REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL APPEAL NO. 7 OF 2016

SHEIKH MOHAMED NUNOW.....APPELLANT/APPLICANT

VERSUS

ALI IBRAHIM HASSAN.....RESPONDENT

RULING

1. The applicant via Notice of Motion dated 9/7/2019 seeks the orders that:

   I. Judgement delivered this 22/5/2019 be set aside.

   II. The appeal be reinstated for hearing; plus

   III. Costs.

2. The applicant relies on grounds on the face of the Notice of Motion and his replying affidavit plus submissions.

3. The respondent relies on his replying affidavit but no submissions filed to date.

APPLICANT'S SUBMISSIONS

4. That under Order 12 rule 7 of the Civil Procedure Rules, 2010 provides that, ***"where under this order judgement has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."***

5. Order 45 rule 1 of the Civil Procedure Rules, 2010 also provides thus:

   "(1) Any person considering himself aggrieved-

   by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

   by a decree or order from which no appeal is hereby allowed, and who from the discovery of 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 the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgement to the court which passed the decree or made the order without unreasonable delay."

6. Section 1A and 1B of the Civil Procedure Act provide for what are commonly known as the oxygen principles while section 3A of the same Act gives this court inherent power to make necessary orders for the ends to justice to be met.

7. Starting by state law, this court therefore has powers given the circumstances of this case to grant the orders sought.

8. The court should note that there is a misstate on record that clearly shows that on 26th February 2019, Ms. Odiya was in court, for the appellant while the true position was that she was absent.

9. The appellant reiterates the following again: On 26th February 2019, when the matter came before Honourable **Justice Dulu** this is where

the problems started. While the quorum shows that Ms. Odiya was in attendance, a keen reading of the proceedings shows she was not in attendance. The proceedings for that day are as follows:

> ***"26/2/2019***
>
> ***Before Hon. G. Dulu J***
>
> ***C/c Martin/Amina***
>
> ***For Appellant – Ms. Odiya present***
>
> ***For Respondent – Mr. Farouk Kyalo present***
>
> ***Mr. Farouk Kyalo – we have just come on record. The Appellant's counsel was to serve today's hearing notice. We are not sure if same was done. To date no written submissions have been filed though there was a consent on that.***
>
> ***This is a mention date to confirm filing of written submissions. It will also give us time to peruse documents and take action.***
>
> ***Ruling***
>
> ***Court: 1. On request of the counsel for the Respondent and as counsel for the Appellant is absent, matter is adjourned. (Emphasis by the Appellant).***
>
> ***2. Mention on 26/3/19 to confirm filing of written submissions and for further directions."***

10. On 26th March 2019, a date which should have been served on the Appellant's advocate because they did not attend court on 26th February 2019, Mr. F. Kyalo appeared for the Respondent and sought more time to comply. Time was granted and a highlighting date was set for 25th April, 2019.

11. On 25th April, 2019 again a date that should have been served upon the Appellant's counsel, Mr. F. Kyalo appeared and confirmed filing of his submissions after which the court gave 22nd May 2019 as the date it would deliver judgment.

12. On 22nd May 2019, the Hon Court delivered the judgment that the Appellant now wants set aside.

13. From the record, it is therefore clear that the Appellant was not represented on 26th February 2019, 26th March, 2019, 25th April, 2019 and 22nd May, 2019.

14. On all those occasions, counsel for the Respondent was under duty to serve notices to the Appellant's counsel especially taking into consideration that the Respondent who had a cross-appeal attended court but never served the Appellant's counsel with any notice(s).

15. This Hon Court should exercise its discretion and grant the orders sought to ensure the ends of justice are met.

RESPONDENT'S REPLY

16. In reply the Respondent filed replying affidavit dated 12th November 2019 and his side of story is that, the application by the Applicant is unmeritorious without basis and should be dismissed.Thisis because the Applicant herein vide a letter to his advocates, referenced *Withdrawal of the case Civil Appeal No. 7 of 2016 and general withdrawal of all cases relating to Masjid Noor Wajir*, asked that this matter be withdrawn.

17. The Applicant's advocates herein shared the same information and a copy of the letter from their client. Thus it came as a surprise that the Applicant herein wishes to now proceed with the matter.

18. That the Applicant herein has been back and forth with this matter and has never been serious in it. That on the conclusion of this matter, filed by the Applicant herein, in the Magistrate's Court in Wajir, Senior Principal Magistrate Cherono dismissed the Applicant's herein suit with costs to the Defendant.

19. That the Applicant herein then filed an appeal and the Respondent filed their cross-appeal and the cross-appeal succeeded and the appeal did not. That this application is a desperate attempt by the Applicant to disrupt the functioning of the Respondent's Committee in Masjid Noor Mosque, Wajir.

20. That the Applicant in his affidavit in support of his application states that he was not represented on three occasions a clear failure on his side and lack of seriousness in pursuing his own matter.

21. That his advocates have advised him which advise he consider to be true that the Applicant's appeal and application both lack merit and all this is a waste of court's time and a delay of the inevitable, which is a dismissal of his matter.

22. That on paragraph 13 of the applicant's affidavit stating, "a great and imminent danger" if the Respondent proceeds to execute, is a bit too dramatic given the number of times he has given up this matter in favour of the Respondent.

23. That this application is an attempt by the Applicant in seeking relevance in the day to day running of Masjir Noor Mosque, and that indulging the court is a great waste of taxpayers' money and an expensive way to seek attention.

24. That he is informed by the advocate on record, information he verily believes to be true that the suit was dismissed for lack of merit and not for non-prosecution.

