



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 83 OF 2016**

**PENNINAH KATILA MWANTHI.....APPELLANT**

**VERSUS**

**JEREMIAH MUTUKU MUSAU.....RESPONDENT**

***(Being an Appeal from the ruling of Hon. M.M. Nafula (SRM) delivered in Tawa SRMCC No. 221 of 2014 on 3<sup>rd</sup> August, 2014)***

**JUDGEMENT**

1. The Appellant has filed this Appeal on the following grounds:

- i. The learned magistrate erred in both law and fact in her ruling by totally failing to appreciate the primary issue of irregularity of the proceedings conducted on 27<sup>th</sup> April, 2016 that was raised in the appellant's application dated 30<sup>th</sup> June, 2016.
- ii. The learned magistrate erred in both law and fact by primarily being driven and basing her ruling upon her observations of the appellant's previous advocates' conduct other than the merits of the aforesaid Application.
- iii. The learned magistrate erred in both law and fact by denying the appellant the right to a fair trial; and proceeding to punish the appellant for a mistake occasioned by her advocates then on record.
- iv. The learned magistrate erred in both law and fact in unjustly invoking her discretionary powers and failing to appreciate the vigilance on the part of the appellant who always attended court for her matter.
- v. The learned magistrate erred in both law and fact in failing to consider grounds advanced by the appellant in support of the notice of motion dated 30<sup>th</sup> June, 2016, and refusing to set aside the court's judgment/orders dated 25<sup>th</sup> May, 2016 and proceedings of 27<sup>th</sup> April, 2016 when justice of the case demanded that she sets aside the aforesaid orders.

2. Brief facts from the court record are that on several occasions, the appellant's counsel was never present for the hearing of the case. On 27<sup>th</sup> April, 2016 advocates for both the appellant and the respondent were absent. The trial court closed the respondent's case and gave a judgment date. The said case was dismissed.

3. Subsequent to the delivery of judgment, the appellant filed a notice of motion dated 30<sup>th</sup> June, 2016 seeking orders that:

- a) Leave be granted to the appellant to change advocates from the firm of J.N. KIMEU & COMPANY ADVOCATES to the firm of J.K. MWALIMU & COMPANY ADVOCATES.
- b) That there be stay of execution of the court's decree/judgment dated 25<sup>th</sup> May, 2016 pending inter-partes hearing of the application.
- c) That the court's proceedings dated 27<sup>th</sup> April, 2016 and the judgment/decreed dated 25<sup>th</sup> May, 2016 be set aside.
- d) That costs of the application be provided.

4. The motion was based on grounds that the appellant was present in court on 27<sup>th</sup> April, 2016 but her advocates then on record failed to attend court for hearing. That the trial court proceeded to close the defence case and issued a date for judgment yet the plaintiff's case had not been closed. That on 22<sup>nd</sup> May, 2016, the appellant attended court only to be informed that the court was not sitting and that judgment would be delivered on notice. That on 22<sup>nd</sup> June, 2016, the appellant visited the offices of his then advocates and was informed that judgment had

been delivered dismissing her suit. That she is desirous of prosecuting her matter which was not closed to its logical conclusion. That the Appellant was diligent in attending court and his advocates' mistake ought not be visited on him.

5. The trial court considered the Application and dismissed it on the basis that her affidavit was full of falsehood. The court pointed out that the appellant's case was closed by her advocate on 31<sup>st</sup> March, 2016. That a date for defence hearing was taken by consent before her for 27<sup>th</sup> April, 2016. That on the day the appellant claims that the trial court was not sitting is the date judgment was delivered.

6. I have given due consideration to the appeal herein. The issue falling for this court's determination is whether or not the trial court erred in dismissing the application dated 30<sup>th</sup> June, 2016. The essential prayers sought therein were prayers for stay of execution and setting aside of the judgment.

