Kenya Orient Insurance Limited v Murage (Civil Appeal E011 of 2023)
[2025] KEHC 1614 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1614 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E011 OF 2023

MA ODERO, J

FEBRUARY 21, 2025

(FROM THE ORIGINAL CIVIL SUIT NO. 363 OF 2019)

BETWEEN

KENYA ORIENT INSURANCE LIMITED ..... APPELLANT

AND

JANE NJOKI MURAGE ..... RESPONDENT

JUDGMENT

1. Before this Court for determination is the Memorandum of Appeal dated 28th February 2023 by which the Appellant Kenya Orient Insurance LTD seeks the following orders:-

   "(1) That the Ruling of the Court in Nyeri Civil Suit Number 363 of 2019 dated 14th February 2023 be set aside and substituted with an order allowing the Appellants application dated 28th October 2022.

   (2) That the costs of the appeal be granted to the Appellant."

2. The Respondent Jane Njoki Murage opposed the appeal. The appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated 4th October 2024, whilst the Respondent relied upon its written submissions dated 24th October 2024.

Background

3. This appeal emanates from the proceedings in Nyeri CMCC No. 363 of 2019. In that matter the learned trial magistrate set down the date for defence hearing as 25th October 2022. This date was allocated in the presence of and with the consent of counsel for both the plaintiff and the Defendant.

4. On the scheduled hearing date of 25th October 2022 counsel for the plaintiff was present in Court and ready to proceed. However Defence Counsel was not present. The court noting that the date had been taken by consent proceeded to mark the defence case as CLOSED. The Defendant [Appellant herein] then filed in the lower court Notice of Motion Application dated 28th October 2022 seeking the following orders.

> " 1. That this matter be certified urgent, and service be dispensed with at the first instance.
>
> 2. That this honourable court be pleased to set aside the orders of 25th October 2022 and grant leave to the Defendant to re-open the Defendant's case to be heard on merit.
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> 3. That once leave to re-open is granted, this Honourable Court be pleased to grant leave to the Defendant to file list of documents and witness statement out of time.
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> 4. That upon such leave, the list of documents and witness statement filed herein on 29th August 2022 be deemed as duly filed/properly on record.
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> 5. That this Application be served and heard interpartes at a hearing date to be granted by this Honourable Court.
>
> 6. That the court be pleased to issue such orders as may be fair and just to secure the Applicant's rights to a fair and just trial.
>
> 7. That costs of this application be in the cause."

5. The application seeking to re-open the defence case was duly heard in the lower court and was dismissed with costs vide the Ruling delivered on 14th February 2023.

6. Being aggrieved by the said Ruling the Appellant filed this present appeal, which appeal was premised upon the following grounds that

    1. The learned Magistrate erred in law and in fact in holding that the Appellant's application dated 28th October 2022 had no merit and in dismissing the said application.

    2. The learned magistrate erred in law and fact by disallowing the Appellant an opportunity to re-open its case and call up evidence to assist in the Appellants case, which evidence would in no way prejudice the respondent who would have had an equal opportunity to cross-examine.

    3. The learned Magistrate failed to properly evaluate the facts set out in the affidavits in support of the Application dated 28th October 2022 and to appreciate Article 159(1) (a) of *the Constitution* and was thus in error for finding that the application lacked merit.

    4. The learned Magistrate erred in law in failing to appreciate the obligation of court to do substantive justice between the parties in order to give a better effect of the right to fair hearing and to right of Appellant to defend itself.

    5. The learned Magistrate erred in law by failing to consider the authorities and submissions relied on the Appellant in his ruling which is the subject of this appeal.

7. As stated earlier the Appeal was opposed.

Analysis and Determination

8. I have carefully considered the record of Appeal filed in court on 13th October 2023, as well as the submissions filed by both parties. This being a first appeal the High Court is obliged to re-evaluate the evidence adduced before the lower court and to draw its own conclusions on the same.

9. The duty of the first appellate court was set out in the case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the court held as follows;-

> " .....this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court....is by way of trial and the Court of Appeal is not bound to follow the subordinate court's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

10. In the case of Mbogo and Another -vs- Shah [1968] E.A 93 the court stated that:-

> " .....this court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

11. The Appellant submitted that its Advocate erroneously mis-diarised the hearing date and that as a result neither the Appellant nor his advocate were in Court on 25th October 2023 when the matter was scheduled for hearing. It was submitted that the client ought not be penalized for the mistakes of his/her advocate.

