Kimeu v Family Bank Limited & another (Civil Appeal 586 of 2018)
[2024] KEHC 1279 (KLR) (Civ) (16 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1279 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 586 OF 2018

AN ONGERI, J

FEBRUARY 16, 2024

BETWEEN

MARTIN KIMEU ..... APPELLANT

AND

FAMILY BANK LIMITED ..... 1ST RESPONDENT

CREDIT REFERENCE BUREAU ..... 2ND RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated 18/7/2023 seeking the following orders;

   i. Spent

   ii. Spent

   iii. That the honourable court be pleased review/vary, rescind and/or set aside its orders made on 30th June 2023 dismissing the applicant's appeal for want of prosecution and substitute the same with an order reinstating the appeal.

   iv. That the honourable court may be pleased to order that the appeal do proceed to hearing and determination on merit.

   v. That this honourable court do issue any other order that would deem fit to grant "suo moto" as to expeditious disposal of the application to meet the interest of justice.

   vi. That the cost of this application be in the cause.

2. The application is supported by supporting affidavit of Martin Kimeu in which he deposed that on 13/12/2018 he filed this appeal through his former advocates after being dissatisfied with the judgement of the subordinate court. The appeal was admitted on 25/10/2021 and his former advocates were to procure a hearing date. On many occasions he visited the chamber of his former advocates on record who informed him that a hearing date was yet to be issued by the court as the matter kept being mentioned so as to be allocated before a judge for hearing.

3. He deposed that later he sought counsel from his now advocates who perused the file and to his utter surprise they noted that the matter was dismissed for want of prosecution. It was also discovered that his former advocates had not been attending court even when the matter was listed for Notice to Show Cause.

4. He averred that he is very desirous of prosecuting this appeal and has instructed the advocates on record to file the present application for the appeal to be reinstated and heard on merit. The application herein was made expeditiously and without undue delay from the time he learnt of the factual proceedings of this matter. The mistake of counsel should not be visited upon an innocent litigant especially when a counsel fails to attend court and misadvises the client.

5. The 1st respondent filed replying affidavit by George Kithi dated 30/10/2023 in which they deposed that all parties counsel were present in court on 30/5/2022 and the next date of July 2022 was taken by mutual consent. Since the 20/7/2022 to its dismissal, neither the appellant nor his advocate appeared in court to prosecute their appeal despite being served with mention notices.

6. He averred that the Applicant in his Supporting Affidavit states that his Appeal was admitted on December, 2022 but he waited until July, 2023 to seek new counsel from the Advocates who are now on record for the Applicant. The Applicant waited approximately 8 months before seeking advice from other Advocates. The delay was inordinate as the applicant waited an extremely long time before seeking new counsel.

7. He averred that the applicant has not proven any error in principle, any new evidence that was not in his knowledge and any other sufficient reason that would warrant the grant of an Order for review. The Applicant has also not provided reasons why the Appeal should proceed to hearing. The instant Application only serves to shift the blame to the Applicant's former advocates even though the law demands that litigants must be diligent in expediting their cases. Litigants ought to be vigilant instead of abandoning their matters until such a point in time when it is already too late. Additionally, the 1st Respondent stands to suffer extreme prejudice if this Court exercises its judicial discretion in the Applicant's favour and reinstates the Appeal. Not to mention that this matter begun in the year 2012.

8. The parties filed written submissions as follows; the applicant submitted that he has every desire to prosecute his Appeal and it was only after the matter delayed in being heard that the Applicant sought to find out the status of the matter through his Advocates on record only to find out that the matter had just been dismissed for want of prosecution and immediately filed the present Application. The 1st Respondent shall not suffer any prejudice if the Appeal is heard on merit. On the other hand, the Applicant stands to suffer extreme prejudice if the Appeal is not heard.

9. The applicant submitted that the application was filed 18 days after the dismissal of the appeal and it was therefore filed without undue delay. That further the mistakes of his former advocates should not

be visited upon him. In support the applicant cited *Noah Misiko & 26 others v Registered Trustees of Christ the King Catholic Church Kibera & 2 others* [2015] eKLR, where the court held that;

> "The burden of proof to offer a satisfactory explanation for the delay in filing an appeal lies on the Applicant.... As stated by the Applicant this is a mistake of an advocate which should not be visited upon the litigant. This accordingly appears to be a case where the Application should be considered favourably subject, however to other relevant factors raised. The decision in the case of *Lucy Bosire v Kehancha Div Land Dispute Tribunal & 2 Others* [20131 eKLR where Odunga J stated as follows:
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> > "In this case the dispute revolves around land which is Very emotive subject in this country. Accordingly, such matters ought to be heard on merits as far as possible so that parties do not feel that they were driven out of the seat of justice without being afforded an opportunity of being heard. In this case the blame is placed at the door steps of the Applicant's advocates. It is true that where the justice of the case mandates, mistakes of advocates even if blunders should not be visited on the clients when the situation can be remedied by costs. It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined in its merits. See *Philip Keipto Chemwolo & Another v Augustine Kubende* [19861 KLR 492; (1982-88) 1 KAR 1036 at 1042; [1986-1989] EA 74."

10. The 1st respondent on the other hand submitted that according to the applicant the neglect by his former advocates was the main reason for not prosecuting his case. The 1st respondent argued that if the Applicant felt that his Advocates did not conduct themselves as per the Applicant's instruction and expectation, he ought to have at the very least reported the said advocates to the advocates commission for such unprofessionalism.

11. The 1st respondent submitted that the last court appearance was on 30/5/2022 and therefore the applicant waited approximately one year before seeking advice from new counsel. No valid reason whatsoever has been tendered for the delay. On the contrary, the Applicant leaves unexplained gaps and doubts on what he did for the years.

12. The 1st respondent submitted that the applicant has a duty to follow up on his case and he was intentionally negligent in observance of his duty and unreasonably delayed to take action. in support the 1st respondent cited *Beatrice Wambura Muriuki v National Police Service Commission* (Civil Application 106 of 2019) [2022] KECA 32 (KLR) (4 February 2022) (Ruling) the Court stated:

> "To my mind, the reason for delay proffered by the applicant is neither believable nor satisfactory. She blames her advocate for the delay yet she says she became aware of her advocate's error after four whole months. Considering that her career was at stake, I would expect her to be more vigilant in following up on the progress of her matter. Otherwise, it seems to me as though she gave instructions to her advocates and went to sleep only to discover the mistake when it was too late..."

13. The sole issue for determination in this application is whether the appeal should be reinstated for hearing.

14. The court has a discretion to reinstate the appeal under certain conditions.

15. There is no dispute that the appeal was dismissed due to the mistake of the former advocates for the appellant.

16. I find that it is not in the interest of justice to punish a party for the mistakes of his counsel.

17. I find that the 1st respondent will not suffer prejudice that cannot be compensated by an award of costs.

18. I reinstate the appeal on the following conditions;

    i. That the appellant pays the 1st respondent thrown away costs of kshs.20,000 before the appeal is heard.

    ii. That the record be served within 14 days.

    iii. That the appeal be and is hereby admitted for hearing before a single Judge.

    iv. That the same be prosecuted fully within 60 days of this date.

    v. That failure to fully prosecute this appeal within 60 days, the same to stand automatically dismissed at the expiry of 60 days from this date.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent