



REPUBLIC OF KENYA



KENYA LAW
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**Ngobe v Kamau (Environment and Land Appeal 33 of 2019)
[2022] KEELC 3532 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3532 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 33 OF 2019**

OA ANGOTE, J

MAY 19, 2022

BETWEEN

PATRICK GICHUHI NGOBE APPELLANT

AND

DAVID NDUNG’U KAMAU RESPONDENT

RULING

Introduction

1. Vide a Notice of Motion dated 26th February, 2021 expressed to be brought pursuant to the provisions of Sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act*, Cap 21, Order 51 Rule 1 and Order 42 Rule 21 of the *Civil Procedure Rules* and all enabling provisions of the law, the Appellant seeks the following reliefs;
 - i. That this Honourable Court be pleased to set aside the Dismissal Order made on the 16th February, 2021 and to reinstate the Appeal.
 - ii. That the costs of this Application be in the cause.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Caleb Odhiambo Jaoko, the Advocate with conduct of the matter on behalf of the Appellant. The Appellant’s advocate deponed that the present Appeal was filed against the Judgment of Hon E. Wanjala (SRM) delivered on 28th March, 2019.
3. It was deponed by counsel that on 30th April, 2019, he applied for certified copies of the proceedings and Judgment but his clerk was informed that the firm of Kirimi & Co Advocates had equally applied for the same and the registry was working on it and as such could not receive his letter.
4. It was deponed that vide a letter of 3rd May, 2019, he applied for a Decree and Certificate of Costs; that on 26th May, 2019, the matter was listed before the Deputy Registrar for directions wherein it



was consolidated with Civil Appeal case No. 266 of 2019; that vide a notice dated 27th August, 2020, the parties were notified that the lower court file had been received in the registry and that they were required to file a Record of Appeal.

5. According to the Deponent, he responded to the notice aforesaid by requesting that the file be returned to the lower court for issuance of certified copies of the proceedings and judgment for purposes of filing the record of Appeal; that the file was returned to the lower court and that he duly re-applied for the Decree, the Certificate of Costs and certified proceedings.
6. According to counsel, the Deputy Registrar suo moto fixed the matter for mention on 16th February, 2021; that no notice of the same was served on the parties; that on the said date, counsel was attending to Nairobi CMCC 1759 of 2019-Fredrick Osewe vs Chandaria Industries Limited; that by the time he virtually logged onto the court, the matter had been disposed off and that the non-attendance was inadvertently occasioned by lack of prior notification of the date and the attendance of other matters.
7. In response, the Respondent deponed that no sufficient cause has been shown by the Appellant to warrant the re-instatement of the Appeal; that the Appellant is misleading the court in stating that this Appeal was mentioned on 26th May, 2019 whereas the same was consolidated with the Respondents' Appeal being HCCA 226 of 2019 and that there is no sworn Affidavit by the clerk indicating how he found out that the matter had been listed for mention on 16th February, 2021.
8. The Respondent deponed that the Applicant's conduct throughout the proceedings leading to the filing of the instant application has been to delay by whatever means the finalization of the dispute and that the court should exercise its discretion judicially and dismiss the instant application in its entirety with costs to the Respondent.
9. The Appellant filed submissions which I have considered. The Respondent did not file submissions.

Analysis and Determination

10. The present Application has been brought under the provisions of Order 42 Rule 21 of the Civil Procedure Rules which provides as follows;

“Where an appeal is dismissed under rule 20, the appellant may apply to the court to which such appeal is preferred for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.
11. Order 42, rule 20(1) aforesaid under the heading dismissal of appeal for appellant's default provides;

“Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, and has not filed a declaration under rule 16, the court may make an order that the appeal be dismissed.”
12. It is evident from the provisions of Order 42 Rule 21, that the court has unfettered discretion to reinstate an Appeal, where it finds there is sufficient cause warranting the non-attendance and subject only to such terms as are just. Indeed, as correctly observed by the Appellant, the exercise of this discretion is not intended to aid a person who deliberately seeks to obstruct justice but to avoid hardship resulting from an accident, or excusable mistake or error.



13. This position was enunciated by the Court of Appeal of East Africa in the case of *Shah vs Mbogo & Another* (1967) EA 116, where the learned justices held;

“The 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 it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”.
14. More recently, the Court of Appeal in the case of *Patriotic Guards Limited vs James Kipchirchir Sambu* [2018] eKLR stated that:

“...It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”
15. As to what constitutes sufficient cause, the Court will be guided by the decision of the Court of Appeal in *Wilson Cheboi Yego vs Samuel Kipsang Cheboi* [2019] eKLR, where court stated that:

“But what is ‘sufficient cause’? It is a question of fact and the court has to exercise its discretion in the varied and special circumstances of each case.”
16. In the present case, the Appellant seeks an order setting aside the orders made by this court on 16th February, 2021 dismissing the Appeal for non-attendance. In determining this matter, it is prudent to consider the record.
17. This matter made its first appearance before this court on 26th June, 2019 when it came up before the Deputy Registrar. The court gave directions that the matter would be mentioned before the judge on the 20th January, 2020 for directions on possible consolidation. On the 20th January, 2020, only Mr Kirimi for the Respondent was present and he informed the court that the Record of Appeal had not been prepared and sought for another mention date.
18. The Court set the matter to be mentioned on 27th April, 2020. The matter came up before the court on 28th April, 2020 in the absence of both parties and another date was fixed being 17th September, 2020 with directions that notice would be issued by the court. There was again no appearance by either party on the said date and another mention was set for the 16th February, 2021 with directions that notice would be issued by the Deputy Registrar. On the 16th February, 2021, the Appeal was dismissed for non-attendance.
19. What can be gleaned from the above narration is that other than the non-appearance of the Appellant’s counsel on 20th January, 2020, the Appellants’ advocate’s non-appearance on 28th April, 2020, 17th September, 2020 and 16th February, 2021 cannot be said to be deliberate considering that there is no evidence on record to show that he was served with the mention notices by the court. The failure by the court to serve the Appellant’s counsel with the mention notice for 16th February, 2021 led to the non-appearance of counsel and the dismissal of the suit.
20. It is trite that an order of dismissal of a suit for non-attendance can only be issued upon all parties been served with a mention notice. The Appellant’s advocate having not been served with the mention



notice, it is the finding of this court that the dismissal of the Appeal on 16th February, 2021 was not warranted.

21. For those reasons, I allow the application dated 26th February, 2021 as follows:

- a. The orders issued on 16th February, 2021 dismissing the appeal be and are hereby set aside.
- b. The Appeal be and is hereby reinstated.
- c. The Record of Appeal to be filed within 45 days, and if not the appeal will stand dismissed.
- d. Each party to bear his own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 19TH DAY OF MAY, 2022.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Bariki holding brief for Kirimi for Respondent.

No appearance for Applicant

Court Assistant – John Okumu