7. It was the appellant's submission that the decision to close the appellant's case by her advocate was erroneously arrived at since she was not privy to that fact until after the filing of the application. That the failure to give her another chance to redeem her case has only occasioned her more hardship. The appellant sought reliance in **Mbogo v. Shah & another [1968] EA 89**. The particular excerpt cited is:

***"I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should have acted or because it has failed to take into account and consideration and in doing so arrived at a wrong conclusion."***

8. It was further submitted that the trial court took into consideration the conduct of counsel representing the parties other than the overriding objective under sections 1A, 1B and 3A of the Civil Procedure Act. That the respondent despite having been served with the application never filed any response clearly indicating that he would have suffered no prejudice if the proceedings and judgment were set aside to give all parties the opportunity to be heard and the matter be determined on merit.

9. On the other hand, the respondent citing **Eunice Auma Onyango v. Salin Akinyi Oluoch [2015] eKLR** invited the court to consider this case in its totality. The court was referred to the appellant's contradicting statement in the grounds on the body of the motion and the supporting affidavit. That on the grounds of the application, the appellant stated that she was in court with her witnesses on 27<sup>th</sup> April, 2016 but her advocate failed to attend hearing and the court closed the defence case and in the supporting affidavit stated that the matter was erroneously fixed for defence hearing on 27<sup>th</sup> April, 2016 because she had not closed her case and intended to call two more witnesses. That while the appellant stated so, the court record reveals that both parties took directions on 13<sup>th</sup> August, 2015 for the matter to proceed from where it had reached and proceedings be typed. That on 31<sup>st</sup> March, 2016, Mr. N. Kimeu advocate for the appellant personally appeared and closed the plaintiff's case and as such there was no irregular proceedings as alleged by the Appellant.

10. It was submitted that the orders sought were equitable in nature and having approached court with unclean hands, equity frowned on her. That having closed her case, the appellant's presence was immaterial since it was the defence hearing. That the appellant did not make an application to set aside the proceedings of 31<sup>st</sup> March, 2016 where her advocate on record then closed her case therefore setting aside the proceedings closing the defence case is of no effect. That even if the proceedings of 27<sup>th</sup> April, 2016 were to be set aside, she would not get a chance to call her witnesses since her case will still remain closed.

11. I have given due consideration to the parties' submissions and the subject notice of motion. The said motion sought stay of execution and setting aside of the proceedings of 27<sup>th</sup> April, 2016. For an Applicant to succeed in an application for stay of execution, he/she must bring such an application timeously, it must be established that loss shall be suffered and must furnish security. The judgment sought to be stayed was delivered on 25<sup>th</sup> May, 2016 and the motion filed on 30<sup>th</sup> June, 2016 that is within the thirty days prescribed period. The motion is thereby found to have been filed timeously. On the second issue, it is the plaintiff's contention that she is being subjected to suffer for her advocate's mistake. That she had witnesses yet the trial magistrate went ahead to close her case. A keen look at the court record reveal that that appellant had an advocate on record and that her case was closed way back and not on the date she alleged. She also contended that she had witnesses yet her case had been closed. There seems to have been no synergy between the appellant and her advocate. The question is whether such a party can be in the circumstances accommodated by the court. Despite the fact that the appellant had more witnesses, an advocate commanding a better understanding of the law had good reasons to close the case without calling more witnesses. In the end, I find that the appellant has not established that she stands to suffer loss. Further, the appellant did not furnish security or make an undertaking as to security. Her application for stay therefore fails.

12. On setting aside, I find that the Appellant has not given any reasonable explanation for setting aside the proceedings of 27<sup>th</sup> April, 2016. I say so because, as correctly submitted by the Respondent, the said order will serve no purpose since her case was closed way before then. So that even if the proceedings were to be set aside, her case will still remain closed.

13. In the circumstances, I find no merit in this Appeal and it is hereby dismissed with costs to the Respondent.

It is so ordered.

**Dated and Delivered at Machakos this 26<sup>th</sup> day of February, 2018.**

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**D.K. KEMEI**

**JUDGE**

**In the presence of:-**

Osino for Nyaata- for the Appellant

Munyao for Kemende - for the Respondent

Kituva - Court Assistant