



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: Hon. D. K. Kemei - J

CIVIL APPEAL NO. 3 OF 2020

ST MARY ACADEMY LIMITED.....1ST APPELLANT

MICHAEL MBURIA NAMISU.....2ND APPELLANT

VERSUS

GRACE NJERI MUKORA.....1ST RESPONDENT

CYRUS MWENDIA2ND RESPONDENT

RULING

1. The Appellants herein filed an application dated 26/02/2021 seeking for an order of reinstatement of the Appellants application dated 23/01/2020 for hearing and determination. It also seeks that the costs thereof be in the cause.

2. The application is supported by the grounds set out on the face thereof and the affidavit of Otieno Oluoch sworn on even date. The Appellants gravamen is that their application dated 23/01/2020 was dismissed on the 25/02/2020 for want of prosecution due to non-attendance by the appellants Advocate. It is the Appellants case that the failure of the Advocate to attend court on the material date was occasioned by circumstances beyond his control. The Appellants Advocate Mr. Oluoch deposed that his vehicle broke down along Mombasa road and had to have it fixed by a mechanic and arrived at Machakos law courts at 11.45 a.m. only to find the matter had been dismissed for want of prosecution. It was also deposed that the failure to attend court was not deliberate. A further affidavit sworn on 19/03/2021 by the deponent sought to indicate that the time of arrival at Machakos law courts had been inadvertently indicated.

3. The application was strenuously opposed by the Respondents. The 1st Respondent filed a replying affidavit dated 4/03/2021 in which she averred inter alia: that the physical presence of the Appellants Advocate was not necessary since the court was at the time conducting virtual hearings; that the Appellants Advocate's claim that he arrived in court at 11.45 is false in view of the fact that the matter was the last to be mentioned at around 1.30 p.m; that the Appellants advocate is engaged in dilatory tactics aimed at delaying the case to the prejudice of the Respondents who cannot access the fruits of their judgments; that the Respondents will be seeking to retrieve the recordings from the Microsoft Teams Meeting of the particular day with a view to putting the appellants in the right place regarding their claim that their Advocate arrived in court at 11.45 a.m.

4. Parties agreed to canvass the application by way of written submissions.

5. Mr. Oluoch for the Appellant/Applicants submitted that the reasons advanced for failing to attend court are plausible and sufficient to warrant the court's exercise of discretion in the Appellants favour. It was submitted that the court has unfettered discretion to reinstate the dismissed application so as to do justice to the parties since the court should ensure that a party is not put to injustice or hardship. It was also submitted that the Appellants will be prejudiced and condemned unheard if the application is not reinstated. Finally, it was submitted that the Respondent's inconvenience can be properly compensated by an award of costs.

6. Miss Jeruto for the Respondents submitted that the counsel for the Appellant/Applicants is not candid with the reasons for failing to attend court on the material date. Counsel urged the court to find that the Appellants are not deserving of the court's discretionary reliefs as the reasons for absence in court are not plausible. Learned counsel sought reliance in the case of **Shah –vs- Mbogo [1967] EA 116** where the court held **“This discretion (to set aside exparte proceedings or decision) is intended so as to be exercised to avoid injustice or hardships resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice”**.

Learned Counsel submitted that the conduct of the Appellant's counsel in neglecting to prosecute his application despite arriving in court before the session kicked off should be sufficient for this court to deny granting the equitable remedy sought. It was also submitted that the Appellants should not be allowed to hide behind the mistakes of their Advocate but should be made to suffer and to shoulder the consequences of their Advocates conduct.

7. I have given due consideration to the Appellants application, rival affidavits and submissions. The only issue for consideration is whether the Appellant has furnished sufficient reasons warranting the setting aside of the orders dated 25/02/2021. Learned counsel for the Appellant has indicated that his vehicle had a mechanical breakdown on the material date and arrived in court when the matter had been called out and dismissed for want of prosecution. Counsel has further stated that the circumstances at the time were beyond his control due to the vehicle's mechanical breakdown. He now seeks for the court's discretion and that his clients should not be made to suffer but be given a chance to prosecute their application dated 23/01/2020 to conclusion. On the other hand learned counsel for the Respondents has maintained that the appellant's Counsel is not candid in his explanation for failing to attend court on the material date going by his denial vide further affidavit that he arrived in court at 11.45 a.m. According to Respondents counsel, the explanation tendered smacks of dishonesty on the part of the Appellant's counsel and hence the appellants should not be granted the discretionary relief sought.

