Gikuru v Orokise Sacco Society Limited (Civil Appeal 651 of 2017) [2024] KEHC 3230 (KLR) (Civ) (4 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3230 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 651 OF 2017

CW MEOLI, J

APRIL 4, 2024

BETWEEN

SAMUEL WAWERU GIKURU .... APPLICANT

AND

OROKISE SACCO SOCIETY LIMITED .... RESPONDENT

RULING

1. Samuel Waweru Gikuru (hereafter the Applicant) filed the Notice of Motion (the Motion) dated 18th February, 2023 seeking that :
    1. Spent.
    2. That this court be pleased to set aside or vary the order issued on the 17th day of March 2022 dismissing Civil Appeal No. 651 of 2017 Samuel Waweru Gikuru vs Orokise Sacco Society Limited for want of prosecution, and reinstate the appeal for hearing and determination on merit.
    3. That this Honourable Court be pleased to extend the orders given by the Co-operative Tribunal Nairobi on the 21st of November 2017 in CTC 456 of 2013 Orokise Sacco Society vs Samuel Waweru Gikuru.
    4. Spent.
    5. That pending hearing and determination of the reinstated appeal, this Honourable Court be pleased to grant stay of proceedings in Co-operative Tribunal Case No. 456 of 2013 Orokise Sacco Society Limited vs Samuel Waweru Gikuru
    6. That costs of and occasioned by this application be provided for. sic

2. The Motion which is expressed to have been brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* (CPA); Order 12, Rule 7 and Order 50 (5) of the Civil Procedure Rules (CPR); and Articles 50 (1) and 159 (1)(2) of *the Constitution*, and premised on the grounds on its face, as amplified in the supporting affidavit sworn by the Applicant.

3. Therein, the said Applicant stated that Orokise Sacco Society Limited (hereafter the Respondent) had filed Co-operative Tribunal Case No. 456 of 2013-Orokise Sacco Society v Samuel Waweru Gikuru (the claim) before the Co-operative Tribunal (the Tribunal) against him, seeking payment of outstanding sums in alleged loan arrears. The Applicant stated that the claim proceeded for hearing ex parte on 9th May, 2017. That subsequently, judgment was entered in favour of the Respondent and against the Applicant, in the sum of Kshs. 886,090/-. That the Applicant's advocates on record at the time applied to have the judgment set aside which application gave rise to a ruling delivered by the Tribunal on 21st November, 2017, the subject matter of his appeal herein.

4. Concerning the events leading up to the dismissal order made on 17th March 2022 the Applicant by his affidavit, faulted the firm of S.W. Ndegwa & Co. Advocates (the erstwhile advocates) then representing him for failing to attend court upon service of the notice to show cause (NTSC) and to offer him the necessary professional and efficient legal representation during the subsistence of the appeal. That the Applicant therefore instructed the firm of Gichuki King'ara & Co. Advocates (the current advocates) to take over the matter, during which time the dismissal order was discovered, hence the instant Motion.

5. It was the Applicant's averment that the Tribunal by its impugned ruling, made an order requiring him to deposit half the decretal amount while directing him to obtain a date from the registry for the defence hearing which orders the Applicant now urges the court to extend, to enable compliance on his part. It was his averment that unless the prayers in the instant Motion are granted, the Respondent is likely to proceed with execution of the decree arising out of the judgment delivered by the Tribunal, to his detriment.

6. The Respondent resisted the Motion through the replying affidavit sworn by its Chairperson, Joseph Kamau Gatheca, on 28th April, 2023. Therein, he deposed that the Motion is frivolous, vexatious and an abuse of the court process, and intended at hindering the Respondent from enjoying the fruits of its judgment. The deponent further stated that the execution process had commenced, and that despite being served with notices to show cause as to why execution should not be made against him, the Applicant neglected and/or failed to pay the decretal sum awarded by the Tribunal.

7. The deponent further averred that by its ruling, the Tribunal ordered the Applicant to deposit the sum of Kshs. 423,450/- within 30 days in order to be heard on his defence within the said 30 days, but that there was non-compliance on the part of the Applicant. It was his averment that the Applicant was at all material times represented by counsel who took no steps to ensure prosecution of the appeal, leading to its dismissal. That save for casting blame on the erstwhile advocates, the Applicant has not brought forth any other solid explanation for the delay in prosecuting the appeal prior to dismissal. Ultimately, the deponent faulted the Applicant's indolence for the delay in prosecuting the appeal, and he urged that the Motion be dismissed with costs.

