



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 70 OF 2018

JOSEPH JOHN NDIRANGU (Suing on behalf of the

Estate of LYDIA WANJIKU KAMAU.....APPELLANT

VERSUS

MERU GREENS HORTICULTURE LTD.....RESPONDENT

(The appellant above named against the ruling and/or order of the Senior Resident Magistrate NYAMBOKE sitting at Wang'uru Civil Suit No. 61 of 2017 on 19th November, 2018 in Wang'uru Civil Suit no. 61. 2017)

JUDGMENT

This appeal arises out of Proceedings in **Wanguru Civil Suit No. 61 of 2017** in Wang'uru Senior Resident Magistrate's Court. The trial magistrate gave a Ruling dated 19th of November, 2019 which dismissed the Appellant's application seeking to set aside an order issued on 30th July, 2018 dismissing the suit.

The appellant was dissatisfied with the Ruling and filed this appeal which raises the following **grounds**;

- (i) The Learned trial magistrate erred in law and fact in delivering a ruling that dismissed the application to set aside the dismissal of suit order.
- (ii) The Learned trial magistrate erred in failing to evaluate and appreciate the strength and weight of the evidence tendered by the appellant.
- (iii) The Learned trial magistrate erred in law in dismissing the application for reinstatement of suit due to want of prosecution.
- (iv) The learned magistrate erred in law and fact in finding that the cause was within the limited time.
- (v) The Learned trial magistrate erred in law and in fact in not finding that the Plaintiff/applicant claim in Civil Suit no. 61 of 2017 should have proceeded to be heard on merit.
- (vi) The Learned trial magistrate erred in law and fact in failing to consider that the suit had earlier been adjourned by the insistence of the Defendant's Advocate.
- (vii) The Learned trial magistrate erred in law and fact in failing to consider that the appellant had sought justice in the same court and in event punished the appellant due to the mistake of his Advocate.
- (viii) The Learned trial magistrate erred in law and fact in failing to consider that the appellant was ready to have the suit concluded to its logics.
- (ix) The Learned trial magistrate erred in law and fact in dismissing the appellants' case despite the obvious fact that the application for reinstatement had triable issues.
- (x) The Learned trial magistrate erred in law and fact in failing to adhere to equity and justice in entering a dismissal order of the suit.
- (xi) The Learned trial magistrate erred in law and facts in applying the wrong principles of law and failing to consider

matters that she ought to have considered in his ruling.

(xii) Magistrate erred in law and facts by failing to appreciate or consider the fact that the appellant has already committed himself to the cause hence making a ruling against the weight of the evidence adduced before the court.

(xiii) The Learned trial magistrate ignored the fact that the appellant lost a niece and life was lost in the cause before the claim.

(xiv) The Learned trial magistrate erred in law and facts by failing to consider the appellant entire evidence but instead improperly analyzed the evidence for the respondent in isolation and hence arrived at a wrong conclusion.

The brief facts of this case are that the appellant had filed Originating Summons in the High Court of Kenya at Nairobi dated 2nd May, 2010 seeking an order that the Appellant Joseph John Ndirangu be allowed to file a suit out of time on behalf of the estate of **Lydia Wanjiku Kamau (deceased)** who had died in a Road Traffic Accident on 22nd October, 2006.

It is not clear from the record whether the Originating Summons were determined as the Judgment and/or the Ruling does not form part of the Record of Appeal.

The appellant proceeded to file Civil Suit No. **21 of 2017** vide a Plaint dated 9th of May, 2017, which was Amended on 17th May, 2017 claiming;

(a) Special damages

(b) General damages under the Law Reform Act (Cap 26) for the benefit of the deceased estate, general damages under the fatal accident Act for the benefit of the plaintiff, loss of life expectancy, pain and suffering under the English Common Law, plus interest thereon at Court rates.

(c) Costs of this suit and interest on a, and b above.

(d) Any other relief that this honourable court may deem fit to grant.

It would seem the Respondents filed a defence but their defence does not form part of the Record of Appeal. The matter was then set down for hearing and on 30th July, 2018 the Trial Magistrate following the failure by the plaintiff to appear in court on the date of hearing, ordered that the suit be dismissed with costs.

The Appellant filed an application dated 16th August, 2018 seeking an order, that the Order dismissing the suit on 30th July, 2018 be set aside and the suit be reinstated for hearing.

The Court gave its Ruling on 19th November, 2018 and dismissed the Application.

When the Appeal came for directions the parties agreed to proceed by way of written submissions.

