Rafiki Microfinance Bank Limited v Okeyo & another (Civil Appeal 4 of 2020) [2025] KEHC 8395 (KLR) (16 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8395 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL 4 OF 2020

BM MUSYOKI, J

JUNE 16, 2025

BETWEEN

RAFIKI MICROFINANCE BANK LIMITED ..... APPELLANT

AND

JACK OTIENO OKEYO ..... 1ST RESPONDENT

QUINTER ANYANGO ODERO ..... 2ND RESPONDENT

(Being an appeal against ruling and order in the Chief Magistrate's Court at Kisumu (L. Akoth RM) civil case number 336 of 2015 dated 9th December 2019)

JUDGMENT

1. The appellant who was the defendant in the lower court matter had pleaded a counterclaim for Kshs 573,775.50 being balance of financial facility granted to the plaintiff for purchasing motor vehicle registration number KBX 749X. The respondent's suit was dismissed on 5-07-2018 for non-attendance and the matter fixed for hearing of the counterclaim on 14-09-2018. On the said date, the appellant was not ready to proceed and the matter was fixed for hearing on 25-10-2018. When that date came, the appellant and its advocate did not show up and the matter was dismissed for want of attendance at 12.04 pm after having been placed aside for hearing at 11.30 am.

2. By a notice of motion dated 6-12-2018, the appellant approached the court to have the order of dismissal dated 25-10-2018 set aside and the counterclaim reinstated for hearing. The court was not satisfied with the reasons advanced and dismissed the application on 9th December 2019 which aggrieved the appellant hence this appeal in which the appellant has raised the following grounds;

    1. The learned trial Magistrate erred in law and fact by holding that the appellant had not met the threshold for an order of reinstatement of the counter-claim when the said application was unopposed.

2. The learned trial Magistrate erred in law by failing to appreciate all the relevant facts pertaining to the appellant's counter-claim against the respondents as well as the prejudice that dismissing the application for the reinstatement of the counter-claim would occasions the appellant.

3. The learned trial Magistrate erred in law and fact by holding that a 56 days' delay in filing the application for the reinstatement of the counter-claim was inordinate and inexcusable as a result making an erroneous finding.

4. The learned trial Magistrate erred in law by dismissing the application dated 6/12/2018 indicating that she considered the pleadings and submissions of both parties when the application before her was unopposed.

5. The learned trial Magistrate misdirected herself by punishing the client for the mistake of its counsel by dismissing the application for reinstatement of the counter-claim.

6. The learned trial Magistrate erred in law by failing to take into account the provisions of Article 159 of *the Constitution* of Kenya hence making an erroneous ruling based on procedural technicalities.

3. The appeal was disposed of by way of written submissions. I have read the submissions of the appellant dated 14-02-2024 and those of the respondent that are not dated. It is common ground that the appellant and its counsel were not in court when the matter was called out on 25-10-2018. Despite their absence, the court did not dismiss the suit but allocated time for hearing at 11.30 am. The matter was called out again at 12.04 in the absence of the appellant and its advocates when the counsel for the respondents made an application for dismissal of the counter-claim for want of prosecution and the court proceeded to dismiss it for non-attendance. The appellant did not file the application for reinstatement until 6-12-2018. Although the notice of motion and the supporting affidavit indicate that the date of the dismissal was 29-10-2018, the proceedings are clear that it was on 25-10-2018.

4. The affidavit in support of the application was sworn by Owiti C. Ochieng, the advocate for the appellant. All that the advocated stated in the said affidavit was that he had sent an advocate to hold his brief who arrived late in court and found that the matter had been dismissed for non-attendance. The deponent of the supporting affidavit did not disclose the date when he became aware of the dismissal but since he states that the advocate he had sent to hold his brief found that it had been dismissed, this court assumes that the appellant became aware of the fate of the matter on the same date.

