



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 412 OF 2010**

**KENNETH KINYANJUI AGNES.....APPELLANT**

**VERSUS**

**GODFREY N. NYAGA T/A OSTRICH LION AUCTIONEERS.....RESPONDENT**

*(Appeal from the ruling and orders of Hon. Mr. S.A. Okato Principal Magistrate in Milimani CMCC No. 3068 of 2008 delivered on 30th September, 2010)*

**JUDGMENT**

1. The Appellant filed Milimani CMCC No.3068 of 2008 against the Respondent claiming KShs. 239,580/-. When the matter came up for hearing on 7<sup>th</sup> June, 2010, the matter was called over and a time allocation was given for 12.15 pm. At the time of the call over all the parties were represented. At 12.20 pm when the matter was to proceed, there was no appearance for the Appellant. The Respondent's counsel Mr. Kaburu then made an oral application to have the suit dismissed for non-attendance and the court so dismissed the suit.
2. The Appellant subsequently filed a chamber summons dated 10<sup>th</sup> June, 2010 seeking to set aside the orders of 7<sup>th</sup> June, 2010 and have the suit reinstated and set down for hearing. It was explained in the supporting affidavit of Kenneth Kinyanjui Agnes that the non-attendance was occasioned by the miscommunication on the exact time the matter was to be heard. He averred that the Advocate who held his advocate's brief indicated that the matter was to be heard at 12.45 pm rather than 12.15pm. That he was in court and raised his hand when the matter was called out but the magistrate did not see him raise his hand. He annexed a cause list in which he alleged the counsel holding brief had indicated that the matter was to be heard at 12.45 pm.
3. By a grounds of opposition dated 14<sup>th</sup> June, 2010, the Respondent opposed the application on grounds that it was incompetent and lacked merit; that there had been undue delay in filing the application and that the application disclosed no sufficient reason why the suit should be reinstated.
4. The Appellant's submissions were essentially a reiteration of his depositions in the supporting affidavit. The Respondent on the other hand contended that the Appellant did not explain why he did not inform his Advocate of the correct time either by a text message or a call since he was in court and why he did not alert the court of his presence when the matter was called out at 12.20 p.m. It was submitted that for that reason, the Appellant's averment was not truthful and that the trial court in exercising its discretionary powers, was thereby bound by the doctrine of equity that he who comes before equity must come with clean hands. Secondly, the Respondent took issue