FOR THE APPELLANT:

Submissions were filed by Kahuthu & Kahuthu Advocates;

He submits that on the 9th of November, 2018 when the suit was dismissed the appellant would have proceeded, had the defendants advocate not written a letter inferring the suit be adjourned on that day, that is 9th November, 2018 as they would not be able to proceed. However, the Record does not show any proceedings which were supposed to take place on 9th November, 2018 and the impugned Ruling was delivered on 19th November, 2018, on that day the Counsel for the Appellant was not in Court.

He further submits that being an elderly person then aged 75 years only failed to attend Court because he was sickly and his advocate had already alerted him that the respondents advocate had requested for adjournment of the matter on 19th November, 2018, hence the mistake of advocate should not be visited on a party as it is a genuine mistake. However, the Appellant does not give an explanation as to why he was not in Court on 30th July, 2018 when the suit was dismissed.

From the record the date of 30th July, 2018 was fixed by consent of the parties in Open court on 25th June, 2018, and the Court indicated that the appellant was given a last adjournment. When the matter came up for hearing on 30th July, 2018, Mr. Ogwenso appearing for the appellant informed the court that there are no witnesses in Court and the case was dismissed.

The Appellant submits that he resides in Nairobi and hence the mistake of his Advocate informing him that the defendant's advocate had requested for adjournment and that the matter in the event the matter would not proceed, should not be visited on the respondent.

He has relied on the case of; **Belinda Murai & others -vs- Amoi Wainaina (1978) Majen J (the proper citation was not given) to** say that a party should not be locked out of the seat of Justice on account of a mistake.

He further submits that when the suit was dismissed the plaintiff immediately filed an application for reinstatement of the suit which the court declined to exercise its discretion Judiciously based on facts and the Law.

That the Appellant demonstrated good faith by indulging Counsel for the defendant/ respondent and hence the lower court failed to consider the principles of: **Shah -vs- Mbogo** In exercise of its discretion. That dismissal of the case upon summary procedure is a draconian measure that will forever live the appellant suffering along without a remedy.

He further submits that Justice and equity and fair play should prevail as the appellant has painfully tried to prosecute this matter to ensure justice for the deceased's estate.

He prays that the Appeal be allowed and the Plaintiff be allowed to prosecute the suit in the lower court.

FOR THE RESPONDENTS

Submissions were filed by; Njeru Nyaga & Company Advocates for the Respondents.

It is submitted that Litigation must come to an end. They have relied on the case of; **Republic -vs- City Council of Nairobi & 2 Others (2014) eklr** where it was stated that:

“one of cardinal principles of law is that litigation must come to an end and were a court of competent jurisdiction has pronounced a final decision on a matter to bring fresh proceedings whether as judicial review proceedings or otherwise would amount to an abuse of the process of the court and would therefore not be entertained. The Court in terminating the same would be invoking its inherent jurisdiction which is not a jurisdiction conferred by Section 3A of the Civil Procedure Act as such but merely reserved thereunder.”

He further submits that a matter cannot be litigated endlessly. By this Appeal the appellant is asking the court to dwell on this single file for as long as it takes. That it is not worthy that despite the matter been time bad the sub-ordinate court continue to entertain the same, yet the appellant was not vigilant enough to bring it to a conclusive close.

It is further submitted that the appeal is not only veiled in equity but also a clear demonstration in disinterest in disguise.

That the appellant is simply engaging in blame game blaming the respondent for not proceeding with the hearing when they ought to have done so.

That this court should put finality to this matter. He has relied on the case of : **William Koross (legal representative of Elijah C.A. Koross. -vs- Ezekiah Kiptoo Komen & 4 others (2015) eklr** where it was stated that “.....is that it has to be finality; litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives. It is meant to provide, rest and closure for endless litigation and agitation does little more than vex and add to costs, a successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.”

It is further submitted this Appeal is mere impendent to the Respondent reaping the fruit of their hard labour.

That the court on 19th November, 2018 pronounced itself with clarity and they urged the court to honour and affirm that decision.

It is submitted that an arguable appeal is not one that will necessary succeed but one which raises triable issues.

There are no valid issues raised in the matter at hand. The appellant is simply groping in darkness. Ordering this matter to be heard afresh or at all, will be a waste of courts precious time and scare resources, the appeal has no reverence in law and should die a natural death. He relies on the case of; **CMC Holdings limited -vs- James Mumo Musyoki (2004) 1 KLR 181**, where the court quoted with approval the case of; **Shah -vs- Mbogo & Another (1967) EA 116** where the court held that.