25. That it can be noted from the records that the Applicant has never been keen to prosecute this matter. That the law is supposed to be applied equally, the Applicant should not use the law to perpetuate an injustice or to deny the Respondent fruits of his judgment.

26. That granting the prayers sought will prejudice the Respondent as he suffers to relieve a process that he has already been through and succeeded before. That the application is unmeritorious and an abuse of the court process and should be dismissed with costs.

ISSUES, ANALYSIS AND DETERMINATION

27. The only issue for determination is; **whether the appellant/applicant was served when the eventually matter was heard?**

28. On 26th March 2019, a date which should have been served on the Appellant's advocate because they did not attend court on 26th February 2019, Mr. F. Kyalo appeared for the Respondent and sought more time to comply. Time was granted and a highlighting date was set for 25th April, 2019.

29. On 25th April, 2019 again a date that should have been served upon the Appellant's counsel, Mr. F. Kyalo appeared and confirmed filing of his submissions after which the court gave 22nd May 2019 as the date it would deliver judgment.

30. On 22nd May 2019, the Hon Court delivered the judgment that the Appellant now wants set aside.

31. From the record, it is therefore clear that the Appellant was not represented on 26th February 2019, 26th March, 2019, 25th April, 2019 and 22nd May, 2019.

32. On all those occasions, counsel for the Respondent was under duty to serve notices to the Appellant's counsel especially taking into consideration that the Respondent who had a cross-appeal attended court but never served the Appellant's counsel with any notice(s).

33. I find that the reason given by the applicant for failing to attend court is candid and excusable and that this is a proper case for the court to exercise its discretion in favour of the applicant. In this regard, I find useful guidance in the court of appeal decision in the case of **Richard Nchapai Leiyangu vs IEBC & 2 others** where the court expressed itself as follows:-

> ***"We agree with the noble principles which go further to establish that the courts' discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice."***

34. I find the reason offered to be reasonable and excusable. I hold the view that it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard the opportunity of prosecuting his case. The court in the above cited case of ***Richard Nchapai Leiyanguvs IEBC & 2 others*** proceeded to state as follows:-

> ***"The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."***

35. The above case was cited with approval by the Court of Appeal in ***Harrison Wanjohi Wambugu vs Felista Wairimu Chege*** where by the court reinstated an appeal that had been dismissed for non-attendance. A similar position was held by the court of appeal in the case of ***Cecilia Wanja Waweru vs Jackson Wainaina Muiruri*** where the court allowed an application to reinstate an appeal that had been dismissed for want of prosecution. Similarly, I stand guided and persuaded by the decision of the court of appeal in ***CMC Holdings Ltd vs James Mumo Nzioka*** where it was held inter alia:-

> ***"The discretion that a court of law has, in deciding whether or not to set aside ex-parte order such as before us 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 in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error"***

36. I also find help in the position held by the court of appeal in the case of ***Wenendeya vs Gaboi*** where the court in reinstating an appeal that had earlier been dismissed for non-attendance stated that disputes ought to be determined on merits and that lapses ought not necessarily debar a litigant from pursuing his rights.

37. It is also important to mention that the absence of the service of hearing notices having been raised, it was necessary for the respondent

to rebut the same and/or justify the same. The counsel for the Respondent did not deem it fit to avail explanation if at all why the service was indeed never effected in the stated dates.

38. Section **3A of the Civil Procedure Act** provides that **'Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'**

39. The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. It is fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, *ex debito justiciae*, to have any determination which affects him set aside.

40. Discussing the nature and objects of the inherent powers of the court, ***Sir Dinshah Mulla in The Code of Civil Procedure*** observes that:-

> ***"the Code of Civil procedure is not exhaustive, the simple reason being that the legislature is incapable of contemplating all the possible circumstances, which may arise, in future litigation, and consequently, for providing the procedure for them. The principle is well established that when the Code of Civil Procedure is silent regarding a procedural aspect, the inherent power of the court can come to its aid to act ex debito justiciae for doing real and substantial justice between the parties. The court has, therefore, in many cases, where the circumstances so require, acted upon the assumption of the possession of an inherent power to act ex debito justiciae, and to do real and substantial justice for the administration, for which alone, it exists. However, the power, under this section, relates to matters of procedure. If ordinary rules of procedure result in injustice, and there is no other remedy, they can be broken in order to achieve the ends of justice....."***

41. The court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit. The inherent power, as observed by the Supreme Court of India in **Raj Bahadur Ras Raja vs Seth Hiralal** ***"has not been conferred on the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it."*** Lord Cairns in ***Roger vs Comptoir D' Escompts De Paris*** stated as follows:-

> ***"One of the first and highest duties of all, Courts is to take care that the act of the court does no injury to any of the suitors and when the expression 'Act of the court' is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the case."***

42. Discretion vested in the court is dependent upon various circumstances, which the court has to consider. It can be exercised on application filed by a party. It could also be exercised in order to stall the dilatory tactics adopted in the process of hearing a suit, and to do real and substantial justice to the parties to the suit.

43. In conclusion, having considered the facts of this case, the affidavits filed by both parties, the submissions by both counsels and the relevant law and authorities, I find that this is a proper case for this court to exercise its discretion in favour of the applicant. Accordingly, I hereby set aside the judgement delivered herein and all the consequential orders and order that appeal and cross-appeal proceeds for hearing afresh as a defended case.

44. Costs in the main cause.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 30TH DAY OF JANUARY, 2020.

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C. KARIUKI

JUDGE