Absa Bank Kenya PLC & another v Oshe (Civil Appeal E006 of 2023) [2024] KEHC 636 (KLR) (9 January 2024) (Ruling)

Neutral citation: [2024] KEHC 636 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CIVIL APPEAL E006 OF 2023

JN ONYIEGO, J

JANUARY 9, 2024

BETWEEN

ABSA BANK KENYA PLC ..... 1ST APPELLANT

ABSA LIFE ASSURANCE KENYA LTD ..... 2ND APPELLANT

AND

MANJUU MBARAK OSHE ..... RESPONDENT

RULING

1. The application for determination Before me is that dated 28.09.2013 wherein the applicants sought for the following orders:
   i. Spent.
   ii. Spent.
   iii. This court be pleased to vary, review and/or set aside the orders issued on 28.09.2023 to such extent to reinstate the application dated 11.09.2023 for hearing and determination.
   iv. The court be at liberty to make any further orders in the interests of justice.
   v. The costs of and/or incidental to this application be provided for.
2. The application is premised upon the grounds stated on its face and further supported by the affidavit of the applicant.
3. The appellants'/applicants' case is hinged on the fact that there is a pending substantive appeal against the judgment delivered on 26.04.2023 and subsequent decree extracted in Garissa CMCC No. E035 of 2022 Manjuu Mbarak Oshe v Absa Bank Kenya PLC & Another. That upon filing the aforementioned appeal, the appellants simultaneously filed an application for stay of execution dated 19.05.2023 wherein vide a ruling delivered on 28.07.2023, this honourable court granted stay of execution orders

on condition that the applicants jointly deposited the decretal sum in an interest earning account in the joint names of counsel for the parties within 30 days and that failure to comply with the order aforementioned, the respondent be at liberty to execute the impugned judgment.

4. It was their case that the parties' advocates' commenced negotiations on a mutually agreeable bank to have the funds deposited in which they agreed on Diamond Trust Bank Kenya Limited. That the appellants'/applicants' advocates via an email dated 21.08.2023 and 24.08.2023 informed the respondent's advocates that funds had been placed with them thus they dispatched the account opening forms to enable the process of opening the joint account. However, vide an email dated 24.08.2023, the respondent's advocates notified them that they could not access the documents on email and therefore sought to have the documents shipped from Nairobi to Garissa.

5. They deponed that having noted the error, they shared the documents afresh on 28.08.2023 but instead, via an email dated 29.08.2023, the respondents affirmed that they would proceed to execute against the appellants.

6. That given the endless game in opening the said account, the appellants filed an application dated 11.09.2023 wherein they sought for review of the court orders to enable them deposit the said money before the court. However, the matter was not listed and the counsel for the appellants /applicants later learnt that the directions issued by Mulwa J staying execution pending the hearing of the application before Onyiego J was not shared by the Milimani Registry. That upon further follow up with the court, counsel for the appellants'/applicants learnt that the said application dated 11.09.2023 had been called out and dismissed for want of prosecution.

7. Counsel beseeched this court urging that the court grants orders as prayed as the application herein was filed without delay.

8. Mr. Nyipolo, counsel for the respondent filed a replying affidavit sworn by the respondent on 12.10.2023 deponing that pursuant to the orders issued by Mulwa J on 13.09.2023, counsel for the respondent attended court while counsel for the appellants'/applicants' failed to turn up. That the application was thus dismissed for want of prosecution. It was urged that it was the responsibility for counsel to show up and argue his case as had been directed by the court.

9. The respondent contended that in as much as this court has wide inherent powers to ensure that justice is realized, the same ought not to be invoked without a good cause. That the appellants/applicants made their bed and so, they must lie on the same. Additionally, it was urged that should the court be gracious enough to allow the application for reinstatement, then the court should order the appellants/applicants to pay the respondent thrown away costs and the cost of the application herein.

10. The matter was argued orally whereby counsel for appellants /applicants reiterated the content of his application that he did not hear the matter called out. Further, by the time that he was allowed to join the meeting, the court had already dealt with and dismissed the matter. He urged this court to issue orders prayed as the respondent did not stand to suffer any prejudice.

11. Mr. Nyipolo viciously opposed the submissions by counsel for the appellants/applicants by arguing that the court should not allow the orders for reinstatement for the reason that the hearing date had been issued by the court and the same was within counsel's knowledge. That there was no good reason fronted by counsel for the appellants/applicants to make the Honourable Court reconsider its decisions. It was argued that the application was misconceived and aimed at delaying the respondent to realize the fruits of his judgment. That in the event the court allowed the application, then he be granted thrown away costs.

