investigation by the Court. The Memorandum of Appeal shows that the impugned ruling was delivered on the 16th December 2020 and that the appeal itself was filed on 19th January 2021; yet Section 79G of the *Civil Procedure Act*, stipulates that:

> Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period any time which the lower court may certify as having been requisite for preparation and delivery to the appellant of a copy of the decree or order:
>
> Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal."

[23] It was therefore imperative that before taking steps in this appeal, the appellant ought to have moved the Court under the *proviso* to Section 79G aforementioned for orders that the appeal be admitted out of time. This position was well explicated by Hon. Emukule, J. in *Gerald M'limbine v Joseph Kangangi* [2008] eKLR, thus:

> My understanding of the proviso to section 79G is that an applicant seeking "an appeal to be admitted out of time" must in effect file such an appeal, and at the same time seek the court's leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court's process under section 79B which says:
>
> 79B Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient

> ground for interfering with the decree part of a decree or order appealed against he may notwithstanding section 79C, reject the appeal summarily"
>
> It seems to me therefore that it is not open to the court to exercise its discretion under the proviso to section 79G of the *Civil Procedure Act* except upon the existence and perusal of the appeal to be "admitted" not to be "filed out of time." Admission presupposes that the appeal has been filed and will be "admitted" for hearing after a judge has established under Section 79B that there is "sufficient" ground for interfering with the decree part of a decree or order appealed against."
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> To allow the Applicant's Motion would be to defeat entirely the requirements of Section 79B of the *Civil Procedure Act* and indeed Section 79G itself upon which the Applicant relies – the requirement for a Certificate of Delay in the preparation and delivery to the appellant of a copy of a decree or order. The Applicant's motion is bereft of such explanation or certificate. Default by the Applicants former advocate would then have seen properly anchored on such certificate."

[24] The learned Judge proceeded to dismiss the application with costs. The same line of thought was expressed in *Ndungu Muhindi James & Another v Cecilia Wanjiku Waweru* [2020] eKLR, wherein the case of James Njau Githui (*supra*) was followed. Hon. Kasango, J. held thus after reviewing relevant authorities on the proper construction of the proviso to Section 79G:

> It follows that the prayers for an appeal to be filed out of time and stay pending the determination of that yet to be filed appeal will fail in view of the jurisprudence pronounced in the above case James Njau Githui (supra)..."

[25] In this instance, no attempt at all was made by the appellant to explain why the appeal was filed outside the prescribed period; and therefore the question to pose is, what is the effect of this omission? The position taken by the Court of Appeal is that such an appeal would be incompetent. For instance, in *Patrick Kiruja Kithinji v Victor Mugira Marete* [2015] eKLR it took the following view:

> In our view whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. Consequently, we find that an appeal filed out of time is not curable under Article 159."

[26] Similarly, in *Mae Properties Limited v Joseph Kibe & Another* [2017] eKLR, the Court of Appeal restated its position on the matter of late lodgment of appeal as hereunder:

> It is not in dispute that the notice of appeal was lodged at the High Court registry on 26th May, 2015. It is also not in dispute that by dint of Rule 82(1) of the *Court of Appeal Rules* 2010, the appeal should have been instituted within sixty days thereafter, but was not. It in fact had not been instituted as at the date of the filing of the motion some 15 months later. As at the hearing of the motion, more than two years had elapsed. We have said on numerous occasions that the Rules of Court exist for the purpose of orderly administration of justice before this Court. The timelines for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals that come before us. The Rules are expressed in clear and unambiguous terms and they command obedience. Failure to comply with the timelines set invites sure consequences. In the case of failure to lodge an appeal

within 60 days after filing of the notice of appeal, Rule 83, which is invoked by the applicant herein, provides thus;

"If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.'

We think that the true meaning and import of the rule is more often than not scarcely appreciated. The rule as framed prescribes the legal consequence for non-institution of an appeal within the 60 days appointed by the Rules of Court. Moreover, the said consequence is couched in mandatory, peremptory terms: the offending party shall be deemed to have withdrawn the appeal. It seems to us that the deeming sets in the moment the appointed time lapses. Essentially this is a practical rule that is intended to rid our registry of merely speculative notices of appeal filed either in kneejerk reaction to the decision of the court below, or filed in holding mode while the party considers whether or not to lodge a substantive appeal. Indeed, it is not uncommon and we take judicial notice of it, for such notices to be lodged *ex abundanti cautella* by counsel upon the pronouncement of decisions but to await instructions on whether or not to proceed full throttle with the appeal proper - with the attendant risks, prospects and consequences."

[27] Lastly, Hon. Musyoka, J. *in Re Estate of Mukhono Chibo (Deceased)* [2022] eKLR had no hesitation in striking out an appeal that was filed outside the prescribed time without leave. He expressed the view that:

4. The appeal herein, therefore, was filed way outside the thirty days, allowed by section 79G of the *Civil Procedure Act*. There is no certificate of delay exhibited, and, therefore, the appellant did not benefit from the exclusion permitted under section 79G.

5. Section 79G has a proviso, which gives a window to the appellant, who finds himself outside the time allowed for filing appeal, which is by asking the court to allow admission of an appeal out of time, if there is good and sufficient case for not filing appeal in time. There is no evidence that the appellant obtained leave of court for admission of the appeal out of time.

6. An appellate court would have no jurisdiction to entertain an appeal which is incompetent, on account of having been filed outside the time allowed in law, and without leave of court.

7. The final order shall be that the appeal herein is incompetent, for it was filed out of time, and without leave of court, and I have no jurisdiction to entertain it. I hereby accordingly strike it out. With costs."

[28] In is manifest therefore that, in the light of the peremptory wording of Section 79G of the *Civil Procedure Act*, this Court lacks the jurisdiction to hear and determine this appeal for the reason that it was filed outside the prescribed period of 30 days without leave of the Court. The appeal is therefore incompetent and is hereby struck out with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MOMBASA THIS 22ND DAY OF JUNE 2022.

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OLGA SEWE

JUDGE