REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 127 OF 2018

MICHEAL MBAABU KIRIMANIA (Suing

as the legal representative of the estate

of the late KIRIMANIA MUGUONGO alias

KIRIMANIA M'MUGUONGO - deceased).....APPELLANT

VERSUS

KINOTI KARUNTIMI.....RESPONDENT

(Being an appeal from the Ruling and Order of Hon. Hannah Ndungu dated and delivered on 6/11/2018 in Meru CMCC No. 432 of 2006)

J U D G M E N T

1. In a Ruling dated 6/11/2018, the trial court dismissed the appellant's application dated 20/8/2018 which had sought to set aside the order made on 26/7/2018 dismissing the appellant's suit and to reinstate the same for hearing and determination.

2. Aggrieved by the said determination, the appellant filed his Memorandum of Appeal raising three grounds which were to the effect that the trial Court exercised its discretion wrongly in dismissing his application.

3. In his submission, the appellant indicated his desire to prosecute his claim in the trial court. He noted that this being a land matter, the same was sensitive to the parties involved and should therefore be determined on its merit. He cited the case of **Gold Lida Limited v NIC Bank Limited & 2 others [2018] eklr** in support of those submissions**.**

4. On his part, the respondent submitted that there was no evidence to show that the appellant and his advocate were within the court premises as alleged in their application. That if the appellant was in court and had learnt of the dismissal orders on the same day, he should have applied for its setting aside immediately and not to wait until 10/9/2018 when he lodged the application.

5. This being a first appeal the Court is bound by the principle in ***Selle .v. Associated Motor Boat Co. Ltd [1968] EA 123***. That is, the court should revisit the evidence afresh and arrive at its own independent conclusions.

6. The suit before the trial Court was instituted on 18/10/2006. It was dismissed on 26/7/2018 for non-attendance. On 10/09/2018, the appellant filed an application dated 20/8/2018 seeking the reinstatement thereof.

7. The application was supported by affidavits sworn by **Mugambi Mutegi** and **Micheal Mbaabu Kirimania** in their capacities as advocate and plaintiff, respectively. They both averred that the matter was slated for hearing on 26/7/2018. When the matter came up for hearing, they were both present before **Court 1, Hon Hannah Ndungu CM** only to realise that the same was not listed before that court. On inquiry at the registry, they were informed that the same was listed before a visiting Magistrate Hon. E. Kiprono SRM who was sitting in Court 3. That when they got there at about 9:15 a.m., the matter had been called out and dismissed.

8. The application was not opposed. The trial court however dismissed the application.

9. The record shows that it did not give any reasons for dismissing the application. What is recorded is a one line Ruling as follows; ***"The application is denied and the suit stands dismissed"***.

10. In **Stephen Mbugua Ikigu v Peter M. Mbugua & 2 others [2014] Eklr,** the court addressed the need to have a concise judgement as follows: -

"… There is really no ideal manner of writing a judgment, it is basically a skill that can be learned, practised, improved and refined. What is important is that a judgment must be clear and demonstrate a reasoned thought process. It must at least set out the nature of the claim, the defence, the arguments, and the issues for determination, the reasons for the decision and the decision.

In a publication by the Judicial Commission of New South Wales, an article by Hon. Justice Linda Dessall of the Family Court of Australia, and Judge Tom Wodak, discuss seven steps to clearer judgment writing, to include:-

Dealing with the history and facts.

Time, place or order of events.

Identify issues for determination.

Issues of fact.

Set out the law, the legal principles applied, analyse these in relation to the facts of the case. Conclude by resolving each issue, giving reasons for the conclusion ..."

11. The foregoing position also applies to rulings. A court must give reasons for its decision.

12. In **Order 12 rule 7** under which the application was brought before the trial Court reads:

"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."

13. In view of the foregoing, there is discretion in the court when considering an application under that order. That discretion is perfectly free. However, the same as in all discretions, must not be capriciously exercised but judiciously.

14. In **Stephen Ndichu v Monty's Wines and Spirits (2006) Eklr,** it was held: -

"The principles governing the exercise of judicial discretion to set aside ex-parte judgments are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it (See Patel –vs- E. A. Cargo Handling Services Ltd (1974) E. A. 75). The discretion is intended to be exercised 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 (see Shah –vs- Mbogo (1969) E. A. 116). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration –vs- Gasyali (1968) E. Way. 300). It also goes without saying that the reason for failure to attend should be considered."

15. Having failed to give reasons for its decision, it cannot be said that the trial court exercised its discretion judiciously and its decision cannot stand. The same is for setting aside *ex debito justitiae*. Having set aside the order of dismissal, it is upon this Court to consider the merits of the application that was before the trial court.

16. I have considered the history of the suit before the trial court. The same had a long history hurdled by adjournments caused by both parties. There was also the need to substitute the plaintiff who passed on during the proceedings. On various occasions, the appellant was ready to proceed with the hearing but the respondent sought adjournment. The suit was also delayed by the *Malindi case* of **Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others (2017) Eklr,** that sought to resolve the issue of jurisdiction of Magistrates Courts to handle environment and land related matters.

17. The appellant submitted that the failure to attend court was an inadvertent mistake occasioned by the matter not being listed before court 1 where it had previously been listed. A perusal of the record shows that on the material day, 26/7/2018, the matter was listed before Hon. E. K. Too SRM who dismissed the same for non-attendance. That fact was neither rebutted nor challenged. It would not be too unreasonable expect an advocate and his client to handling a matter, moreso that allocated a hearing date for the same.

18. I have already noted that there was no evidence that previously the appellant had not been keen to prosecute the suit. His diligence can be seen all over the record. In this regard, I am satisfied that his failure to attend court was due to inadvertence mistake of going into a wrong court.

19. Accordingly, I find that the appeal is meritorious and I allow the same. The appellant's suit before the trial court is hereby reinstated for hearing on merit. Each party to bear own costs.

DATED and DELIVERED at Meru this 24th day of September, 2020.

A. MABEYA

JUDGE