



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 259 OF 2017

CHARLES KYALE MBUVI.....APPELLANT

VERSUS

RACE GUARD LIMITED.....RESPONDENT

(Being an appeal from the Judgment of Honourable S.W. Mburu (Mr) Principal Magistrate at Chief Magistrate's Court at Milimani Commercial Courts No CMCC No.7392 of 2012 delivered on 28th April 2017)

RULING

INTRODUCTION

1. The Appellant's Notice of Motion application dated and filed on 23rd October 2018 was brought pursuant to the provisions of Order 12 Rule 7, Order 51 Rule (1) of the Civil Procedure Rules, Section 1A,1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya. It sought the following orders:-

- 1. That this Honourable Court set aside the orders of 19th October 2018 dismissing this Appeal for non-attendance by the Appellant and his Advocates together with all the consequential orders thereto.**
- 2. That this Appeal be re-instated.**
- 3. That costs of this application be on the cause.**

2. His Written Submissions were dated and filed on 19th February 2019 while those of the Respondent were dated 25th February 2019 and filed on 28th February 2019.

3. Parties asked this court to deliver its decision based on the Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE APPELLANT'S CASE.

4. The Appellant's application was supported by the Affidavit of his advocate, Kevin O. Omondi that was sworn on 23rd October 2018.

5. He contended that he failed to attend court on 19th October 2018 when directions on the Appeal herein were to be given due to an inadvertent error on their part as advocates as they failed to diarise the matter. He annexed a copy of an extract of their diary for the period between 15th and 19th October 2018 evidencing that the matter herein was not diarised.

6. He averred that the Appellant had an arguable appeal and urged this court to set aside its orders of 19th October 2018 in which it dismissed the Appellant's Appeal and reinstate the same for it to be heard on merit to avoid prejudice, injustice and hardship to the Appellant.

7. It therefore urged this court to allow its application as prayed.

THE RESPONDENT'S CASE

8. In opposition to the said application, the Respondent filed Grounds of Opposition dated 5th February 2019 on 7th February 2019.

9. The grounds of opposition were as follows:-

1. The application was incurably defective considering this Honourable Court in its orders of 19th October 2018 dismissed the Appeal for the non-attendance by the Appellant and his Advocates.

2. The application was defective as it did not comply with the provisions of Order 12 of the Civil Procedure Rules.

10. It therefore asked this court to dismiss the present application.

LEGAL ANALYSIS

11. The Appellant referred this court to the case of **Waweru vs Ndiga (1983) KLR 236** where the Court of Appeal held that the court had unfettered discretion to do justice between the parties.

12. He pointed out that he filed the present application three (3) days after his Appeal was dismissed which demonstrated his vigilance in having his matter heard and determined expeditiously.

13. He also placed reliance on the case of **Grace Wambui Kamau (Suing on behalf of Riruta Satellite Women Group) Vs Philomena Munge [2014] eKLR** and on the case of **Hamko Yadpal Industries Ltd vs Kalka Flower Ltd (2013) eKLR** where the principles governing the exercise of discretion to set aside an *ex parte* judgment were outlined.

14. On its part, the Respondent relied on the case of **Shah vs Mbogo & Another (1967) EA 1116** where it was held that it was the role of a party praying that the court exercises its discretion bring sufficient and compelling reasons that would persuade the court to exercise its discretion.

15. It also referred this court to the case of **Utalii Transport Co Ltd & 3 others vs NIC Bank & Another [2014] eKLR** where it was held that:

“...It is the primary duty of Plaintiffs to progress their case as they are the ones who dragged the Defendant to court.”

16. It was its contention that it was never served with a Mention Notice to attend court but that despite the Appellant's advocates having been served with a Hearing Notice, they opted not to come to court.

17. It was its further averment that although the Appellant had tried to show that he was keen to prosecute his Appeal, his reasons to reinstate his Appeal were not convincing.

18. It was evident that both parties were clear as to when the court could exercise its discretion in favour of a party when his suit was dismissed. The principles would be applicable in a case of a dismissal of a suit.

19. As was held in the case of **Utalii Transport Co Ltd & 3 others vs NIC Bank & Another** (Supra) which holding this court fully associated itself with a party who drags the other to court must take all reasonable steps to have his matter determined with utmost dispatch to avoid prejudicing his opponent.

