



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 445 OF 2016

GEORGE KARANJA MACHARIA.....APPELLANT

VERSUS

THE COUNTY GOVERNMENT OF NAIROBI.....1ST RESPONDENT

CATHERINE MUTUVA.....2ND RESPONDENT

(Being an appeal from the Ruling of Hon L. W. Kabaria (Miss) Resident Magistrate (RM) at the Chief Magistrate's Court at Milimani in Civil Case No 8464 of 2005 delivered on 10th June 2016)

JUDGMENT

INTRODUCTION

1. In her Ruling delivered on 10th June 2016, the Learned Trial Magistrate, Hon L.W. Kabaria (Ms) Resident Magistrate dismissed the Appellant's Notice of Motion application dated 22nd October 2015 and filed on 23rd October 2015 with costs to the Respondent.
2. Being dissatisfied with the said decision, the Appellant filed his Appeal dated 4th July 2016 on the same date. He relied on six (6) Grounds of Appeal. His Written Submissions were dated 12th February 2018 and filed on 14th February 2018. The 1st Respondent's Written Submissions were dated 7th June 2018 and filed on 11th June 2018. The 2nd Respondent did not participate in the proceedings herein.
3. When the matter came up in court on 11th June 2018, both parties asked this court to render its decision based on their respective Written Submissions that they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

THE APPELLANT'S CASE

4. The Appellant's case was that when he arrived in court on 6th October 2015 for the hearing of his matter, he was unable to locate the court where his matter had been listed for hearing and he was also unwell. He had intended to request the court to place his matter aside as his advocate was going to be late. When his advocate arrived on that day at about 11.00 am, they established that his suit had been dismissed for want of prosecution.
5. He subsequently filed the aforesaid Notice of Motion application seeking to set aside the orders that had dismissed his suit for want of prosecution but the Learned Trial Magistrate dismissed the same.
6. His argument was that courts have discretion to set aside orders for dismissal if it is demonstrated that failure to attend court was due to an excusable mistake or error. He asked this court not to visit the mistakes of his advocate on him.
7. He relied on several cases to demonstrate how the court could exercise its discretion- See **Pithon Waweru Maina vs Thuka Mugiria [1982- 1988] 1 KAR 171, CMC Holdings Ltd vs Nzioki [2004] 1 KLR 173** amongst other cases.
8. He therefore urged this court to allow his Appeal to enable him prosecute his case

THE 1ST RESPONDENT'S CASE

9. The 1st Respondent's case was that courts have the duty to expeditiously and timeously determine suits that are filed before it. It averred that the Learned Trial Magistrate acted correctly when she dismissed the Appellant's Notice of Motion application seeking to reinstate his suit because his explanations of why he and his advocate did not attend court on 6th October 2015 were wanting and contradictory.

10. It added that court proceedings commence at 9.00 am and that there was no excuse for the Appellant's counsel to have gone to court at 11.00 am. It further contended that it had in fact attended court after being served with an *ex parte* hearing notice.

11. It relied on the case of **Mariara & others vs Matundura [2004] 2 EA 163 (CAK)** where it was held that legal business should not be handled in a sloppy and careless manner. It did not, however, attach a copy of the case of **Teachers Service Commission ex parte Patrick M Njuguna [2013] eKLR** where it was held that a case belonged to a litigant and that he had a duty to constantly check with his advocate, the progress of his case.

12. It therefore urged this court to dismiss the Appellant's appeal.

LEGAL ANALYSIS

13. Section 1A of the Civil Procedure Act Cap 21 (Laws of Kenya) provides as follows:-

1. The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

2. The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

3. A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

14. Order 12 Rule 3 (1) of the Civil Procedure Rules, 2010 stipulates as follows:-

“If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court”.

15. It was therefore clear from the above provision of the law that the court has a duty to dismiss a case to avoid any time wasting and lead to a just conclusion of a case before it. Having said so, courts are now mandated to administer justice without undue regard to procedural technicalities unless it can be shown that the commission or omission to do something in the manner it is prescribed is in bad faith.