- with the fact that the Advocate for the Appellant had not filed an affidavit to explain why he failed to attend court to ascertain the Appellant's allegations. It was submitted that counsel had the burden under Section 107 and 108 of the Evidence Act, to prove that the allegations in support of the application were true.
5. The trial magistrate dismissed the application for the reasons that there was no explanation given for not filing the application timeously and that counsel failed to account for his non-attendance. He particularly stated that it was expected for the advocate to seek audience with the court for his presence to be noted in the court file. That such failure was a pointer that counsel was not within the court premises.
  6. Aggrieved by that decision the Appellant has filed this appeal on the following grounds:-
    - i. *The learned magistrate erred in law and in fact in dismissing the Appellant's application dated 10<sup>th</sup> June, 2010.*
    - ii. *The learned magistrate erred in law and in fact in totally dismissing the Appellant's written submissions on the application dated 10<sup>th</sup> June, 2010.*
    - iii. *The learned magistrate erred in law and in fact in totally disregarding the supporting affidavit by the Appellant.*
    - iv. *The learned magistrate failed to appreciate that he dismissed the matter on 7<sup>th</sup> June, 2010 in the presence of the Appellant.*
    - v. *In all circumstances of the case the learned magistrate erred in law and in fact in visiting the mistake of the counsel on the Appellant and further occasioned great injustice upon the Appellant.*
    - vi. *The learned magistrate erred in law and in fact in not making a finding that the suit could be reinstated and the Respondent if at all be compensated by an award of costs.*
    - vii. *The learned magistrate erred in law and in fact in not finding that the submissions by the Respondent amounted to receiving evidence from the bar as no replying affidavit was filed and hence erred in dismissing the application dated 10<sup>th</sup> June, 2010 which had a drastic effect of denying the Appellant his day in court.*
    - viii. *The dismissal orders made on 7<sup>th</sup> June, 2010 and on the application dated 10<sup>th</sup> June, 2010 made on 30<sup>th</sup> September, 2010 are wholly erroneous both in law and in fact.*
  7. This being a first appeal, this court is under duty to re-evaluate the facts afresh, assess it and make my own independent conclusions. See *Selle v. Associated Motor Boat Co. Ltd 1968 E.A 123.*
  8. Parties to this appeal agreed to canvass this application by way of written submissions. However, the Appellant's submissions will not be considered following this court's order of 4<sup>th</sup> March, 2015 for being in contempt of court the order that submissions were to be filed within two (2) days after 18<sup>th</sup> February, 2015. The Respondent's submissions were not any different to the submissions before the lower court which I have mentioned earlier in this judgment. To buttress his case, the Respondent cited *Njagi Kanyunguti alias Karingi Kanyunguti & 4 Others v. David Njeru Njogu No. 1818 of 1994 (UR)* quoted in *Duncan Waithaka Ndegwa v. Maina Wangombe (2013) eKLR* in support of his submissions.
  9. I have considered this appeal and the applicable law. The issue falling for this court's determination is whether the trial court properly exercised its discretion and applied the principles of setting aside in determining the Appellant's application. The principles to be applied before setting aside a judgment were enunciated in the case of *Shah v. Mbogo & Another (1967) EA 470* where the Court of Appeal for Eastern Africa held as follows:-

**“IV. ..the court’s discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.”**  
(Emphasis own).

See also *Patel v. E.A. Cargo Handling Services (1974) EA 75.*

10. In view of the aforesaid and the issues raised by parties, the question that arises is whether the application had been filed timeously and if so, whether the Appellant's explanation for his Advocate's non attendance was satisfactory and/or whether the non attendance was an excusable mistake.
11. The record is very clear that on the material day, the suit was fixed for hearing at 12.15 p.m. However, at 12.12 p.m., the suit was called out and the Respondent applied for it to be dismissed and it was so dismissed. With greatest respect to the trial court, having fixed the matter for hearing at 12.15 p.m. in the presence of both parties, the court could not properly vary and review that order and bring the suit forward for hearing earlier than ordered in the absence and concurrence of the Appellant or his Counsel. To my mind, that was a grave irregularity and to the extent that the suit was dismissed before the appointed time, the order for dismissal is liable to be set aside *ex debito justitiae*.
12. However, if I am wrong on the foregoing, was the application before the court meritorious? I find that the application was filed within 4 days of the order of dismissal i.e. on 11<sup>th</sup> June, 2010. That to my mind was timeous. The court did not consider this fact. It was wrong for the court to hold that four (4) days was not a reasonable time. The court did not give any reason why four (4) days was a delay. That was an error on its part. Secondly, the Appellant swore a long Affidavit explaining why the Appellant's advocate was not in court when the matter was called out. He stated that he was seated in court when the matter was called but when he raised his hand the court did not see him. The court failed to consider the fact that the Appellant swore positively and there was no denial on oath by the Respondent that what the Appellant stated was the truth. I am certain that had the court seen the Appellant raising his hand, it could not have dismissed the suit for non-attendance since it was the Appellant's case and not the Advocate.
13. I am convinced that the lower court erred in its decision by failing to take into account the foregoing matters. There was no indication that the Appellant was over reaching himself in applying to reinstate the suit. In my view, the trial court failed to properly exercise its discretion.
14. Accordingly, the appeal is meritorious. The same is allowed with costs.

**Dated, Signed and Delivered at Nairobi this 22<sup>nd</sup> day of May, 2015**

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**A. MABEYA**

**JUDGE**