REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

FORMERLY CIVIL APPEAL NO. 237 OF 2017

CIVIL APPEAL NO. 5 OF 2017

JAMES KIMINDA NDEGWA.....PLAINTIFF

-VERSUS-

HOUSING FINANCE CO. LTD.....1ST DEFENDANT

KENYA RAILWAYS CORPORATION.....2ND DEFENDANT

JUDGMENT

1. **James Kiminda Ndegwa**, the appellant sought by his application dated 24th May 2016 to have set aside the dismissal of his case, being Chief Magistrates Court case No 3242 of 2008, and that it be reinstated; and that an injunction be issued restraining Housing Finance Company Limited, the 1st respondent from realizing its security by selling the appellant's property **L.R. No. 264/SEC./MN/KIEBENI EAST PHASE II.** The application was heard by the learned **Senior Principal Magistrate E.K. Usui**. By the learned Magistrate's Ruling of 9th May 2017 the appellant's application was dismissed. This appeal is against that dismissal.

2. The background of this matter is that the appellant filed a case in the high court commercial division being case number HCCC No. 526 of 2004. On 15th May 2008 the appellant's case was transferred to the Chief Magistrate's Court because by then that court had jurisdiction to entertain the matter.

3. On 3rd July 2015 the learned magistrate granted orders sought by the 1st respondent for the dismissal of the appellant's suit for want of prosecution. It is that dismissal of the suit the appellant sought to set aside by his application dated 24th May 2016. On that application being dismissed this appeal was presented before this court.

4. The appellant has presented ten grounds of appeal. By those grounds the appellant stated that the learned magistrate erred both in law and in fact because the learned magistrate failed to consider, in dismissing the application, that when the appellant's suit was dismissed the appellant's then advocate had applied to cease acting for the appellant; that the learned magistrate failed to consider that the subject matter of the suit was immovable property; that the learned magistrate failed to take into account that the appellant was not aware of the application for dismissal of his suit for want of prosecution; and that the learned magistrate failed to consider that the appellant's suit ought to be heard on merit.

5. The learned advocates for the appellant in their written submissions stated that the learned magistrate failed to address the fact that it had been established by various court decisions that a party should not be made to suffer for the mistake of his advocate. Further that the learned magistrate failed to consider that it was the appellant's then advocate who failed to pursue the case with diligence. In this regard the appellant relied on the case F.M. v E.K. (2019) eKLR:

> ***"In my considered view, the excuse tendered by counsel for the Appellant for his failure and that of Appellant to attend court is plausible and ought to have been a sufficient reason to persuade the trial magistrate to set aside the exparte proceedings and not drive the Appellant from the seat of justice without being given an opportunity to be heard. The justice of this case mandates the mistake of the counsel should not be visited on the Appellant. This is in recognition of the fact that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits."***

6. The appellant's learned advocate further submitted that the learned magistrate did not recognize that the appellant's then advocate's failure to inform the appellant of the application to dismiss his suit was a violation of the appellant's constitutional right to fair hearing as provided under Article 50 of the Constitution of Kenya.

7. The 1st respondent opposed the appeal. on its behalf it was submitted that the appeal was fatally defective for want of an order as required under Order 42 Rule 2 and 13(f) of the Civil Procedure Rules. Those Rules provide:

> ***ORDER 42 RULE 2***
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> ***2. Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.***
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> ***ORDER 42 RULE 13 (4) (F)***
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> ***(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:***
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> ***(a).....***
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> ***(b) .....***
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> ***(c) .....***
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> ***(d) .....***
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> ***(e) .....***
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> ***(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:***

8. The 1st respondent, in error in my view submitted that the appellant's dismissed application was for review of the dismissal order. I have looked at the appellant's application and it is clear that what the appellant sought was to set aside the order dismissing his suit for want of prosecution. The appellant did not seek a review of the dismissal of his suit. it follows that the 1st respondent's submissions on whether the appellant met the standard of a review is without standing and will not be considered.

9. The 1st respondent further submitted that the appellant had not met the principles of granting an injunction.

10. The learned Magistrate in dismissing the appellant's application dated 24th May 2016 did not consider the other prayer in that application for injunction. The learned magistrate only made a finding that there had been inordinate delay on the part of the appellant, in prosecuting his suit, and accordingly the learned magistrate found that the suit could not be reinstated.

11. The 2nd respondent further opposed the appeal. In the 2nd respondent's view the learned magistrate in dismissing the appellant's application had exercised her judicial discretion. 2nd respondent submitted that this court cannot substitute its own discretion for that of the learned magistrate.

