Mwangi v Wanainchi Hauliers Knight Aviation Limited (Civil Appeal 64 of 2020) [2024] KEHC 906 (KLR) (6 February 2024) (Ruling)

Neutral citation: [2024] KEHC 906 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 64 OF 2020

DKN MAGARE, J

FEBRUARY 6, 2024

BETWEEN

RUTH WANGARE MWANGI ..... APPELLANT

AND

WANAINCHI HAULIERS KNIGHT AVIATION LIMITED ..... RESPONDENT

RULING

1. This is a Ruling on an Application seeking to set aside the Order of this Court dated 2nd August 2023 dismissing the Appeal for non attendance so that the Appeal is reinstated.
2. The Application is dated 22nd August 2023 and is supported by the Affidavit of Samuel Odhiambo, Advocate.
3. It is conceded that the Advocate was not in court when the matter was called out. Counsel deponed that he had the impression that the High Court Vacation had begun on 1st August 2023 and failed to join the virtual court session on 2nd August 2923.
4. It is also averred that no prejudice will be occasioned to the Respondent.
5. There is an Affidavit of service upon the Respondent. The Application is, however, not opposed.

Submissions

6. The Appellant filed submissions dated 7th December 2023. It is submitted that the reason of failure by counsel to attend court was plausible and explained.
7. It was submitted on the basis of the annexed High Court Vacation Notice that counsel honestly believed that the vacation had commenced on 1st August 2023 and the matter would therefore not proceed on 2nd August 2023.

8. I was urged to allow the Application.

Analysis

9. The setting aside under order 42 of the Civil Procedure Rules is typically a matter of discretion. Under Order 21 of the Civil Procedure Rules, the court has discretion to re-admit the APPEAL if it is shown that the Appellant has a sufficient cause for not appearing on the date slated for hearing. The same provides as doth: -

> " 21. Re-admission of appeal dismissed for default
>
> Where an appeal is dismissed under rule 20, the appellant may apply to the court to which such appeal is preferred for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the court shall re-admit the appeal on such terms as to costs or otherwise.

10. The Court's discretion has to be exercised judiciously, as was stated the case of Shah vs Mbogo (1979) EA 116 quoted with approval in the case of John Mukuha Mburu v Charles Mwenga Mburu [2019] eKLR:

> " .....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."

11. In the case of Wachira Karani v Bildad Wachira [2016] eKLR, the Supreme Court stated that:-

> " sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"
>
> The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. 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.

12. The Appellant has the primary obligation to prosecute the Appeal and the reason for the absence of counsel must be sufficiently explained. I say so because, parties have the obligation and duty to assist the court to adjudicate on the matters brought before it expeditiously as was held in Gideon Sitelu Konchella vs Daima Bank Limited (2013) eKLR where the court while citing the case of Mobil Kitale Service Limited vs Mobil Oil Kenya Limited, held that:-

> " It is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously ....the overriding objection of this Act and Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

13. I have perused the reasons given by Counsel. I also note that the Application was filed about 3 weeks after the dismissal Order. The Court of Appeal in England in Allen Vs. Sir Alfred Mc Alpine & Sons Ltd 1968 1 ALL ER 543 stated thus:

> " Where it was held that when the delay is prolonged and inexcusable and is such as to do grave injustice to the one side or the other or both, the court may in its discretion dismiss the action straightaway."

14. The delay of 3 weeks, in my view is not inordinate delay. It depicts the Appellant as a passionate litigant as counsel even posited that he checked the status of the matter on 3rd August 2023 after one day. Parties have the obligation and duty to assist the court to adjudicate on the matters brought before it expeditiously as was held in Gideon Sitelu Konchella vs Daima Bank Limited (2013) eKLR where the court while citing the case of Mobil Kitale Service Limited vs Mobil Oil Kenya Limited, held that:-

> "It is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously ....the overriding objection of this Act and Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

15. Moreover, the Respondent was duly served but chose not to attend Court or file a response the Application. I am unable to gauge any prejudice that may accrue to the Respondent if this Application is allowed or the Appeal reinstated. After all the Respondent will be heard in the main Appeal.

16. In my view, the prejudice that the Appellant would suffer if the Appeal were to remain dismissed exceeds the prejudice that the Respondent would stand to suffer if the Appeal were to be reinstated. In Harris Horn Senior, Harris Horn Junior vs. Vijay Morjaria Nyeri Civil Appeal No. 223 of 2007 the Court made observations therein inter alia as follows:

> (32) As for the need to do justice to the parties before it, we have no doubt that this is the core business of the Court. However, a court of law cannot ignore principles of substantive law or case law governing the particular aspect of justice sought from its seat. Its primary role is to ensure that the justice handed out is kept anchored on both the law and the facts of each case."

17. I am satisfied that the Appellant was prevented by sufficient cause from attending court, that he was not aware and in any case it was during the court vacation. He could not be expected to check the cause

list for high court. In the circumstances, I allow the Application dated 22nd August 2023 and give shall give directions for expeditious disposal of the Appeal.

18. As regards to costs, the same follow the event. The event in this case is reinstatement of an unopposed Appeal. In Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others Petition No. 4 of 2012; [2014] eKLR the supreme court stated as follows:

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation."
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> "[22] Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant."

19. In this matter, the respondent is not entitled to costs. Neither was the Appellant at complete fault. The order commending itself is that parties shall bear their own costs.

Determination

20. In the upshot, I make the following orders:

    i. Application dated 22nd August 2023 is allowed.

    ii. The Appeal is reinstated.

    iii. The Appeal shall be fixed for directions forthwith.

    iv. Each party shall bear their on costs.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 6TH DAY OF FEBRUARY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for the Appellant

Miss Owino for the Respondent

Court Assistant Brian