



Mugure & another v Kimathi & 4 others (Environment and Land Appeal E051 of 2020) [2023] KEELC 19868 (KLR) (20 September 2023) (Ruling)

Neutral citation: [2023] KEELC 19868 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E051 OF 2020
CK YANO, J
SEPTEMBER 20, 2023**

BETWEEN

REGINA MUGURE 1ST APPELLANT

STEPHEN MWENDA MUGAMBI 2ND APPELLANT

AND

KENNEDY KIMATHI 1ST RESPONDENT

MARY NTINYARI 2ND RESPONDENT

FAMILY BANK LIMITED 3RD RESPONDENT

MERU LAND REGISTRAR 4TH RESPONDENT

HON. ATTORNEY GENERAL 5TH RESPONDENT

RULING

1. This ruling is in respect of the notice of motion dated 24th March 2023 brought pursuant to order 45 rule 1, order 50 rule 6 and order 51 rule 1 of the *Civil Procedure Rules*, sections 1A, 1B, 3A and 95 of the *Civil Procedure Act* and all other enabling provisions of the law. In the application, the appellants mainly seek to set aside the orders dismissing the appeal and for orders reinstating the appeal herein for hearing and reinstatement of the orders granted vide the ruling of the court dated 18th January, 2023.
2. The application is based on the grounds on the face of the motion and supported by the affidavit of Joel Mutuma Advocate for the applicants, sworn on 24th March 2023. On 9th March 2023, the appeal was dismissed for want of compliance with the orders of court made on 18th January, 2023 directing the filing of the Record of Appeal before 9th March 2023. Counsel for the applicants avers that he misdiarized the date as 10th April 2023 instead of 9th March 2023. He has annexed a copy of his diary and pointed out that none of the advocates for the parties were present on 9th March 2023. That the



record of appeal is now ready and it is just, fair and in the interest of justice that the applicants are granted the orders sought as the appeal raises triable issues that need to be heard and determined by the court. It is further stated that the application has been made without unreasonable delay and that mistake of counsel should not be visited on the party.

3. The application is opposed by the 3rd respondent through a replying affidavit of Joyfavour Mugenya Advocate sworn on 20th April 2023. It is averred that it was the primary duty of the appellants to take steps to progress their appeal since they are the ones who appealed against the decision of the trial court. That the appellants failure to comply with the court's directions given on 18th January, 2023 and even not being present on 9th March 2023 led to the dismissal of the appeal. That the error given by the appellant's advocate is inexcusable as he had not complied with the court's directions and also elected not to attend court, hence the dismissal of the appeal.
4. Counsel for the 3rd respondent avers that the 3rd respondent stands to suffer grave injustice and prejudice if the appeal is reinstated as the loan is likely to accrue interest until it outstrips the value of the charged land by the time the appeal is heard and determined. It is the position of the 3rd respondent that the appeal is frivolous and that the application has no merit and is a waste of the court's precious time and urged the court to dismiss it with costs.

Analysis And Determination

5. Having considered the application, the affidavit in support and against it is my view that the main issues for determination by this court are:-
 - i. Whether this court should set aside the orders made on 9th March 2023 dismissing the applicant's appeal for non attendance.
 - ii. Whether this court should reinstate the appeal for determination on merit.
 - iii. who should bear the costs.

Whether the court should set aside the orders dated 9th March 2023 dismissing the appeal.