“Applying the principle that the courts discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident inadvertence or excusable mistake or error but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the course of justice, the motion should be refused.”

He further submits that setting aside judgment or order of the court is in the discretion of the court, and such discretion must be exercised upon reasons, and must be exercised judiciously.

The respondent submits that the actions of the appellant and his advocate do not amount to an excusable mistake.

That in the matter at hand, the Appellant refusal to provision to be heard either in ex-parte or otherwise can neither be said to have been inadvertent or occurred as a result of an accident.

The appellant just intends to delay justice in this case, by intentionally failing to attend to the matter hoping for the courts indulgence, and thus the appeal ought to be dismissed.

The respondent submits that the appeal is only aimed at unnecessarily protracting the matter which will occasion the respondent great injustice and prejudice, considering that the respondent witness, the driver at the time of the accident is ill and often in and out of hospital.

That this case has been in court for a while and if the appellant was desirous of having this matter been dealt with conclusively then he should have been active in prosecuting this suit from the beginning.

That it will be unfair and unjust for the negligence and indolence of the appellant to be visited upon the respondent.

Finally the Respondent submits that the appellant chose to sleep on his right, yet equity imputes an intent to fulfil an obligation and it aids the vigilant and not the indolent. That both Equity and the Law demand that this appeal be dismissed.

I have considered the Appeal and the submissions.

ANALYSIS & DETERMINATION

The Issue which arises for determination is:

- Whether the appellant has shown good cause for the court to order the setting aside of the Ruling by the Trial Magistrate refusing to reinstate the suit which had been dismissed.

The Appellant is seeking the exercise of these courts' discretion so that the suit before the Trial Magistrate can be reinstated and be heard on merit.

Order 12 Rule 3 of The Civil Procedure Rules Provides as follows;

“ if on the day fixed for hearing, after the suit have been called on for hearing outside the court only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the Court.”

The Provision provides for the dismissal of the suit for nonattendance of the Plaintiff.

However, the court has discretion to adjourn the suit where a good cause has been shown and is recorded by the trial court.

The court however has discretion to reinstate a suit that has been dismissed. **Order 12 Rule 7** of The Civil Procedure Rules provides as follows;

“Where under this order Judgment 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.”

It is trite that the discretion of the court must be exercised judiciously. In this case the record shows that the plaintiff failed to attend court when the matter came up for hearing after the date was taken by consent. From the record of the Lower Court it shows that the appellant was not in court but there was an advocate who was appearing for him. The Advocate informed the court that the witnesses were not in court.

The appellant filed an application for the suit to be reinstated, but the Trial Magistrate held that he had considered the conduct of the appellant and dismissed the application.

In the Supporting affidavit which was sworn by Anthony Kahuthu he has deponed that on the day the matter came up for hearing on 30th July, 2018 for the main suit the appellant would have been ready to proceed but the defendant advocate Mr. Nyaga called the deponent and informed him that he shall not be able to proceed as his client is unwell and indisposed and wrote a consent agreeing to take out the matter from the day's cause list which the Plaintiff advocate reluctantly agreed to, but executed the consent which was already filed as part of the record.

The consent which was annexed to the Supporting affidavit at page 81 of the record stated that; The matter be taken out from the cause list of 30th July, 2018 and the letter is signed by both counsels for the appellant and the respondent. It would seem that when the matter came before the trial magistrate on 30th of July, 2018 the court was not informed that the parties had agreed to take out the matter from the days cause list.

When considering this application the trial magistrate stated that on the day the counsel for the appellant sought adjournment due to lack of witnesses, and the defendant left the final decision to court.

The counsel for the respondent who was before the court, failed to inform the court that they had entered a consent to take

out the matter out of day's cause list. The appellant was therefore not to blame for the state of affairs that led to the dismissal of the suit.

The application to re-instate the suit was filed on 16th August, 2018. The delay in filing this application to re-instate the suit was not unreasonable or inordinate. The mistake was not by the appellant failing to attend court.

The court should therefore exercise the discretion judiciously, consider the circumstances leading to the dismissal of the suit.

It has been stated dismissing a case is draconian and a party should not be locked out of the Sit of Justice. As stated in the Case of;

Belinda Murai & Others -vs- Amoi Wainaina (1978) Majen J.

“ The door of Justice is not closed because a mistake has been made by a lawyer of experience who ought to know better the court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate....”