8. The Motion was canvassed by way of written submissions. In urging the court to reinstate the appeal for prosecution, counsel for the Applicant reiterated the affidavit material blaming the erstwhile advocates for failing to follow up on the progress of the appeal, leading to its dismissal. In that respect, counsel anchored his submissions on the decisions in *Itute Ingu & Another v Isumael Mwakavi Mwendwa* [1994] eKLR and *Belinda Muras & 6 others v Amos Wainaina* [1978] KLR regarding

the general legal principle that mistake of an advocate should not bar the courts from exercising their discretion in favour of an innocent party. The counsel further cited the decision in *Shah v Mbogo & Another* [1967] EA 116 on the discretionary power of courts in setting aside ex parte judgments and/or orders where necessary, in order to serve the interests of justice.

9. Relating to the prayer for extension of the orders issued by the Tribunal in the impugned ruling, the Applicant's counsel while echoing earlier averments, asserted that faulted the erstwhile advocates for failing to comply with the orders of the Tribunal and instead lodging the appeal. And which they subsequently did not prosecute, all to the detriment of the Applicant. Counsel here citing the decision rendered in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Other*s [2014] eKLR on the principle of extension of time.

10. As concerns the order seeking to stay the proceedings before the Tribunal, pending the appeal, it was counsel's contention that unless the stay order sought is granted, the Applicant is apprehensive that the Respondent will move to execute the decree arising from the claim and yet, he is yet to be heard on his defence. For those reasons, the court was urged to equally grant the aforesaid order. The decision in *RWW v EKW* [2019] eKLR being cited on the applicable principles. In conclusion, the court was urged to allow the Motion as prayed.

11. On the part of the Respondent, its counsel cited the decisions rendered in *Cecilia Wanja Waweru vs Jackson Wainaina Muiruri & Another* (2014) eKLR and Habo Agencies Ltd vs Wilfred Odhiambo (2016) eKLR among others. In support of the submission that while it is a general legal principle that the mistake of an advocate should not be visited upon the client, it is not enough for the client to simply blame his or her advocate without tendering proof. That in the present case, the Applicant's indolence resulted in dismissal of the appeal and hence the Motion is an abuse of the court process in a bid to deny the Respondent the fruits of its judgment.

12. Secondly concerning the prayer for extension of the orders made pursuant to the impugned ruling, the Respondent's counsel contended that the High Court has no powers to extend orders not issued by itself. That in any event, the aforesaid ruling is the subject of the appeal. Lastly regarding the prayer seeking to stay proceedings, the Respondent's counsel submitted that the execution process having commenced, there are no subsisting proceedings capable of being stayed. Moreover, previous similar applications filed by the Applicant before the Tribunal seeking to stay execution had been dismissed.

13. In closing, counsel urged the court to consider the decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others* [2013] eKLR regarding the duty of the court to do substantive justice whilst simultaneously upholding the rules of procedure and fairness. In the end therefore, counsel contended that no sufficient cause has been shown by the Applicant to warrant the exercise of the court's discretion in his favour and the court ought to decline to grant the orders sought in the Motion.

14. The court has considered the rival affidavit material and the submissions filed in respect of the Motion. The prayers therein are three -fold. The court will begin with the foremost prayer which seeks the setting aside of the dismissal order made on 17th March, 2022 and reinstatement of the appeal. The outcome of the remaining prayers will depend on whether that prayer succeeds.

15. The grant or refusal to set aside or vary an order, judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, the discretion must be exercised judicially and justly.

The rationale for the discretion to set aside as conferred on the court was spelt out in the case of *Shah v Mbogo and Another* [1967] E.A 116:

> " The discretion to set aside an ex-part judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

16. Order 12, Rule 7 of the CPR which was cited in the Motion relates to the setting aside/varying of judgments/orders made in suits. The applicable provisions on the setting aside of a dismissal order and the reinstatement of an appeal as in the present case , are Order 42, Rule 35 of the CPR as read together with Section 3A of the CPA, the latter which reserves the inherent power of the court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court."