12. The Appellant further urged that in compliance with Article 159(2) (d) of *the Constitution* of Kenya 2010, courts ought to administer substantive justice without undue regard to technicalities.

13. It is not in any dispute that neither the Appellant nor their Advocate appeared in court on the hearing dated of 25th October 2022. Noting that the hearing date had been taken by consent, the court proceeded to close the Defendants (Appellants) case in their absence. The Appellant stated that his advocate had mis-diarised the hearing date as 25th November 2022 as opposed to 25th October 2022. That this is what led to their failure to attend court on the hearing date.

14. The Appellants submitted that the omissions of an advocate ought not be visited upon the client. This may be so but it must be remembered that a suit belongs to the client not to the Advocate. A litigant cannot just instruct an advocate and then sit back and expect the case to proceed without any input from the client himself. In the case of Savings and Loan Limited -vs- Susan Wanjiru Muritu [2002] eKLR, Hon. Justice Luka Kimaru (as he then was) stated as follows:-

> " Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates, failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such Advocate's failure to attend court. It is the duty of the litigant to constantly check with her Advocate the progress of her case. [own emphasis]

15. In Edney Adaka Ismail -vs- Equity Bank Limited [2014] eKLR the court stated thus

> " It is true that the justice of the case mandates, mistake of advocate even if they are blunders, should not be visited on the clients when the situation can be remedied by costs. However it is not in every case that a mistake committed by an advocate would be a ground for setting aside orders of the court."

The court in the same case went on to state that

> " It is not enough for a party to simply blame the advocate but must show tangible steps taken by him in following up his matter." [Own emphasis]

16. In this case the Appellants Advocate pleaded that he had misdiarized the hearing date. That he erroneously recorded the hearing date as 25th 'November' 2022 instead of 25th 'October' 2022. The Advocate even annexed to the Further Supporting Affidavit a copy of the Diary (Annexture 1'SJ-1').

17. In my view the misdiarising of a matter is an inadvertent and understandable mistake. It is said that "to err is human". No person is perfect. There is no evidence much less a suggestion that counsel deliberately entered the wrong date in his diary.

18. Notwithstanding the general rule that a litigant must pursue his own case I find that this was an excusable error and one for which the client ought not have been penalized.

19. In my view the learned trial magistrate acted precipitately. The record indicates that this was a matter in which both counsel regularly appeared. The Appellants Advocate did not have a history of failing to attend court. In the circumstances the trial court ought to have granted some leeway instead of closing the Defendants case after only one failure to attend court. The trial court ought not have been so quick to close the defendants case.

20. Further in my view the Respondents will not suffer any prejudice if the Appellants are allowed to re-open their case. The Respondents will have ample opportunity to cross-examine any witnesses called by the Appellant. The trial court could well have penalized the Appellant by way of costs.

21. I therefore find merit in this ground of the Appeal and allow the same.

22. The next prayer contained in the Application dated 28th October 2022 was that the Appellant be granted leave to file their list of documents and witness statements out of time.

23. It was averred that the list of documents which included an investigation Report had been misplaced due to restructuring of the Defendant Company hence the failure to file the same on time. That the delay was excusable and as such the documents ought to be admitted.

24. The Applicant has also placed reliance on Article 159 (2) (d) of *the Constitution* of Kenya 2010. The enactment of this constitutional provision was not intended to invite the court to completely ignore or dismiss all rules of procedure. In Nicholas Kiptoo Arap Korir Salat -VS- IEBC & Others [2013] eKLR the Court of Appeal in addressing the application of Article 159(2) (d) observed as follows:-

> " .....I am not in the least persuaded that Article 159 of *the constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient proportionate and cost effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow of destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This court and indeed all courts must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those

rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts, for while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts gave assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned....." [own emphasis]

25. It is not in any doubt that the law sets out the timelines for performance of certain activities relating to the case. The hearing date was set by consent. However the Appellants did not abide by the known timelines. They did not file and serve their witness statements and bundles of documents well before the allocated hearing date. The pre-trial directions were taken way back in the 2020 when the suit was set down for hearing. The application seeking to have the Appellants bundle filed out of time was not made until October 2022.

26. It is pertinent to note that the Respondents (the Plaintiff in the main suit) closed its case on 30th August 2022. Therefore the Appellant were seeking to introduce their documents after the plaintiffs had closed their case.

27. In the case of P.H Ogola Onyango t/a Pitts Consult Consulting Engineers -vs- Daniel Githegi t/a Quantalysis [2002] eKLR, Hon Justice Hatari Waweru (Retired) observed as follows:-

> " Indeed discovery, along with Interrogatories and inspection is a pre-trial procedure. They are all meant to facilitate a quick and expeditious trial of the action. Though the court no doubt has jurisdiction to allow a party to introduce a document or documents once the trial had begun, it is another thing for a party to seek to introduce documents once the opposing party has closed its case. The present suit was filed way back in 1999. The Defendant filed his defence in January 2000. He had more than ample time to make discovery before the trial commenced. To allow him to introduce documents once the plaintiff has closed his case will occasion the plaintiff serious prejudice that cannot be cured by cross-examination. In civil litigation there must be a level playing field. That field cannot be level were one party to be permitted to introduce documents in the trial after the opposite party had closed its case and many years after pleadings closed." [own emphasis]

28. In the case of Raila Odinga & 7 Others -vs- IEBC & 3 Others [2013] eKLR the Court held as follows;-

> " The parties have a duty to ensure they comply with their respective time-lines, and the court must adhere to its own. There must be a fair and level playing field so that no party or the court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided."
>
> The other issue the court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively,

the court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence."

29. In this case the Court gave the parties directions to file their respective documents. The Appellant seeks to introduce new evidence almost five (5) years after the fact – this is clearly an afterthought.

30. In Oracle Productions Limited -vs- Decapture Limited & 3 Others [2014] eKLR, Hon. Justice Kimondo observed as follows:-

> " The true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at the trial. This is aptly captured in Halsbury's Laws of England Vol 13 paragraph 1:
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> > "The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation."

31. The Appellant had claimed that the additional evidence they sought to adduce had only recently been discovered due to administrative changes and restructuring in the Appellant Company which cause the relevant file to be misplaced.

32. The above excuses are not persuasive. No evidence was adduced to show that the said investigative report had in fact been misplaced. The said investigative report was prepared on 30th November 2016. The same was therefore in the custody of the Appellants all along but they took no steps to produce the same. It is obvious that the failure to file documents in time was the result of the indolence of the Appellant and its legal representative. The Appellant were in effect trying to conduct their defence by ambush.

33. In the circumstances neither Article 159(2) (d) of *the Constitution* of Kenya nor the 'Oxygen Principles' will come to the aid of the Appellant. In Odoyo Osodo -vs- Rael Obara Ojuok & 4 Others [2017] eKLR the court stated as follows:-

> " Lawyers time and again will plead with the courts not to punish litigants for their mistakes. When it is a genuine mistake or error on the part of the lawyer the court may overlook in the interest of justice. However in the instant matter I am not persuaded there was any genuine mistake and/or error. They are conduct for which the counsel and his client should take responsibility and bear the consequences. Not even the overriding objective principle under Sections 1A and B of the *Civil Procedure Act* in my view can come to the aid of the applicants. The cardinal tenets of the overriding objective principle are delivered in an efficient and expeditious manner. The conduct of the applicants herein run counter to these tenets as it is evident the conduct militates against the efficient and expeditious finalization of the present matter"

34. I do not believe that restructuring of an office would take up to six (6) years. Further even if the report was misplaced as alleged by the Appellant they should have moved to obtain a copy of said report. It cannot be that only one copy of the said report existed.

35. The Appellants were clearly trying to remedy their own laxity through the application dated 28th October 2022. This the court will not countenance. Accordingly I dismiss this ground of the appeal.

36. Finally this appeal is partially successful. The court makes the following orders.

    (1) The Ruling delivered in Nyeri Civil Suit No. 363 of 2019 dated 14th February 2023 be and is hereby set aside.

    (2) In its place this Court makes the following orders;-

        (a) The Appellant is hereby granted leave to re-open their defence case and the matter to be allocated to a different magistrate for hearing.

        (b) The Appellants prayer for leave to file list of documents and witness statements out of time is denied.

        (c) Costs of the appeal to be met by the Appellant.

DATED IN NYERI THIS 21ST DAY OF FEBRUARY 2025.

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MAUREEN A. ODERO

JUDGE