Apaloo JA outlined the following approach to a similar question in Phillip Chemwolo and Another -vs- Augustine Kubede (1982 -1988) KAR 103;

“Blunder 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 having his case heard on merit, I think the broad equity approach to this matter 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. The courts as is often said exist for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

In the exercise of discretion the court has a free hand and has to consider the reason on non –attendance in court by the applicant as to whether he is deserving or undeserving the exercise of discretion in his favour.

The purpose for the court to exercise discretion is to ensure that a party does not suffer injustice or hardship. In the case of: **Shah -vs- Mbogo** which was cited by the appellant was stated as follows;

“ Applying the principles that the courts discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accidents, inadvertence, or excusable mistake, or error but not to assist a person who has deliberately sought (whether be evasion or otherwise) to obstruct or delay the cause of justice.”

In this case, the appellants did not attend court as he had been informed by the counsel for the defendant that he would take out the matter from the hearing list of that day.

In most cases where parties have filed a consent in a matter, courts normally allow the consent or adopt the consent as the order of the court.

The appellants' advocate cannot be faulted for not presenting his witnesses in court, after signing the consent where the party had consented to take out the matter.

The defence counsel who appeared before the Trial Magistrate was not candid as he failed to bring it to the attention of the court that there was a consent to take out the matter out of the cause list of that day.

This facts were before the Trial Magistrate when she delivered the impugned Ruling on 19th November, 2018.

The Trial Magistrate erred dismissing the application to dismiss the suit where it was clear it was not the fault of the appellant that the case could not proceed on that day.

The Trial Magistrate erred by stating that having dismissing the suit she could not entertain the application for re-instatement. This was made in error because on **ORDER 12 Rule 7 (supra)**, the court has discretion to set aside or vary the Judgment or the order dismissing the suit upon such terms as may be just.

This is a case where the court ought to have exercised discretion to re-instate the suit as the appellant had shown a good cause why he was not in court. **Article 159 (2) (d)** of the Constitution;

“In exercising Judicial authority, the Courts and Tribunals shall be guided by the following principles;-

- Justice shall be administered without undue regard to procedural technicalities.

This calls on the court to aim at doing substantive justice other than dismissing the suit.”

In the case of; **Phillip Chemwolo & Another –vs- Augustine Kubede (1982 -1988) KAR** quoted in **Pan African Paper Mills Limited -vs- Silvester Nyarango Obwocha (2018) eKLR**, it was stated:

“ Blunders will continue to be made from time to time and it does not follow because a mistake has been made, a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that, unless there is fraud or intention to over reach there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties, and not the purpose of imposing discipline.”

In the case of; **Richard Ncharpi Leyagu -vs- I.E.B.C & 2 Others (Civil Appeal: 18/2013)** the Court of Appeal stated that;

“ 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 courts process from abuse that would amount to injustice and at the end of the day there should be proportionality” =

In this case failure by the appellant to attend court has been explained.

The explanation is plausible as the Counsel for the appellant has exhibited the letter of consent by the parties that the case would not proceed on that day and the Court in this matter should exercise discretion in his favour to avoid hardship and injustice which are Factors which the court must consider while exercising discretion.

In the case of; **Richard Ncharpi Leyagu -vs- I.E.B.C & 2 others (supra)** the Court of Appeal stated that;

“ We appeal with the noble principles which go further to establish that the courts principles to set aside an ex-parte judgment or order 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 cause of justice.”

Although the respondent have submitted that litigation must come to an end, It should not be by default but as much as possible on merits of the case which can only be where both parties have been heard. The respondents created the state of affairs by failing to disclose to the Trial Magistrate that they had persuaded the counsel for the appellant to sign a consent removing the matter from the hearing list.

It would be unfair and an injustice to allow the respondents benefit from that kind of conduct.

I find that the appellant has shown a good cause why he was not in court when the suit was dismissed, it was through no fault of his own.

The Trial Magistrate ought to have exercised discretion in his favour.

IN CONCLUSION

- This court has a duty to do substantive justice to all parties who appear before it to seek justice.
- The appellant had pursued this matter and his expectation that justice would be done should not be dashed.
- I find that this application has merit

I make an Order that;

- (i) The Ruling of the Magistrate dated 19th November, 2018 is set aside and replaced with an order allowing the appellants application to re-instate the suit, and substitute it with an order reinstating the suit.
- (ii) Consequently, the order dismissing the suit is set aside.
- (iii) The parties shall appear before the Trial Magistrate or any magistrate with jurisdiction at Wang’uru Law Court for the hearing and determination of the suit.
- (iv) On costs’ costs of this appeal to the appellant.

Dated, signed at Kerugoya this 29th day of May 2020

L. W. GITARI

JUDGE