REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 44 OF 2015

Arising from the Ruling of Hon Duke Ocharo (SRM), in Nkubu Civil Suit No. 23 of 2013

(CORAM: GIKONYO J)

HENRY RUKINDU M' MUKUI (Suing as the

Legal Representative of the

Estate of BENEDICT MUTHUIYA.....APPELLANT

-VS-

EUSTACE MAINGI.....1ST RESPONDENT

ERASTUS KIRIMI.....2ND RESPONDENT

JUDGMENT.

[1] This Appeal emanates from the Ruling of Hon Duke Ocharo (SRM), in Nkubu Civil Suit No. 23 of 2013, in which the Learned Trial Magistrate inter alia dismissed the Appellant's Application for reinstatement of suit dated 20th November, 2013. The Appellant's said application was dismissed on 2nd September 2015 thus proving the instant Appeal via a Memorandum of Appeal dated 15th October 2015, in which the Appellant raised the following grounds of Appeal:

1. The Learned Magistrate erred in law and facts by failing to analyze the reasons why he dismissed the Appellant Application.

2. The Learned Magistrate erred in law and facts by failing to apply his discretion to uphold justice to all parties, but favoured the respondents, yet the respondents could be compensated by way of costs.

3. The Learned Magistrate erred in law and facts by failing to consider that order 11 of the Civil Procedure Rules was not complied with and that matter was prematurely fixed for hearing leading to its dismissal even before the case conference was done especially where respondent had not complied at all.

4. The Learned Trial Magistrate erred in law and facts by failing to give weight to to the reasons adduced by the appellant and by failing to note that, the presiding officer was not stable due to sickness and she could not reason that, a party could not proceed with a matter when an advocate was already in the record unless the advocate could have been withdrawn first.

5. The Learned Trial Magistrate erred in law and facts, by treating very pertinent issues of law casually and by exposing the appellant to a serious mental anguish and trauma by failing to apply the judicial discretion in the appellant favour, yet the respondents had nothing to lose.

6. The Learned Trial Magistrate erred in law and in facts by failing to appreciate the reason adduced by the appellant about the delay because the appellant sickness was natural and not his own making and the respondents did not doubt the sickness of the appellant being the little delay to file application.

7. The Learned Magistrate erred in law and facts by being biased against the appellant and his advocates contrary to the

rules of natural justice that, when was supposed to be a neutral arbiter and failed to consider all what was pleaded by the appellants and even failed to state the right of appeal of 30 days against his ruling.

[2] When the appeal came up for hearing on 18th May 2015, the court directed that the Appeal be canvassed by way of written submissions. Briefly, it was submitted for the Appellants that in the affidavit in support of the impugned application, the Appellant clearly explained what happened on the material day and that his counsel was ready to proceed and was actually on way to court when his vehicle developed mechanical problem and that the advocate in his predicament made court and sent his clerk ahead of him to mitigate the emergency and that before the advocate could arrive, counsel for the defendant took advantage and insisted that the matter be dismissed.

[3] On the other hand, it was submitted for the Respondents that the court when dealing with an application for reinstatement of a dismissed suit has a discretionary power with the implication being that if the said power is not execerised in favour of a mover of a motion, then on appeal it must be demonstrated that the trial magistrate misdirected himself in some such matter and as such arrived at a wrong decision and that in the present case, the trial court did not in any way misdirect itself when it was dealing with the application that had been brought by the Appellant and that the ruling that was delivered was clearly reasoned, setting out facts of the case and analyzed the applicable law and made a determination and that it was sound in law and fact. The Respondent further submitted that the court considered the issue of delay which was unexplained between the date that the suit was dismissed and the time that application for setting aside was made and made a finding that there was inordinate delay and that this showed that the trial court did not in any way misdirect itself when delivering its ruling of 2nd September 2015 and that it considered the law and all the relevant issues arising and made a determination that the Appellant did not deserve his discretion.