17. Concerning the latter provision, the Court of Appeal in *Rose Njoki King'au & Another v Shaba Trustees Limited & Another* [2018] eKLR stated that:

> " Also cited was Section 3A of the *Civil Procedure Act* which enshrines the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court. In *Equity Bank Ltd versus West Link Mbo Limited* [2013], eKLR, Musinga, JA stated inter alia, that, by "inherent power" it means that
>
> "Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from *the Constitution* or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion."

18. The Supreme Court in *Board of Governors, Moi High School Kabarak and another v Malcolm Bell* [2013] eKLR, added the following:

> " Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just." (sic)

19. Order 42, Rule 35 (supra) provides that:

    1. Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

    2. If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.

20. The events leading to the dismissal order of 17th March, 2022 are as follows. The Applicant filed the memorandum of appeal on 24th November, 2017. However, it is apparent from the record that no further progressive steps were taken in the appeal, resulting in issuance of a NTSC on 18th January,

2022 requiring the parties to attend court on 17th March, 2022 to show cause why the appeal should not to be dismissed for want of prosecution. When the NTSC came up for hearing on the scheduled date, only the Respondent's advocate was in attendance, and the appeal was consequently dismissed, pursuant to Order 42, Rule 35(2) (supra). The said dismissal order prompted the present Motion.

21. Upon considering the explanation by the Applicant to the effect that the erstwhile advocates were solely to blame for their inaction in the appeal and hence he should not be penalised for their mistake, the court takes the following view. While acknowledging that the mistake of an advocate should not be visited upon the client as a matter of general principle, this principle does not apply in a blanket sense. It is also trite law that a suit/appeal ultimately belongs to the litigant and not the advocate. Hence it is the litigant's duty to pursue or otherwise take proactive steps to ensure the timely prosecution of his or her claim.

22. The foregoing position was spelt out by the Court of Appeal in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR when it held thus:

> "It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."

23. Moreover, the Court of Appeal stated in the case of *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others* [2015] eKLR that :-

> "While mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude (in *Mwangi v Kariuki* [1999] LLR 2632 (CAK)) Shah, JA. ruled that "mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude." The import of this is that while the mistake of counsel is excusable, if it is accompanied by a litigant's carelessness and inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned."

24. In the present instance, the Applicant while heaping all the blame on his erstwhile advocates failed to demonstrate any attempts on his part at following up on the appeal with the said advocates; or to show the difficulties if any, experienced in reaching them. Furthermore, upon perusal of the record, the court observed that there had been an inordinate delay of over five (5) years between the date of lodging the appeal and the issuance of the dismissal order. The court further noted that there was a delay of close to one (1) year between the date of issuance of the dismissal order and the filing of the instant Motion.

25. The reasons for this delay have not been furnished beyond the bare assertion that the current advocates were the ones who discovered that the appeal had been dismissed. Hence the court is not satisfied that reasonable or sufficient explanation has been given for the prolonged delay in prosecuting the appeal, to warrant setting aside the dismissal order and reinstatement of the appeal.

26. In closing, it is well to add that the court is duty bound to further the overriding objective. As stated in *Osho Chemicals Ltd v Tabitha Wanjiru Mwaniki [201*8] eKLR the court bears the duty imposed

by Section 1B & 1A of the *Civil Procedure Act*, to further the overriding objective in Section 1 of the *Civil Procedure Act* which states:

> " 1A (1)the overriding objective of this Act and the rules made hereunder is to facilitate, the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act;
>
> (2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in sub-section (1);
>
> (3) A party to civil proceedings or an Advocate for such a party is under a duty to assist the court to further the overriding objective of the Act, and to that effect, to participate in the process of the court and to comply with the directions and orders of the court."

27. At a time when courts are deluged with heavy caseloads, they can ill afford litigants who evince the desire to litigate at leisure, and at the expense of adverse parties. Parties who demonstrate scant regard for the progress of their own cases cannot be allowed to indefinitely hold those they dragged to court, and the court itself at ransom. This appeal had lain dormant for five years at the time of dismissal. The filing of the record of appeal six years after the lodging of the appeal, and almost one and a half years since the dismissal order can only be described as too little, too late.

28. The upshot therefore is that the prayer seeking the setting aside of the dismissal order and reinstatement of the appeal (which is prayer 2 in the Motion) is without merit, and the remaining prayers in the Motion must equally fail. Accordingly, the Notice of Motion dated 18th February 2023 is hereby dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 4TH DAY OF APRIL 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: N/A

For the Respondent: Mr. Ambani

C/A: Erick