20. Having said so, a court must always keep at the back of its mind the vagaries of practice in our courts. The slips and omissions are sometimes caused by parties' advocates. Often times, the slips and omissions are unintended and/or inadvertent but they can have very serious repercussions or consequences on parties' cases.

21. It is the latter instances that a court is called upon to exercise its unfettered discretion to avoid injustice, or hardship. In the case of **Shah vs Mbogo** (Supra), it was held as follows:-

“The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors, 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.”

22. The discretion of a court is therefore not restricted but in exercising its discretion, the same should not be to cause an injustice to the other party. It is therefore the role of the party seeking Court's favour to bring up sufficient and compelling reasons that will persuade court to find in its favour.

23. This was similar to the finding in the case of **Grace Wambui Kamau (Suing on behalf of Riruta Satellite Women Group) vs Philomena Wambui Munge** (Supra) in which it was stated as follows:-

“...It is my view that the Defendant has given sufficient reason as to why there was no defence filed or non-appearance for the hearing of the suit herein that led to the judgment delivered on 5th March 2010. She has provided the evidence of her Advocate's illness which was a factor outside her control, and she should not be penalized for the unfortunate circumstances

that befell the said Advocate. This evidence is also corroborated by the Plaintiff who states that the said Advocate became unavailable. There will also be no undue prejudice suffered by the Plaintiff if the said judgment is set aside as they will still have the opportunity to present their evidence for consideration by the court.”

24. Before this court dismissed the Appeal herein, it satisfied itself that the Appellant’s advocates had been duly served with the Notice under Order 42 Rule 13 of the Civil Procedure Rules. It was evident from the copy on the court record that they were served with the said Notice on 27th August 2018 by the High Court of Kenya Milimani Law Court Civil Division.

25. They themselves do not deny having received the said Notice. What the advocates contended attributed to an inadvertent error on their part was that they did not diarise the date in their diary, which they attributed to an inadvertent error on their part.

26. This court perused a copy of the extract of their Appellant’s advocates’ diary and noted that the case herein was not diarised. This was an omission that was not entirely unexpected. It was an inadvertent omission that was excusable.

27. Whereas the Respondent had correctly averred that it stood to be prejudiced by the Appellant’s failure to prosecute his Appeal, it would not be prejudiced if the Appeal was reinstated for hearing and determination on merit. If it had suffered any prejudice, then it did not demonstrate the same.

28. This court noted that the Appellant filed the present application on 23rd October 2018, about four (4) days after the Appeal was dismissed for non-attendance and under Certificate of Urgency.

29. The speed within which the Appellant applied to court to have the orders issued on 19th October 2018 set aside and his Appeal be reinstated persuaded this court that he was keen to prosecute his Appeal. With such demonstration of zeal, a court should be persuaded to exercise its discretion and grant the orders sought.

30. Accordingly, having considered the parties’ Written Submissions and the case law they each relied upon, this court came to the conclusion that this was a proper case for it to exercise its unfettered discretion in favour of the Appellant herein.

31. The Appellant ought not to have gone scot-free. He ought to have compensated the Respondent for the inconveniences caused. However, the Respondent never attended court on 19th October 2018 which was the first day the matter came up in court. It did not go out of pocket. Since there had been no other attendance in this matter, this court found and held that it was not a suitable case to condemn the Appellant to pay thrown away costs as a condition of his Appeal being reinstated.

32. Indeed, the court was satisfied that the error to diarise the date was an inadvertent error for which the Appellant ought not to be punished for. This court was satisfied that the expeditious filing of the present application three (3) days after the Appeal herein was dismissed demonstrated a keenness on the Appellant to prosecute his Appeal herein.

DISPOSITION

33. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Notice of Motion application dated and filed on 23rd October 2018 was merited and the same is hereby allowed in terms of Prayers Nos (1) and (2) therein but with no order as to costs.

34. The Appellant is required to take all necessary action to ensure the Appeal is prosecuted expeditiously.

35. The Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division is hereby directed to facilitate the expeditious issuance of a fresh Notice under Order 42 Rule 13 of the Civil Procedure Rules to progress this matter.

36. It is so ordered.

DATED and DELIVERED at NAIROBI this 31st day of July 2019

J.KAMAU

JUDGE