5. The Honourable Magistrate held that the appellant should have explained why he took a period of 56 days to file the application. What is inordinate delay depends on the circumstances of the case and the same should be left to the discretion the trial court. However in my my view, a period of 56 days cannot be said to be inordinate. The position in law is that an appellate court should not interfere with discretionary decision of the trial court unless the same is shown to have been injudiciously, unreasonably or the same obviously occasioned injustice to the parties.

6. There is nothing placed before me to show that the trial court exercised its discretion injudiciously. It is also trite that an appellate court should not set aside a discretionary decision of the trial court simply because it would have reached a different decision. In that case, although I hold the opinion that the period of fifty six days was not inordinate in the circumstances of the case, I am not convinced that I should set aside the ruling for the that sole reason. In Mrao ltd v First American Bank of Kenya Ltd & 2 others (2003) KECA 175 (KLR), the Court of Appeal held as follows;

> 'And as is always the case judicial discretion has to be exercised on the basis of the law and evidence. And as was stated by this Court in the case of Carl Ronning v Societe Navale

Chargeurs Delmas Vieljeux (The Francois Vieljeux) [1984] KLR 1 an appellate court may only interfere with the exercise of judicial discretion if satisfied either;

a. The judge misdirected himself on law, or

b. That he misapprehended the facts, or

c. That he took account of considerations of which he should not have taken an account, or

d. That he failed to take account of consideration of which he should have taken account, or

e. That his decision, albeit discretionary one, was plainly wrong.'

7. The same was restated by the Court of Appeal in Patriotic Guards Ltd v James Kipchirchir Sambu (2018) KECA 799 (KLR) thus;

> '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.'

8. Even where an application for reinstatement is made on the same date of dismissal, the applicant has the onus of giving a plausible and convincing reasons why they were not in attendance. The mere fact that the application was filed expeditiously does not guarantee the applicant entitlement to the orders for reinstatement. The period is just but one of the factors for consideration.

9. The supporting affidavit did not disclose the name of the advocate who had been instructed to hold brief for the appellant's advocates. There was no explanation of the reasons for him arriving in court late. The matter was dismissed at 12.04 pm and as the trial Magistrate rightly observed, the courts normally start at 9 am. There was no explanation where the advocate was coming from and the distance between the place and the courts. I have gone through the fifteen-paragraphs affidavit and in my view, it gives an impression that the affidavit was casually drawn and obviously made assumptions that the court should just understand that the appellant was interested in pursuing the matter.

10. It is true that mistakes of a counsel should not be visited upon the parties. It is also true that the cases belong to the parties and not their advocates. It has not been indicated that the appellant's witnesses or representative was in court when the matter was called out twice. Of course, the advocate who arrived late was not coming to testify on behalf of the appellant. If the witnesses were in court, one would be right to apportion blame entirely on the advocate. The matter was coming for hearing and the appellant's witnesses were under an obligation to attend the court even in absence of its advocates.

11. The mantra that mistakes of the counsel should not be visited upon the parties should not be a pinnacle for all the missteps or lack of actions by the advocates. The advocates are agents of the litigants and their actions or inactions should be taken to be those of the parties unless it is shown that the mistake was genuine and failure to correct it would result to injustice to an innocent litigant. In this case, I do not think that the appellant was innocent as the record shows that it was not the first time the appellant's witnesses were not ready to proceed.

12. The appellant should have proceeded with its counterclaim on 5-07-2018 when the plaintiff's case was dismissed but its advocate asked for another date. On 14-09-2019 the appellant's witnesses were not in court and its advocate asked for another adjournment to 25-10-2018. Come the latter date, neither the advocate nor the appellant appeared resulting to the dismissal of the counter-claim.

13. In the circumstances outlined above, I hold that the trial Magistrate was entitled to exercise its discretion as she did in dismissing the application dated 6-12-2018. In the final analysis, I find and hold that this appeal lacks merits and the same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Abande for the respondent and in absence of the respondent.