8. The jurisdiction of the court to set aside its decisions is wide and unfettered. In **Shah –vs- Mbogo & Anor [1967] EA 116** the Court of Appeal for East Africa held as follows:-

“This discretion (to set aside exparte proceedings or decision) is intended to be exercised so as to avoid injustice or hardship resulting from accident inadvertence, or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”.

The discretionary powers of the court are also granted under Order 12 Rule 7 of the Civil Procedure Rules and section 3A of the Civil Procedure Act in that the court's inherent powers to make such orders as may be necessary for the ends of justice or prevent abuse of process of the court is unfettered and further that the court has powers to set aside or vary judgements or upon such terms as may be just.

Learned Counsel for the Respondents has cited the case of **Bains Construction Co. limited –vs- John Mzare Ogowe [2011] eKLR** where the court held **“It is to some extent true to say mistakes of counsel as in the present case should not be visited upon a party but it is equally true when counsel as agent is vested with authority to perform some duties as principal and does not perform it surely such principal should bear the consequences”**. The Counsel urged this court to reject the explanation by the Appellants counsel and dismiss the application on the grounds that the Appellants as parties should be ready to bear the consequences of their counsel's negligence.

9. I have carefully considered the explanation by counsel for the Appellant regarding his failure to attend court on the 25/02/2021. Whereas his affidavit in support of the application indicates that he arrived at the court around 11.45 a.m. and found his matter already called out and dismissed for want of prosecution, his further affidavit filed alongside his submissions dated 19/03/2021 seeks to suggest that the earlier affidavit had been made in a hurry and that he had not paid attention to the details. In this further affidavit the learned counsel seeks the court to ignore the earlier affidavit regarding the issue of him having arrived in court at 11.45 am. It would seem to me that the further affidavit was filed after the Respondents counsel sought to have the record of the Microsoft Teams Meeting for the 25/02/2021 so as to establish the truth of the Appellant's counsel's claim. It is highly likely that the Appellant's counsel decided to beat a hasty retreat by filing the further affidavit discounting the arrival time in court. It follows therefore that the said Applicant's counsel's explanation for failure to attend court is not plausible and that this court is not convinced by the same. As the Affidavits in support of the application have been sworn by counsel himself, it follows that he is the one to carry the blame and not his client. More often than not clients are not on top of things regarding the manner their cases progress in the courts as it is their advocates who are the appointed agents who run the show. Hence, the litigants must be taken into consideration whenever their advocates fail in their duties. In the case of **Philip Keiptoo Chemwolo & Anor – vs- Augustine Kubende [1986] eKLR** the court held:-

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not knowing his case heard on the merits”.

It is noted that the Appellants have already filed a memorandum of appeal and that the application which was dismissed had sought for orders of stay pending determination of the appeal. I find that the Appellants stand to be prejudiced if the orders made on 25/02/2021 are not set aside. The Respondents inconvenience brought by the delay will be cushioned by an award of costs. It is also noted that the Appellants moved the court with the application a day after the orders of dismissal were made and hence the application was timeously filed.

10. In light of the foregoing observations, the Appellants application dated 26/02/2021 is allowed in the following terms:-

(a) The orders made on 25/02/2021 are hereby set aside and or vacated.

(b) The Appellants application dated 23/01/2020 is reinstated for hearing and determination.

(c) The Appellants to pay the Respondents thrown away costs of Kshs.5000/- (five thousand) before the hearing on the application dated 23/01/2020.

(d) Interim orders issued on 23/01/2020 are extended till the next hearing date of the application dated 23/01/2020.

Orders accordingly.

DATED AND DELIVERED AT MACHAKOS THIS 29TH DAY OF JUNE, 2021.

D. K. KEMEI

JUDGE