



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 101 OF 2016

WILSON MUNENE NYAGA.....APPELLANT

VERSUS

1. JARSON ALI GABABA.....1ST RESPONDENT

2. BOARD OF TRUSTEES THE AFRICAN CHRISTIAN CHURCH....2ND RESPONDENT

{Being an appeal against the Ruling and Order of Hon. J. W. Onchuru – Ag. PM Thika delivered on the 24th day of September 2014 in the original Thika Chief Magistrate’s Court Civil Case No. 683 of 2004}

JUDGEMENT

1. This appeal is against a ruling dated 24th September 2014 which dismissed an application by the appellant seeking to reinstate his case which was dismissed with costs on 11th June 2013 for non-attendance.
2. The appeal is premised on grounds that: -

“1. THAT the Learned Trial Magistrate erred in law and in fact by failing to delve and address himself on the grounds of the Application that contain the facts that led to the Appellant’s failure to attend Court thereby neglecting to consider the Appellant’s plea in the Application.

2. THAT the Learned Trial Magistrate erred in law and in fact by failing to find that the failure of the Appellant and his Counsel to attend Court on the hearing day was due to an inadvertent honest mistake on the part of the Appellant’s Advocate’s office in failing to diarize the hearing date.

3. THAT the Learned Trial Magistrate erred in law and in fact by failing to appreciate that the Appellant moved the Court as soon as it found out that drastic orders had been made against it following the explained absence of the Appellant on the date that the Appellant’s Advocates had fixed for hearing but inadvertently failed to diarize.

4. THAT the Learned Trial Magistrate erred in law and in fact by failing to find that the Appellant had made out a good case for exercise of judicial discretion in a matter that was only pending assessment of Damages.

5. THAT the Learned Magistrate erred in law in turning away the Appellant from the seat of justice empty handed even with a judgement on liability on record in the ratio of 80:20 in its favour.

6. THAT the Learned Magistrate failed to grasp the grounds employed by the Appellant in its Application and exercise discretion in favour of the Applicant/Appellant.

7. THAT the Learned Trial Magistrate erred in law and in fact by failing to consider the overriding objectives of the Civil Procedure Act as well as Article 159 (2) of the Constitution of Kenya 2010 particularly in this case where a judgement on liability against the Defendants had already been entered at 80:20 in favour of the Appellant.

8. THAT the Learned Magistrate erred in law and in fact by failing to consider the evidence and the law applicable and uphold the Appellant’s submissions on that issue that the Appellant’s Advocates mistake was not deliberate.

9. THAT the Learned Magistrate erred in law and in fact by failing to consider the proceedings and in particular the fact that a substantial majority of all the earlier adjournments in the Matter had been occasioned by the

Defendants/Respondents.”

3. This court is by this appeal urged to set aside the ruling dated 24th September 2014 and all consequential orders thereto and reinstate the suit for purposes of assessment of damages.

4. The appeal was canvassed through written submissions.

5. The power to reinstate a suit dismissed for non-attendance is donated by **Order 12 Rule 7 of the Civil Procedure Rules** which states: -

“7. Where under this order judgement has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgement or order upon such terms as may be just.”

6. The trial Magistrate who heard the appellant’s application dated 19th March 2014 dismissed it on grounds firstly that the explanation given by Counsel for the appellant for the non-attendance on the hearing date did not add up as they were the ones who had fixed the hearing date. Secondly because the application seeking to reinstate the application was made nine months after the order of dismissal was made an indication that the applicant was not keen on the matter and hence did not deserve the orders.

7. The respondent has raised these self-same grounds in their submissions in opposition to this appeal. The power exercised by the court under **Rule 12 (7) of the Civil Procedure Rules** is discretionary. In **Choitram v Nazari [1984] KLR 327** the Court of Appeal citing with approval the case of **Mbogo & Another v Shah [1968] EA 93** held: -

“An appellate court would not interfere with the decision arrived at by the exercise of discretion of the lower court unless the appellate court was satisfied either that the lower court judge had misdirected himself in some matter and as a result arrived at a wrong decision, or that it was manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result, there was injustice.”

8. In the instant case the explanation given by counsel for the appellant was that although they had taken the date themselves their office did not diarize the date and so they inadvertently failed to attend court on the hearing date. The record reveals that parties had recorded a consent on liability in the ratio **20%:80%** in favour of the appellant against the respondent and all they needed was to agree on the quantum of damages.

9. In the subsequent attendances the court was notified that a second medical report was necessary for an agreement to be reached and that the appellant was to be referred to the respondent’s doctor. Eventually no agreement was reached and parties intimated they wished to file written submissions so the damages could be assessed by the court.

10. On 23rd June 2008 the court stood over the matter generally because the plaintiff was yet to undergo a second medical check-up. The record has it that on 23rd February 2009 the court again stood the suit over generally once again but did not give the reasons. The Advocates for the parties were both present. It was after that that Counsel for the appellant’s firm fixed the case for hearing on 11th June 2013 but come that day they did not attend but there was an Advocate holding brief for the respondent’s Advocate and so the trial Magistrate dismissed the suit with costs.

11. In **CMC Holdings Ltd v James Mumo Nzioki [2004] eKLR** the Court of Appeal stated: -

“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 proper use of such a discretion if the court turns it back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle.”

12. In my view given the history of the case failure to diarize the date was an excusable mistake or error and the trial Magistrate should not have turned his back on the appellant whose Advocate had always attended court an indication that he was always keen to have the case concluded.

13. In **Richard Nchapi Leiyagu v IEBC & 2 Others Civil Appeal No. 18 of 2013** the Court of Appeal stated: -

“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 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.”

14. The Magistrate who dismissed the appellant’s application was clearly wrong in the exercise of his discretion and as a result there was no proportionality. He did not even give any reasons as to why he thought the explanation by the Advocate for the appellant did not add up. As was stated by Apaloo J in **Philip Chemuolo & Another v Augustine Kubede [1982 – 88] KAR 103 at 1040 –**

“.... 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 court as is often said exists for the purpose of deciding the rights of parties and not the purpose of imposing discipline.”

15. It is my finding that in this case the interest of justice would have been served by allowing the application and reinstating the suit upon terms which I determine to be the payment of thrown away costs in the sum of Kshs. 10,000/= (ten thousand shillings only).

16. Accordingly, this appeal succeeds, the ruling dated 24th September 2014 and all consequential orders are hereby set aside upon terms that the appellant shall pay to the respondents thrown away costs of Kshs. 10,000/= (ten thousand shillings only) and the costs of this appeal.

17. The suit is remitted to the lower court for the assessment of the quantum of damages.

18. It is so ordered.

Signed and dated this 23rd day of September 2019.

E. N. MAINA

JUDGE

Dated and delivered in Kiambu this 26th day of September 2019.

C. W. MEOLI

JUDGE