



Mutavi v Dennis (Sued as Mother and Next Friend of JKND) & another (Civil Appeal E056 of 2022) [2024] KEHC 1028 (KLR) (9 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1028 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E056 OF 2022
M THANDE, J
FEBRUARY 9, 2024**

BETWEEN

SAMMY MUTAVI APPELLANT

AND

WINFRED NDUNGE DENNIS (SUED AS MOTHER AND NEXT FRIEND OF JKND) 1ST RESPONDENT

KANYAMO CATHERINE 2ND RESPONDENT

RULING

1. Before this Court for determination is an Application dated 9.8.23 seeking:
 1. Spent.
 2. That the respondent be stopped from collecting rents and or evicting tenants in the suit property in Changamwe, Mombasa pending hearing of the suit and appeal.
 3. That this Court be pleased to set aside the order issued on 13th July 2023 dismissing the appellant/applicant appeal for want of prosecution and reinstate the same for hearing.
 4. That the costs of this application be provided for.
2. The grounds upon which the Application is premised are that following the dismissal of the appeal, the Respondent has already instructed agents to collect rent and evict tenants from the suit property. The Applicant averred that he only became aware of the dismissal on 4.8.23 when his tenants sent him a notice from his agent demanding rents and in default vacate the premises. He asserted that he has always been and is still ready to proceed with the appeal and stands to lose the suit property. He should not be made to suffer for failure of his advocate to attend court on 13.7.23.



3. The Application is opposed by the Respondents vide a replying affidavit sworn on 16.8.23 by the 1st Respondent. She averred that the Application is an abuse of the court process and should be dismissed with costs. The ruling in the lower court was delivered on 3.12.21, dismissing the objection by the Applicant. She proceeded and completed the execution process against the 2nd Respondent and the suit property was sold to the highest bidder, who took possession of the same. As such, the Application has been overtaken by events and there is nothing to stay. The Applicant is an agent of the 2nd Respondent and has filed numerous applications in conspiracy with her. If indeed he had a valid agreement with her, he ought to have sued her for refund of any money paid to her. Further that no explanation has been given as to why the Applicant's advocates did not attend Court on 13.7.23, yet he had been served. It was further averred that there is no appeal against the main suit but against the dismissal of the objection proceedings. The reinstatement of the appeal will therefore have no bearing on the lower court judgment. The entire appeal is incompetent and has no chance of success.
4. Parties filed their written submissions which I have duly considered.
5. The law relating to reinstatement of suits is found in Order 12 Rule 7 of the [Civil Procedure Rules](#), under which the Application is brought, which provides:

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.
6. The Orders sought by the Applicant are discretionary. The Applicant blames his counsel and pleads with the Court not to allow him to suffer for failure of counsel to attend court on 13.7.23. The Court however notes that no explanation was given by the Applicant, for the failure by counsel to attend Court. The Court recognizes that blunders will continue to be made from time to time and it does not follow that because a mistake has been made, that a party should suffer the penalty of not having his case heard on merit. (see [Phillip Chemwolo & Another v Augustine Kubede](#) [1982-88] KAR 103 at 1040). However, it has been stated again and again that while the mistake of counsel should not be visited upon his client, a case belongs to a party and not to the advocate. As such, it is not in every case that the mistake of counsel would warrant the setting aside of the orders of the Court.
7. The conduct of a party is key in any matter where the jurisdiction of the Court to exercise its discretionary powers is invoked. In [Moses Mwangi Kimari v Shammi Kanjirapparambil Thomas & 2 others](#) [2014] eKLR, Gikonyo, J. stated and I concur:

We should not only look at the delay of six months since the direction of 8th November, 2012, we should look also at the entire conduct of the Plaintiff; it is negligent and tinctured a don't-care attitude towards court orders. This is not unfair indictment of the Plaintiff; it is simply an atonement of serious disobedience of court orders which no serious court of law should countenance.
8. I have carefully looked at the record and note that the appeal was filed on 27.5.22. It was admitted on 24.8.22 and the Court directed that the record of appeal be served upon the Respondent. The matter was mentioned on 10.11.22 and in the presence of the Appellant's counsel, stood over to 6.3.23. On that day however, neither the Applicant nor his counsel was present. The Respondent's counsel informed the Court that he had not been served with the record of appeal. The matter was stood over to 8.6.23. On that day again, the Applicant and his counsel were absent. The next court date was 13.7.23 and yet again the Appellant and his counsel were not present. The Respondent's counsel told the Court he was yet to be served with the record of appeal. The Court noted that there was evidence of service and that the Applicant did not appear keen on prosecuting the appeal. The Court proceeded to dismiss



the appeal for want of prosecution. Interestingly, the Applicant had filed submissions on the appeal, although no directions were given to that effect.

9. The matter herein belongs to the Applicant and not his counsel. He was obligated to demonstrate due and reasonable diligence in the pursuit of his case, which he did not. The Court taking into account the indolence and general conduct of the Applicant herein ought not to exercise its discretion in his favour. In this regard, I fully concur with Kimaru, J. who when faced with a similar application in *Savings and Loans Limited v Susan Wanjiru Muritu* Nairobi (Milimani) HCCS No.397 of 2002 stated:

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... She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant.

10. The Applicant says he only became aware of the dismissal on 4.8.23 when his tenants sent him a notice from an agent demanding rents and in default vacate the premises. As a litigant, the Applicant had a duty to pursue the prosecution of his appeal which entails constantly checking with his advocate the progress. The Applicant has not told the Court what efforts he made in pursuing his appeal. He has also not told the Court why his advocate did not attend Court when the matter came up. After filing the appeal, the Applicant appears to have gone to slumber and left everything to his counsel. He was only awakened by the notice from the tenants.

11. I have considered the circumstances of the case and the general conduct of the Applicant herein this matter. With the foregoing history of the matter, there is every reason for the Court to decline the prayer for reinstatement of the appeal. I have however considered that the record of appeal is on record as well as the Applicant's submissions. In the wider interests of justice therefore, the appeal should be reinstated for hearing on merit. In this regard, I associate with Naikuni, J. who faced with a similar situation in the case of *Thathini Development Company Limited v Mombasa Water & Sewerage Company & another* [2022] eKLR, allowed the application on terms and stated:

23. I have no doubt in my mind that the application dated 13th September 2021 ought to be dismissed with costs to the Defendants/Respondents but nonetheless in the interest of Justice equity and conscience to have the Plaintiff/Applicant. First and foremost the following conditions.

- (a) That the Notice of Motion application dated 13th September, 2021 be and is hereby allowed but only upon fulfillment of these conditions.

12. I now turn to the prayer sought that the Respondent be stopped from collecting rents and or evicting tenants in the suit property in Changamwe, Mombasa, pending hearing and determination of the appeal. The record shows that in the ruling appealed against, the trial Magistrate dismissed the Applicant's objection to the sale of the suit property and directed that the attachment and execution of the same may proceed. The 1st Respondent stated that the execution process was completed and the suit property was sold to the highest bidder. The Applicant did not controvert this averment by way of a further affidavit. Further, although the Applicant claims in submissions that this Court had granted



stay of execution of the orders of 3.12.21, the record does not bear that out. Accordingly, I find no basis for granting this order. I need not say more lest I prejudice the appeal.

13. In the end and in view of the foregoing, the Court finds that the Application dated 9.8.23 partly succeeds and the following orders ensue:

1. The appeal is hereby reinstated for hearing on merit.
2. The costs of this Application shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 9TH DAY OF FEBRUARY 2024

M. THANDE

JUDGE

