



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELCA NO. 130 OF 2019

(Formerly MERU HCA 76 OF 2019)

M'MUKIRI IKOTHA.....APPELLANT

-VERSUS-

JAMES RIUNGU M'ABUAYA.....RESPONDENT

JUDGMENT

A. INTRODUCTION AND BACKGROUND

1. This is an appeal against the ruling and order of **Hon. G. Sogomo (PM)** dated 27th June, 2019 in *Tigania PMCC No. 49 of 2008 – M'Mukiri Ikotha v James Riungu M'Abuaya*. By the said ruling, the trial court dismissed the Appellant's application dated 8th April, 2019 seeking the setting aside of a dismissal order purportedly made on 20th November, 2018. The trial court also awarded the Respondent costs of the application.

2. The material on record indicates that the Appellant (who was the Plaintiff before the trial court) was awarded costs of the suit in *Tigania PMCC No 49 of 2008* against the Respondent. The costs were apparently assessed and a certificate of stated costs issued in respect thereof. When the Respondent failed to pay the costs, the Appellant took out a notice to show cause for the Respondent to show cause why he should not be committed to civil jail for failing to settle the costs of the suit.

3. It was contended by the Appellant that his notice to show cause was fixed for hearing on 20th November, 2018 when it was dismissed for default of attendance. Being of that view, the Appellant filed a notice of motion dated 8th April, 2019 under **Order 50 Rule 1, Order 45 Rule 1 of the Civil Procedure Rules, 2010 Sections 1A, 1B & 3A of the Civil Procedure Act (Cap. 21) and all enabling provisions of the law** seeking the setting aside of the dismissal order allegedly made on 20th November, 2018 and reinstatement of his notice to show cause dated 12th November, 2018.

4. The said application was based upon the ground that the Appellant had failed to attend court on 20th November, 2018 because he was bereaved in that he had lost his father. It was contended that the dismissal order had driven the Appellant out of the seat of justice hence it was meet and just that the application for setting aside and review be granted. The application was supported by an affidavit sworn by the Appellant on 8th December, 2019 in which he reiterated and expounded upon the reason for his failure to attend court.

5. The record shows that the Respondent filed a replying affidavit sworn on 10th June, 2019 in opposition to the said application. It was contended that both the Appellant and his advocate had failed to attend court on 20th November, 2018 without just cause. It was pointed out that the personal presence of the Appellant was not necessary for the purpose of prosecuting the *notice to show cause* since he had an advocate on record. The Respondent further contended that the application for reinstatement had been filed after inordinate delay as the delay of 5 months in filing it had not been explained. He consequently asked the court to dismiss the application with costs.

6. The material on record shows that by a short ruling dated and delivered on 27th June, 2019, the trial court considered only one issue. The trial court found and held that there were no proceedings on 20th November, 2019 hence the order sought to be reviewed was non-existent. As a consequence, the trial court dismissed the Appellant's application with costs of Kshs.15,000/= to the Respondent.

B. THE GROUNDS OF APPEAL

7. Being aggrieved by the said ruling and order, the Appellant filed a memorandum of appeal dated 10th July, 2019 raising the following 5 grounds of appeal:

(a) That the trial Magistrate erred in law and fact by failing to exercise his unfettered discretion while deciding the whole matter, hence, dismissing the Appellant's application dated 8th April, 2019 on technicality.

(b) The trial Magistrate erred in law and fact by failing to consider the fact that there was an extracted certificate of costs and notice to show cause issued against the Defendant, hence, proceeded into putting into his consideration irrelevant facts and disregarded relevant facts.

(c) The trial Magistrate erred in both law and fact by failing to apply the whole law and facts governing the execution of a decree where the mode of execution has been nominated.

(d) The trial Magistrate erred in law and fact by failing to appreciate the clerical errors and/or omissions can occur but cannot result to condemning the victorious party out of mere technicality in as far as those errors have not changed and/or altered the initial judgment and decree issued by the court of competent jurisdiction.

(e) The trial Magistrate was totally biased and partial in arriving in his ruling delivered 27th June, 2019 as the said ruling was a product of an abuse of court process.

8. As a result, the Appellant sought the following reliefs:

(a) That the appeal be allowed.

(b) That the ruling and order of the trial court dated 27th June, 2019 be set aside.

(c) That the trial court be directed to review the dismissal order of the notice to show cause dated 12th November, 2018.

(d) That the Appellant be awarded costs of the appeal.