12. In a rejoinder, counsel for the appellants /applicants urged this court to reconsider its decision as by the time he logged into the virtual platform and by the time he was let in, it was noted that the court was handling criminal matters as per the cause list. That after the end of the call over, he was informed that the matter had already been called out and dismissed for want of prosecution. He contended that thrown away costs do not apply in applications and therefore, the suit be reinstated unconditionally.

13. I have considered the application herein, the response thereto, and the oral submissions by the parties. The sole issue for determination is whether the reinstatement orders sought herein should issue.

14. The orders sought in the application are discretionary in nature and the court has unfettered discretion to set aside an ex parte order where sufficient cause has been demonstrated. According to the Court of Appeal in the case of *CMC Holdings Ltd v James Mumo Nzioki* Civil Appeal No. 329 of 2001 [2004] eKLR, it was stated that this wide discretion of the court is intended to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. The test which courts have set to determine whether or not to set aside ex-parte orders is "whether sufficient cause has been shown".

15. 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 guilt of its own, the court will exercise its discretion in favour of the party. Order 12 Rule 7 *Civil Procedure Rules* (supra) provides thus:

> "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."

16. From the reading of the instant application, it is clear that the applicant herein sought for orders to set aside the orders made by the court on 29.09.2023 dismissing the application dated 11.09.2023 and that the suit be reinstated and heard on merits. The grounds in support of the said application were that the said orders were made when the suit came up for hearing and in the absence of the advocate on record for the appellants/applicants.

17. The jurisdiction of the court to review and set aside its decisions is wide and unfettered. In *Shah v Mbogo and Another* [1967] EA 116 the Court of Appeal of East Africa held that the discretion to set aside *ex parte* proceedings or decision is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error and the same is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. For a party to enjoy this discretion, he/ she must demonstrate a sufficient cause warranting setting aside of the ex-parte decision or proceedings. In *Wachira Karani v Bildad Wachira* [2016] eKLR Mativo J held that: -

> "Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause..."

18. In the instant case, the reason given by the applicant's advocate on record is that he inadvertently failed to attend the virtual court for the hearing of the said application after he was let in the meeting fairly late and by that time, the suit had been already called out and further dismissed.

19. There is no doubt, this 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.

20. This is further buttressed by Section 1A & 1B of the *Civil Procedure Act* which provides for overriding objectives of the Act which is to facilitate the just, expeditious resolution of disputes.

21. This court notes that there still lies before it a substantive appeal that is yet to be prosecuted and therefore, dismissing the application herein would be tantamount to denying the appellants/applicants an opportunity to be heard.

22. I have carefully considered the explanation given by counsel for non-attendance. He blames technology for his failure. Although there was no proof attached that he had tried to join at least 15 minutes to starting of court session as required by the requisite regulations governing virtual proceedings, I will give him a benefit of doubt in the interest of justice.

23. However, I need not overemphasize that counsel have a duty to court and to their clients and part of that duty is to exercise diligence in attending court sessions, whether physical or virtual. Logging in and logging out indiscriminately or logging late on the virtual platform is a risky behaviour that may lead to adverse consequences.

24. On the other hand, it is trite that courts exist to serve substantive justice for all parties to a dispute before it. The only time when such justice can be served is to have parties present their issues and be heard on merit rather than being condemned unheard. [See Article 50(1) of the *Constitution* of Kenya, 2010]. It therefore follows that every person ought not to be shut out from accessing court or having his day in court. [Also see *Phillip Chemwolo & Another v Augustine Kubede* (1982-88) KAR 103 at 1040].

25. Mr. Nyipolo urged that in the event that this court allows the application herein, then the respondent be granted thrown away costs. In opposing the same, Mr. Kithinji argued that thrown away costs do not apply in applications and therefore urged this court to disallow the same. Additionally, he argued that the judgment debtor did not demonstrate the prejudice, if any, which he stood to suffer if the application is not allowed.

26. I am in agreement with Mr Kithinji that throw away costs do not apply in respect of dismissed and reinstated applications.

27. The above notwithstanding, it is my considered opinion that the application herein is merited and that the respondent will not suffer any prejudice if the same is allowed. Accordingly, I hereby allow the instant application with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF JANUARY 2024

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J.N.ONYIEGO

JUDGE