16. Indeed, Article 159(2) (d) of the Constitution of Kenya, 2010 provides as follows:-

“Justice shall be administered without undue regard to procedural technicalities”.

17. It is also trite law that the mistakes of an advocate should not be visited on an innocent party more so where the commission or omission was due to an excusable error or mistake and which error or mistake can be compensated by way of costs.

18. In his Notice of Motion application filed on 23rd October 2005 pursuant Order 12 Rule 7, Order 51(i) (**sic**) of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act Chapter 21 and all other enabling provisions of the law, he had sought the following prayers:-

1. THAT this Honourable court be pleased to set aside the orders made on the 6th of October 2015 dismissing the Plaintiff's suit and all other consequential orders thereto.

2. THAT this Honourable court be pleased to reinstate the Plaintiff's suit and set it for FORMAL PROOF.

3. THAT this Honourable court be pleased to make such further orders and/or directions as it deems fit and just to grant.

4. THAT the costs of this application be in the cause.

19. In his affidavit in support of his application, he explained why he was not present when his matter was called out for hearing and dismissed and that he was at all times willing and ready to prosecute his case.

20. This court carefully perused the said affidavit and having considered the parties Written Submissions, it was satisfied that it was unfair for the Learned Trial Magistrate not to have allowed his said application so as to reinstate his suit for prosecution.

21. It is correct that the suit had been filed in 2005 and that there were laches in prosecuting the same. However, as the Appellant took steps to file his application to reinstate his suit, it was in the best interests of justice to give him an opportunity to present his case. Indeed refusing a party an opportunity to have his day in court is too draconian. Such refusal should be used sparingly and only as a last resort.

DISPOSITION

22. For the foregoing reasons, the upshot of this court's decision was that there was merit in the Appellant's Appeal that was lodged on 4th July 2016 and the same is hereby allowed. The effect of this is that the Learned Trial Magistrate's decision that was delivered on 10th June 2016 is hereby set aside and/or vacated and its place, it is hereby directed that the Appellant's Notice of Motion application dated 22nd October 2015 and filed on 23rd October 2015 is hereby allowed in terms of Prayer No (1) therein.

23. Having said so, this court also noted from the Plaint that was amended and filed on 14th August 2014, the suit related to a question of ownership and title of LR No 34/2 and 34/4. The reliefs sought in the said Plaint were as follows:-

- a. A declaration that the Plaintiff was the legal tenant of parcel of Land reference No 34/2 and 34/4 and numbered C.23 on the block plan registered in the registry of documents at Nairobi in Volume D 1 Folio 209/78 File VIII;**
- b. A declaration that the repossession of the suit premises by the 1st Defendant was illegal and the same to be revoked;**
- c. A declaration that the subsequent reallocation of the suit premises to the 2nd defendant was illegal and the same to be revoked;**
- d. An order to the effect that the plaintiff be put into possession of the suit premises forthwith;**
- e. Costs of this suit;**
- f. Interest on [a-e] above court rates.**

24. Bearing in mind the provisions of Article 162 (2) (b) of the Constitution of Kenya, 2010 that stipulates that "**Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land** and Section 13 (2) of the Environment and Land Court No 19 of 2011 that provides that "**In exercise of its jurisdiction under Article 162 (2) (b) the Constitution, the court shall have power to hear and determine disputes relating to environment and land, including disputes:-**

- a. Relating to environmental planning and protection of trade, climate issues, land use planning, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**
- b. Relating to compulsory acquisition of land;**
- c. Relating to land administration and management;**
- d. Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and**
- e. Any other dispute relating to environment and land,"** this court was of the opinion that this was a matter that should ideally be handled by the Environment and Land Court.

25. In the premises foregoing, it is hereby directed that this file be placed before the Presiding Judge Environment and Land Court on 8th October 2018 for his further orders and/or directions.

26. It is so ordered.

DATED and DELIVERED at NAIROBI this 25th day of September 2018

J. KAMAU

JUDGE