Kimondo & another v Progressive Credit Limited (Civil Appeal 49 of 2023) [2024] KEHC 3598 (KLR) (15 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3598 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 49 OF 2023

PN GICHOHI, J

APRIL 15, 2024

BETWEEN

PETER KINYUA KIMONDO ..... 1ST APPELLANT

SUSAN WANGUI GIKUNJU ..... 2ND APPELLANT

AND

PROGRESSIVE CREDIT LIMITED ..... RESPONDENT

RULING

1. The background of this ruling is that under a certificate of urgency, the Appellants/Applicants moved this Court by a Notice of Motion dated 20/03/2023 seeking orders that:-

    1. Spent

    2. Pending the hearing inter-pates, there be a stay of proceedings in Nakuru CMCC No. E033 of 2023.

    3. Pending hearing and determination of this Appeal, there be a stay of proceedings in Nakuru CMCC No. E033 of 2023.

    4. Pending hearing and determination of this Appeal, there be a stay of execution in Nakuru CMCC No. E033 of 2023.

2. The grounds thereof were that Nakuru CMCC No. E033 of 2023 was dismissed with costs and the Appellant was apprehensive that the Respondent may dispose off the motor vehicles KCG 524 L and KBZ 365 B as a result of which the Appellant would suffer irreparable loss and damage as he had not been given a chance to be heard.

3. Directions for that Application were given on 21/03/2023 that the Application be served for hearing inter-partes on 23/03/2023. On 23/03/2023, the Respondent was not present and that Application was adjourned to 08/05/2023 and with an order that it be served.

4. The Application was dismissed on 08/05/2023 at 10.24 am for non-attendance on the part of the Applicant. That dismissal order prompted the Appellants /Applicants to file the Application dated 08/05/2023 under a certificate of urgency seeking reinstalment of the Application dated 20/03/2023.

5. The grounds were that Counsel and the Appellant had attended Court virtually having logged in for this matter which was listed as No. 9 on the cause list, but though Counsel tried to address the Court upon the matter being called out, the Court did not acknowledge. That the Court proceeded to hear the Respondent's Advocate.

6. After Ten (10) minutes, Counsel and the Appellants rushed and attended the Court physically in order to address the Court. That the Court (T. Odera J) directed Counsel to approach the Court formerly which he did on the same day 08/05/2023 vide this Application justifying reinstatement of Application dated 20/03/2023.

7. The Court record shows that on 09/05/2023, the Judge certified the Application dated 08/05/2023 as urgent and directed it be served for inter-partes hearing on 21/06/2023. It was not heard, and by the time the parties appeared before this Court on 22/11/2023, T. Odera J, had already been transferred.

8. Parties agreed that the said application be canvassed by way of written submissions and that the Respondent file and serve the Replying Affidavit.

9. In reply, the Respondent filed an Affidavit Sworn on 09/02/2024 by Njuguna Matiri Advocate for the Respondent opposing the Application and seeking that it be dismissed on the ground that the Application is bad in law, an abuse of court process and/or else fundamentally flawed for reasons that the affidavit identifies the deponent as Samuel Kahiu Njuguna and in the jurat, the deponent is Peter Kinyua Kimondo.

10. Simultaneously with the Replying Affidavit, the Respondent filed his submissions on 09/02/2024. Emphasising on the contents of the Replying Affidavit, Counsel submitted that the Applicant completely failed to prove his attendance on 08/05/2023 and therefore the Court was justified in dismissing the Application. That the Respondent would further be prejudiced if the Application dated 20/03/2023 was reinstated.

11. He further submitted that in the unlikely event that the Court is inclined to grant the Application, then he urges that it be on condition that the Applicant pays to the Respondent punitive throw away costs of Kshs. 50,000/=. In support, he cites cases there cases among them being James Wanyoike & 2 others v CMC Motors Group Limited & 4 others [2015]eKLR where the Defendants were ordered to pay each of the three Plaintiffs a total of Kshs. 90,000/= as thrown away costs.

12. On his part, the Appellants/Applicants filed their submissions on 14/02/2024. Counsel emphasised the contents of the Application and apologised for mix up in the name. That the Application is supported by Affidavit of Peter Kinyua Kimondo. He urged the Court to treat the mix up as a technicality.

13. This Court has considered the Application dated 08/05/2023 , the affidavits , the submissions and the Court. The issues that come up are:-

    1. The Affidavit in support of the Application is incompetent.

2. Whether the Appellants and Counsel attended Court on 08/05/2023.

3. Whether the Respondent should be awarded thrown away costs sought.

14. On the first issue, there is no doubt that the face of the Application, the Applicants indicate that the Application is supported by Affidavit of Peter Kinyua Kimondo but the person making oath is indicated as Samuel Kahu Njuguna. The Court notes that at the end, it is indicated:-

> " Sworn at Nakuru this 8th day of May 2023
>
> By the said Peter Kinyua Kimondo ... at Nakuru this 8th day of May 2023"

15. That is clearly a mix up that can be excused as a technicality. The error cannot invalidate the Application that is clearly drawn and filed on the same day the impugned dismissal order was made, an indicator of the urgency with which Applicants handled the matter thus overlooking the details.

16. As earlier highlighted, the Court record shows that indeed the Certificate was forwarded to the Judge and dealt with on 09/05/2023. The explanation given by Counsel is satisfactory as far as it relates to the challenges encountered when he attended Court virtually. This Court takes judicial notice that at times, a party may try to address the Court but cannot be heard due to the technical hitch with the gadget he is using or with Teams itself.

17. This Court is called upon to do substantial justice in this matter and not to overly place weight on technicalities that do not go to the core of the real issue in controversy.

18. As regards thrown away costs, the authorities cited by the Respondent not relevant as the issues therein and circumstances therein were very different from what is before this Court. It is for those reasons that the Application dated 08/05/2023 allowed and in the following terms:-

    1. The Orders issued by this Court on 08/05/2023 dismissing the Application dated 20/03/2023 be and are hereby set aside.

    2. The Application dated 20/03/2023 be and is hereby reinstated for hearing on merits.

    3. The costs of this Application be in the cause.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 15TH DAY OF APRIL, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

N/A for Applicant

Ms Mbugua for Mr. Matiri for Respondent

Ruto, Court Assistant