C. DIRECTIONS ON SUBMISSIONS

9. It would appear from the material on record that directions were given to the effect that the appeal shall be canvassed through written submissions. When the appeal was listed before this court for hearing on 31st August, 2020 the parties had already filed their respective submissions. The Appellant's submissions were filed on 20th October, 2019 whereas the Respondent's submissions were filed on 4th November, 2019.

D. THE ISSUES FOR DETERMINATION

10. Although the Appellant raised 5 grounds of appeal in his memorandum of appeal, the court is of the opinion that the appeal may effectively be determined on the basis of the following issues:

(a) Whether the trial court erred in law in dismissing the Appellant's notice of motion dated 8th April, 2019.

(b) Who shall bear costs of the appeal.

E. THE APPLICABLE LEGAL PRINCIPLES

11. There is no doubt that in determining the Appellant's application for review dated 8th April 2019 the trial court was exercising judicial discretion under **Section 80 of the Civil Procedure Act (Cap. 21)** and **Order 45 of the Civil Procedure Rules**. It has been held that an appellate court should be slow in interfering with the exercise of judicial discretion by the trial court unless it is demonstrated that such discretion was not exercised judiciously or that the trial court acted on wrong principles.

12. In the case of **Mbogo & Another v Shah [1968] EA 93**, it was held, *inter alia*, that:

” An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which it should be taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice.”

13. There are other decisions from superior courts which have enunciated the same principles on the jurisdiction of an appellate court to interfere with the exercise of judicial discretion by the trial court such as **Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR**; **Apungu Arthur Kibira v IEBC & 3 Others [2019] eKLR**; and **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**.

14. In the case of **Apungu Arthur Kibira (supra)**, the Supreme Court of Kenya stated as follows at paragraph 39:

“We reiterate that in an appeal from a decision based on an exercise of discretionary power, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of *Kacem v Bashir (2010)NZSC 112; (2011)2 NLRI (Kacem)* where it was held para 32]:

“In this context a general appeal is to be distinguished from an appeal against the decision made in exercise of discretion. In that kind of case, the criteria for a successful appeal are stricter: (i) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.”

F. ANALYSIS AND DETERMINATION

(a) Whether the trial court erred in law in dismissing the Appellant’s notice of motion dated 8th April, 2019

15. The court has considered the material and submissions on record on this issue. Whereas the Appellant contended that he had satisfied the requirements for setting aside a default order, the Respondent supported the ruling and order of the trial court dismissing the application. The trial court dismissed the Appellant’s application for reinstatement essentially because there was no evidence on record of the dismissal order which the Appellant claimed was made on 20th November, 2018. The Appellant insisted in his written submissions that such order existed and that the trial court had failed to peruse the entire record in order to trace it.

16. The court has perused the original record of proceedings carefully. The court is unable to trace the dismissal order allegedly made on 20th November, 2018. There is absolutely no record of any proceedings having taken place on that date. There is even no minute indicating that the Appellant ever fixed his notice to show cause for hearing on 20th November, 2018.

17. The court is aware that both this court and the trial court are courts of record. Where there is a dispute as to whether or not a certain order was made or proceedings taken resort must be had to the official record of proceedings. There is no way the trial court could have set aside or reviewed a dismissal order which was non-existent. The Appellant had a duty to satisfy the trial court that it existed in the first place.

18. The court has further noted that the Appellant did not extract the alleged dismissal order when he filed the application for review and reinstatement of the notice to show cause before the trial court. He did not extract it for purposes of the instant appeal either. No copy of such order was included in the record of appeal. In the premises, it would follow that there is no material on record upon which this court may exercise its discretion in favour of the Appellant with respect to the setting aside or review of such order.

19. The court is, therefore, unable to find any error of principle or law on the part of the trial court in dismissing the Appellant’s application dated 8th April, 2019. There is no material on record to demonstrate that the trial court took into account irrelevant considerations or failed to take into account relevant considerations and as a result reached a wrong conclusion. In the premises, the court is not satisfied that there is a valid reason to interfere with the ruling and order of the trial court dated 27th June, 2019.

(d) Who shall bear costs of the appeal

20. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful party should not be awarded costs of the appeal. Accordingly, the court is inclined to grant the Respondent costs of the appeal.

G. CONCLUSION AND DISPOSAL

21. The upshot of the foregoing is that the court finds no merit in the appeal. Accordingly, the Appellant’s appeal is hereby dismissed with costs to the Respondent.

22. It is so decided.

JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 16TH DAY OF JUNE 2021.

Y. M. ANGIMA

ELC JUDGE

Judgment delivered through email this 8th day of July, 2021.

L. N. MBUGUA

ELC JUDGE-MERU