[4] I have carefully considered this appeal and the rival submissions by the parties. This is essentially an Appeal against the Learned Trial Magistrate's decision to dismiss the Appellant's application; it seeks inter alia reinstatement of suit which was dismissed on 20th November 2013.

[5] The case of **Maina v Mugiria Civil Appeal No. 27 of 1982 (unreported)** outlined this Court's wide and unfettered discretion to set aside an *ex parte* Judgment or Order. In that case the Court of Appeal rendered itself thus;

"The principles governing the exercise of the judicial discretion to set aside an ex parte judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing are:

a. *Firstly,* ***there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just …. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E.***

b. *Secondly,* ***this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.***

c. *Thirdly* ***the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo v Shah [1968] EA 93".***

[6] I will apply the test above. The Appellants did not make effort to attach copies of the proceedings in the record of appeal for the benefit of this court's perusal. This court has however carefully considered the impugned ruling by the Learned Trial Magistrate. The Learned Trial Magistrate in dismissing the Appellants application for reinstatement of suit stated inter alia as follows:

"I have gone through the record and specifically the proceedings of the 20th November 2013. On that date all parties appear to have been present. A Mr. Kiplagat as present the defendants a Mr. Muthama held brief for Mr. Kirima and applied for adjournment on the basis that witnesses were then in Nairobi and the application was vehemently opposed by Mr. Kiplagat for the defendants. It is important to say that the hearing date had been fixed by consent on 10th September 2013 in the registry by Mr. Kirima for the plaintiff and a Mr. Kirima for plaintiff and a Mr. Mwongera for the defendants……"

"……as would be noticed the power of the court under all the provisions cited to review and/or set aside an order of dismissal is a discretionary one. A discretionary power is one which should be exercised upon reason in a judicious way…."

"……..in this case it is apparent that the counsel for the plaintiff was indolent and had no interest at all to be in court in the date the plaintiff's suit was dismissed. He had participated in fixing the date of the hearing and he cannot be heard to say that the defendants had not complied with order 11 of the Civil Procedure Rules. It is equally not true to state that the suit was dismissed on a technicality the true position is that the suit was dismissed after the plaintiff failed to adduce evidence. This he failed to do because his advocate was not present. It is not an excuse good enough that mistake of counsel should not be used against client….."

"….let me finally say that there was inordinate delay in filling this application. Suit was dismissed on 20th November 2013 and the application to set aside was filed on 4th November 2014 one year down the line……"

[7] From the above passages it is evident and clear that the Learned Trial Magistrate gave clear reasons as to why he came to the conclusion

that this was not a suitable case to exercise his discretion in favour of the Appellants. I see nothing which show that the trial court misdirect itself when it dismissed the Appellants application. Similarly, the Appellant is not being honest in his submissions when he stated that, on the material day he was ready to proceed as he was actually on his way tom the courts when his vehicle developed a mechanical problem and that he sent his clerk ahead of him to mitigate the emergency as the record clearly shows on the material day, Mr. Muthamia holding brief for Mr. Kirima for the Appellant intimated to court that he was not ready to proceed as his witnesses were in Nakuru. The contention by the Appellant's counsel that his vehicle had on the material date broken down is therefore false. It is also in dispute that the appellants' suit was dismissed 20th November 2013 whereas the application to reinstate the same was filed 4th November 2014, almost an year later. As was rightly observed by the Trial Magistrate, no attempt was made by the Appellants to explain this delay. On appeal ,the appellant adopted a very casual approach when he stated in his submissions that there was no legal time frame for putting in the application and that further he could not have acted without instructions of his client.

[8] Taking into considerations all the circumstances in this case and for the reasons afore stated, I find no basis of interfering with the decision by the trial court. Accordingly, the Appellant's appeal is without merit and is hereby dismissed with costs to the Respondents.

Dated, signed and delivered in open court at Meru this 21st day of March, 2018.

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F. GIKONYO

JUDGE

In the presence of:

Mr. Wamache advocate for Gikonyo for Appellant.

Mr. Muthama advocate for Mr. Munene advocate for Respondent.

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F. GIKONYO

JUDGE