12. The 2nd respondent down played the appellant's submission that it was due to his then advocate's fault that he failed to attend court when his suit was dismissed for want of prosecution. The 2nd respondent relied on the holding in the case **Savings and Loans Limited v Susan Wanjury Muritu Nairobi (Milimani) HCC No. 397 of 2002**: where **Kimaru, J** expressed himself as follows:

> **"Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.**

13. The 2nd respondent further submitted that the appellant had failed to prosecute his case due to inexcusable delay caused by the appellant's then advocate. In the 2nd respondent's view the appellant should seek compensation from his then advocate rather than seek to reinstate his suit. The respondent referred to the case **Three Ways Shipping Services (Group) Ltd v Mitchell Cotts Freighters (K) Ltd (2005) eKLR** where the court of appeal stated:

> *"The question of advocate's mistake being visited on the client has been raised from time to time. Rt. Hon. Lord Denning M.R. in "The Due Process of Law" London Butterworths at p. 93 said:-*
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> > ***"Whenever a solicitor, by his inexcusable delay, deprives a client of his cause of action, the client can claim damages against him; as for instances when a solicitor does not issue a writ in time or serve it in time or does not renew it***

properly. We have seen, I regret to say, several such cases lately. Not a few are legally aided. In all of them the solicitors have, I believe, been quick to compensate the suffering client; or at least their insurers have. So the wrong done by the delay has been remedied as much as can be. I hope this will always be done."

ANALYSIS AND DETERMINATION

14. It is important to set out what the appellant's claim is in the dismissed suit.

15. The appellant obtained financing from the 1st respondent, Housing Finance Corporation of Kenya, to purchase property **L.R No. 2641/SEC.11/MN/KIEMBENI ESTATE PHASE II** (*the suit property*). The appellant, according to his pleading, arranged for the 1st respondent's said loan to be repaid directly from deductions made in the appellant's salary. The appellant was then employed by the 2nd respondent, **Kenya Railways Corporation**.

16. The 1st respondent gave statutory notice to sell by public auction the suit property due to the appellant's default in the repayment of his loan. It is that notice which triggered the appellant's suit. By that suit the appellant sought for the 2nd respondent to give an account of the amount deducted from his salary and remitted to the 1st respondent. The appellant also alleged an over payment to the tune of Ksh 71,611.76 of his loan by the 2nd respondent through the deduction of his salary.

17. By that suit the appellant also sought an injunction to restrain the 1st respondent from selling the suit property by public auction.

18. It is that suit that the learned magistrate dismissed for want of prosecution and later, on the appellant seeking to set aside that dismissal the learned magistrate declined. It is because of that refusal of the learned magistrate to set aside the dismissal that this appeal was filed by the appellant.

19. In dismissing the appellant's application for reinstatement of the suit the learned magistrate was exercising her judicial discretion. As correctly submitted by the respondents this court can only interfere with that discretion if it is satisfied that the learned magistrate mis directed herself on the law or misapprehended the facts; or took into account consideration which she ought not to have taken; or that she failed to take into account consideration which she should have; or that her decision, albeit a discretionary one, was plainly wrong: see the Court of Appeal decision in the case **Tana and Athi River Development Authority v Jeremiah Kimigho Mwakio & 3 Others (2015) eKLR**.

20. The court of appeal also discussed the circumstances under which the appellant court will consider to interfere with judicial discretion in the case **Farah Awad Gullet v CMC Motors Group Limited (2018) eKLR** thus:

> *"In **Edward Sargent versus Chotabha Jhaverbhat Patel [1949] 16EACA 63**, it was held that an appeal does lie to an Appellate Court against an order made in the exercise of judicial discretion, but the Appeal Court will interfere only if it be shown that the discretion was exercised injudiciously. The principles that guide the appellate court in the exercise of this mandate were set by the predecessor of the Court in **Mbogo & Another versus Shah [1968] E.A. 93,** where it was held at page 96 that:-*
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> > ***"An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice"***

21. The Supreme Court also stated, in the same vein, in the case **Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 Others (2019) eKLR**

> ***"[39]** We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of **Kacem v. Bashir** (2010) NZSC 112; (2011) 2 NZLR 1 (**Kacem**)where it was held [paragraph 32]:*
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> > ***"In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong."***

22. The appellant at the time he first filed his case on 29th September 2004 he was represented by the law firm of **Kerongo Bosire & Co. Advocates**.

23. Another firm, **Nyangito & Co. Advocates** took over the conduct of the case on behalf of the appellant on or about 30th November 2005. That firm filed an amended plaint, for the appellant on 13th January 2006.

24. Although I could not trace a notice of change of advocate I noted an application filed on behalf of the appellant, dated 2nd August 2007, by the law firm of **Gikandi & Co. Advocates**.

25. Other activity that proceeded in the court file is that the 1st respondent filed an application dated 23rd October 2006 seeking that the appellant do supply particulars of his pleadings. On 6th June 2007 the court ordered the appellant to supply those particulars.

26. On 15th May 2008 **Justice Warsame** (*as he then was*) transferred this suit to the Chief Magistrate's Court for disposal.

27. At the Chief Magistrate's court the 1st respondent filed a Notice of Motion application dated 24th June 2014. The 1st respondent sought by that application the dismissal of the appellant's suit for want of prosecution. That application was before the learned magistrate on 3rd July 2015. I must admit that in my perusal of the record of appeal and the magistrate's court file I have been unable to trace an affidavit showing whether the appellant or his then advocate, Gikandi Ngibuini Advocates were served with that application for dismissal of the suit for want of prosecution dated 24th June 2014.