6. The orders sought are discretionary. Mr. Joel Mutuma's explanation is that he misdiarized the case hence the dismissal of the appeal for non attendance. The orders for dismissal were made on 9th March 2023 while this application was filed on 27th March 2023. This is a period of 18 days. In my view the application was filed timeously.
7. Counsel for the applicant states that his absence was not deliberate but was due to misdiarizing of the date. In *Belinda Murai & others v Amos Wainaina* 1978 LLR 2792 (CALL) Madan JA stated-;

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”
8. In an application for reinstatement of a dismissed suit or application, an applicant appeals to the discretion of the court. The court must caution itself not to exercise its discretion in a manner that will



result in an injustice. This position is fortified in the case of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR, where the court of appeal stated-;

“We agree with those noble principles which go further to establish that the court’s discretion to set aside an ex-parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend court on the 10th June 2013 with anxious minds. We have asked ourselves whether failure to attend court on 10th June 2013 constituted an excusable mistake, an error of judgment regarding counsel’s failure to diarize the date properly or was it meant to deliberately delay the cause of justice.”

9. The circumstances of this case are sufficient to persuade the court that the non attendance by the applicants or their advocate on the date the appeal was dismissed was not a deliberate attempt to obstruct or delay justice. Accordingly, the applicants should not be denied a hearing.
10. The court has inherent powers to give orders which are necessary to meet the ends of justice. Section 3A *Civil Procedure Act* provides-;

“Nothing in this *Act* shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
11. This is further buttressed by section 1A & 1B of the *Civil Procedure Act* which provides for overriding objectives of the Act and the duty of the court which is to facilitate the just, expeditious resolution of disputes.
12. The 3rd respondent has opposed this application on the basis that the appellant’s advocate excuse is not excusable as he had not complied with the court’s direction when the matter came up for mention on 9th March 2023. It is my view that the law has elaborately made provisions which cushion the court from leaning on technicalities at the expense of doing justice. The courts will determine disputes on the merits and lean on the principle of natural justice which guide all courts, that is a party in a dispute must be given an opportunity to be heard. From the foregoing, I find that the objection by the 3rd respondent cannot be sustained. This court should therefore exercise its discretion in favor of the applicants.
13. Under order 12 of the *Civil Procedure Rules* the court will dismiss an application where a party fails to attend court with full notice of the hearing date. Where a party demonstrates that it was not aware of the hearing date through no guilty of its own, the court will exercise its discretion in favor of the party. Order 12 rule 7 *Civil Procedure Rules* provides-;

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application may set aside or vary the judgment or order upon such terms as may be just.”
14. The court has discretion to set aside judgment or order made to avoid ex-parte to avoid injustice or hardship resulting from an accident inadvertence or excusable mistakes see *Shah v Mbogo & another* [1967] EA 116.



15. In *Patel v E.A Cargo Handling Services Ltd* [1974] E.A 75 the court stated that

“There is 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 to it by the rules.”

16. In this matter, there is no denial that there was a blunder as the applicant’s counsel failed to attend court on 9th Mach, 2023 and has claimed that he had misdiarized the mention date. In *Philip Chemowolo & another v Augustine Kubende* [1986] KLR it was stated that -;

“I think a distinguished equity judge has said:

Blunders will continue to be made from time to time and it does not follow that because a mistake has been made, that a party should suffer the penalty of not having his case heard on merit...”

17. The applicant’s counsel as I have pointed out has given an explanation for his failure to attend court on the mention date. The respondent will not suffer any prejudice as they will have a chance to challenge the appeal. I have also noted that the application was brought without undue delay. The court has further noted that the record of appeal has been filed.

18. I find that the applicants have shown sufficient cause to warrant this court to set aside the orders made on 9th March 2023 and reinstate the appeal.

19. In conclusion, I order as follows-;

- i. The order issued by this court on 9th March 2023 is set aside.
- ii. the appeal is reinstated and shall be heard and determined on merits.
- iii. The orders made on 18th January, 2023 are reinstated.
- iv. Costs of the application to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 20TH DAY OF SEPTEMBER, 2023

C.K YANO

JUDGE

In Presence Of

Court Assistant - V. Kiragu /Lenah M

Mutuma for appellants

Mugenyu for 3rd respondent

Ms Kithaura holding brief for Ms. Mbaikyatta for 4th & 5th respondent

No appearance for 1st and 2nd respondent

