



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL NO. 28 OF 2019

GEORGE KIMANI THUO.....APPELLANT

VERSUS

LUCY NJERI MBUTHIA.....RESPONDENT

***[Being an appeal against the Ruling of Hon. G. Omodho SRM delivered on 27th March 2019 in Thika
CMCC No. 595 of 2011]***

JUDGMENT

1. The appellant herein was the defendant whereas the respondent was the plaintiff in the suit before the magistrate's court Thika CMCC no.595 of 2011. The appellant filed an application in the trial court seeking orders of temporary stay of execution and setting aside of the judgement entered on 5/12/2018 against her. She also desired to have plaintiff's case reopened and the counterclaim reinstated. The applicant further sought leave to replace his previous advocate with the firm of J.K Ngeresa advocates.
2. The gist of the application was that the matter proceeded for hearing despite the absence of the defendant and his then counsel. The applicant maintained that he was desirous of prosecuting his claim and heaped all the blame on the previous advocate for failing to keep him in the loop about the hearing.
3. The trial court vide a Ruling delivered on 27th March 2019 dismissed the application when it held as follows;

“I have had chance to look at the pleadings, Replying Affidavit, authorities and the proceedings in general forming basis of this application. I note that on 3/10/2018 the matter came up for hearing and both parties were represented where the defence Counsel sought adjournment for being bereaved. A fresh hearing date was fixed in Court being 29/10/2018. Come the said hearing date both parties were represented and the matter was allocated time for hearing at 11 am. At 11:41 am the matter proceeded for hearing but in the absence of defence team as per provisions of Order 12 Rule 2(a). The defendant heaps blame on his previous advocate for failing to update him on the progress of the suit but as per records, the Defendant was fully represented in Court at all material times relevant to these proceedings save for the main hearing. It is therefore my take from the above that the Defendant's recourse lies more with his previous advocate as litigation must come to an end. No good reasons has been availed why the plaintiff must be drawn into the disorganization of an adverse party from enjoying the fruits of his judgement. In the circumstances I do not find the application merited and proceed to dismiss it with costs.”

4. Aggrieved by the trial Court's ruling, the appellant filed his Memorandum of appeal on 28th March

2019 listing twelve grounds of appeal summarized as follows;

- (a) That the trial magistrate erred in law by visiting the mistake of the advocate on the litigant hence denying the appellant justice.
- (b) The trial magistrate failed to consider that the appellant had a counterclaim as well as a defence which raised triable issues, and he had agreed to reasonable costs.
- (c) That the trial magistrate erred in condemning the appellant unheard contrary to the rules of natural justice.
- (d) That the trial magistrate erred in not considering the grounds for the exercise of judicial discretion.
- (e) That the trial magistrate erred in not considering the reason for not attending the hearing of the case.

5. The appeal was canvassed by way of written submissions. The appellant submitted that failure to attend the hearing of the case was as a result of an inadvertent mistake on the part of the advocate on record. He faulted the trial magistrate in failing to consider that he had a plausible defence and counterclaim and that the suit property will always be available to the successful party. He cited the cases of **Joseph Ndungu Kamau v John Njihia [2017] eKLR**, **Onyango v A.G. (1986-1989) E.A. 456**, **Sangram Singh v Election Tribunal Kotech AIR 1955 SC 644 at 711**, **Sebei District Administration v Gasyali & Others (1968) EA 300**, **Ali Hussein Sugule v B.A.T Kenya Limited [2009] eKLR** and **Phillip Chemwolo & Another vs Augustine Kubende (1982-88) KAR 103 pg. 1042**.

6. The Respondent submitted that the appellant was in court on the date of the hearing, that his advocate was aware of the hearing date and that the appellant could have communicated with him when the matter was placed aside. The appellant failed to act diligently and remained inactive. In this regard the respondent cited the provisions of **Article 50 (1) of the Constitution and Order 12 Rule 2 and 7 of the Civil Procedure Rules** as well as the case of **Gideon Mose Onchwati V Kenya Oil Co. Ltd & Anor (2017) eKLR**.