28. I have considered the Ruling of the learned magistrate of 9th May 2017, which is the subject of this Ruling. The Learned Magistrate in my view erred to have stated that the appellant's application dated 24th May 2016 sought injunctive orders and an order to review the dismissal of the suit. The correct position is that, that application sought injunctive orders and an order to set aside the dismissal of the suit. There are different consideration a court should have when considering an application for review as opposed to an application to set aside an order.

29. The learned magistrate in my view should have considered whether indeed there were grounds for reinstatement of the suit. In my view the magistrate lay unnecessary emphasis on the delay that may have been there in the prosecution of the suit and failed to consider whether the appellant or his then advocate, had been served with the application for dismissal of the suit.

30. The magistrate in failing to note that the appellant had not been served with the application also failed to note that the firm of Gikandi Ngibuini had sought by a pending application, dated 10th June 2015, to cease to act for the appellant for what was alleged by that advocate to be lack of instructions by the appellant. The learned magistrate did not consider the ramification of that pending application.

31. It is because of the above finding that I am of the view that the magistrate's exercise of discretion is open to be interfered with, by this court. The learned magistrate failed to consider whether the appellant or his then advocate had been served with the application for dismissal of the suit for want of prosecution.

32. It was necessary for the magistrate to have borne in mind that the appellant had been assured by his advocate that he would be kept informed of the progress of the case. The appellant deponed in his affidavit that his then advocate failed to keep him so informed and also that the said advocate failed to prosecute the suit.

33. The appellant further deponed in his affidavit, which the magistrate did not consider, that he had retired and had been sickly and therefore failed to follow up his case.

34. Had the learned magistrate considered those issues which were raised by the appellant in his affidavit in support of his application dated 24th May 2016 it is perhaps possible the learned magistrate could have reached different conclusion. In this regard see the case **Republic v University of Nairobi exparte lazarus Wakoli Kunani & 2 others (2017) eKLR** which case might have assisted the learned magistrate in deciding the application before her. It was stated therein:

> "*The principles guiding the setting aside ex parte orders are trite that the court has wide powers to set aside such ex parte orders save that where the discretion is exercised the Court will do so on terms that are just. In* ***CMC Holdings Limited vs. Nzioki [2004] 1 KLR 173*** *it was held as follows:*
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> > ***"That discretion must be exercised upon reasons and must be exercised judiciously…In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be 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. Such an exercise of discretion would be wrong principle...The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate".***

35. Is this appeal defeated by lack of an order which the appellant is appealing against, as required under Order 42 Rule 2 and Rule 13 (4) (f)? Those Rules talk about an order or decree appealed from section 2 of the Civil Procedure Rules defines order as:

> ***"Means the formal expression of any decision of a court which is not a decree and includes a rule nisi."***

36. In my view it suffices for purpose of those Rules that the learned magistrate's Ruling was included in the record of appeal. That is the Ruling being appealed from. In my view of the provisions of those Rules are satisfied by the presence, in the record of appeal, of the magistrate's Ruling. I so find by invoking the overriding objective of the Civil Procedure Act which requires that the Civil Procedure Act and the Rules do facilitate the just, expeditious, propositionate and affordable resolution of civil dispute. I would also invoke, in reaching that decision, Article 159 (2) (d) of the constitution which requires that Justice be administered without undue regard to procedural technicalities. I therefore find that this appeal is not defeated by lack of an order of the Ruling being appealed against.

37. There is a consent that was recorded before court and in the presence of the appellant and the 1st respondent's advocates. That consent

was adopted by the court on 29th November 2007. That consent was to the terms that the 1st respondent would not sell, by auction, the suit property pending the hearing of the suit. Since I have found that this court can interfere with the discretion of the magistrate and in so doing the appellant's suit will be reinstated – on being reinstated all the subsisting orders in that suit, which include that order of injunction by consent will be reinstated. It follows that there is no need to reconsider the prayer of injunction as sought by the appellant in this appeal.

38. In the end the following is the judgment of this court:

*a. The order of 3rd July 2015 of **Hon SPM Usiu** dismissing the appellant's CMCC No. 3242 of 2008 and the order issued on 9th May 2017 by **Hon. SPM Usiu** dismissing the appellant's application dated 24th June 2015 are hereby set aside.*

b. The appellant's suit CMCC No 3242 of 2008 is hereby reinstated.

c. Consequent to orders (a) and (b) above the injunction order by consent which was adopted by the court on 29th November 2007 is reinstated.

d. The costs of this appeal are awarded to the appellant to be paid in equal share by the 1st and 2nd respondents.

e. This case shall be heard by any other magistrate but Hon. SPM Usiu.

Orders accordingly.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **29th** day of **APRIL,** 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **29th** day of **April, 2020.**

MARY KASANGO

JUDGE