Analysis and Determination

7. This being a first appeal, this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect; See **Municipal Council of Eldoret v Titus Gatitu Njau [2020] eKLR**, **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**).

8. The main issue for determination is whether the trial court applied the proper legal principles and exercised its discretion reasonably when it dismissed the appellant's application dated 6.12.2018. In **Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR**, the Court of Appeal held as follows;

“The principles upon which this Court will interfere with the exercise of a judge’s exercise of discretion in the lower court are also well known and settled. The court of Appeal can only interfere with the exercise of a trial court’s judicial discretion if satisfied that the judge misdirected himself on law; or that he misapprehended the facts; or that he took into account considerations of which he should not have; or that he failed to take into account considerations which he should have; or that his decision, albeit a discretionary one, was plainly wrong”.

9. In **Shah –Vs- Mbogo & Another [1967]6.A U7**, the Court of Appeal for Eastern Africa held that:-

“.....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....”.

10. The gist of the appellant’s case is that he was not aware of the hearing date. He blames his previous advocate for this mistake. I have looked at the totality of the case in considering whether this court should exercise its discretion in favour of the appellant. The records of 3.10.2018 (when the date of hearing was given as 29.10.2018) indicate that an advocate identified as Weru was holding brief for the appellant’s counsel. Thus the appellant’s side was aware of the hearing date. However, even the date of 3.10.2018 was a hearing date, only that the case was adjourned and ordinarily, the appellant was supposed to be in court on that day. He has not given any plausible account as to why he was not in court on 3.10.2018.

11. The conduct of the appellant during the lifetime of the case is rather wanting. Previously, the appellant had again made an application to set aside interlocutory judgement which had been entered in favour of the respondent. Vide a Ruling dated 7/4/2012 the application was allowed.

12. However, 4 years down the line, precisely on 3.6.2016, the court decried the fact that the case was very old and the appellant was given a last adjournment. It follows that from henceforth, the appellant was put on notice, that the case would not be adjourned again at his instance. Against this background, it was not enough for the appellant to simply blame his advocate. It was incumbent upon the appellant to demonstrate that he was keenly following his case.

13. In the case of **Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR**, cited in **Tana and Athi Rivers Development Authority vs. Jeremiah Kimigho Mwakio & 3 Others (2015) eKLR**, it was held that;

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

14. In exercising its judicial authority this court has a duty to facilitate just and expeditious determination of proceedings. One of the cardinal principles in our Constitution is “**the expeditious delivery of justice**” –See **Article 159 (2) (b)** thereof, which in effect codifies the 17th century maxim “**Justice delayed is justice denied**”. This means that if justice is not provided in a timely manner to the parties, it loses its importance and it violates the human rights of the litigants and their families. That is precisely why rights to speedy trials are incorporated in law worldwide.

15. The people of Kenya have for decades cried out to the justice system to embrace the aforementioned principle of expeditious delivery of justice, and in response thereof, the Judiciary formulated its blue print “**Sustaining Judiciary Transformation - (SJT 2017 - 2021)**” where speedy delivery of justice was one of the key strategic area of concern. Under that key area, Judiciary embarked on an exercise of clearing old cases which had clogged the justice system for many years. The matters identified as falling under this category were cases which were five years old and/or older by the year 2017 - 2018. The suit before the trial court was filed on 13.9.2011 and was therefore part of the backlog as it was 7 years old by the time a hearing date of 29.10.2018 was given.

16. I find that it would be unjust to give a litigant who appears not vigilant another opportunity to revive and extend the lifespan of this very old case, See **Frans investment limited vs. G4S Security Limited (2015)eKLR**.

17. In the circumstances, I find that this appeal is not merited. The same is dismissed with costs to the respondent.

DATED AND SIGNED AT MERU THIS 4TH DAY OF MARCH, 2021

HON. LUCY N. MBUGUA

ELC JUDGE - MERU

DELIVERED AT THIKA THIS 18TH DAY OF MARCH 2021

HON. LUCY GACHERU

ELC JUDGE - THIKA