Wanje (Suing as the Legal Representative of the Estate of the Late Eunice Samini Ngana) v T.S.S. Express Limited (Civil Appeal 91 of 2016) [2024] KEHC 3794 (KLR) (17 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3794 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 91 OF 2016

DKN MAGARE, J

APRIL 17, 2024

BETWEEN

JUSTINE WANJE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE EUNICE SAMINI NGANA) ..... APPELLANT

AND

T.S.S. EXPRESS LIMITED ..... RESPONDENT

RULING

1. This is a ruling from the application dated 1/11/2021. The court made a decision on 3/12/2020. Where, the court ordered that the suit should be stand dismissed within 120 days from 3/12/2020. The Lower court suit was dismissed on 30/6/2016 for want of prosecution.

2. The Applicant made an appeal from the order for dismissal. This court, Justice D O Chepkwony allowed the appeal, set aside dismissal and ordered that the suit in the lower court be prosecuted within 120 days. This marked the end of this Appeal.

3. The arena moved to the lower court. There was no Appeal to the Court of Appeal from the decision of Justice D O Chepkwony's orders.

4. The Applicant filed an application dated 1/11/2021 to set aside the orders given in a judgment for the suit to be reinstated for hearing. In their submissions they relied on the case of *Philip Keipto Chemwolo & Another v Augustine Kubende [1986] e*KLR, where the learned court of Appeal judges (Platt, Gachuhi & Apallo JJA) stated as doth: -

> " I think a distinguished equity judge has said:
>
> "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 determined on its merits."

> I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline. "

5. The Appellant stated that they were not aware of delivery of the Judgment. Their case was supported by the decision in the case of Ivita – vs – Kyumbu (1984) KLR 441 Chesoni J (as he then was) stated that the test as to whether a suit should be reinstated is whether there is delay that is prolonged and inexcusable and if justice will be done despite the delay.

6. They stated that there was no consent to have the judgment delivered online. They stated that the judgment was not pursuant to waiver of order 21 rule 1.

7. The respondent stated that parties are bound by the orders they seek in their pleadings. They rely on the case of Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR this Court adopted with approval a passage from Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The Common Law Library No.5) that: -

> " The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two- fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.Sir Jack Jacob in an article entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems and which article was quoted with approval by the Supreme Court of Malawi in Malawi Railways Limited v Nyasulu [1998] MWSC 3 states of the importance of pleadings:"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial." [Emphasis added]

8. They state that this matter was never dismissed. The matter in the lower court had been allowed to be prosecuted within 120 days.

Analysis

9. The order sought to be set aside was given by a court of co-ordinate jurisdiction. The Applicant was successful in the suit. If the Applicant was aggrieved by the decision, they should have Appealed. If it is true, that they had no notice then it was open for them to file an application to extend time to Appeal.

10. I cannot set aside the judgment on the court on basis that the court was wrong. The issues raised can be good for Appeal and not an application of this nature.

12. The appeal was concluded in favour of the Applicant. The applicant has not brought this matter as a review application. Even where there is review, there has to be parameters for review. Section 80 of the *Civil Procedure Act* states that:

> " Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit".

Section 63 (e) of the *Civil Procedure Act* states that:

"In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient.

12. Order 45 of the *Civil Procedure Rules* provides for Review and it states as follows:

"(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"

12. I associate myself with the reasoning of Kuloba J (as he then was) in Lakesteel Supplies vs. Dr. Badia and Anor Kisumu HCCC No. 191 of 1994 where he opined that:

"The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to

prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made."

12. There is nothing showing the court erred in any way. The applicant must in any case be aware that the court has an inherent jurisdiction to dismiss matters that are not prosecuted. In the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969) EA 696 the court stated as doth: -

> " In cases falling outside the specific provisions quoted above. Farrel, J., adopted this view. Dalton, J., in Saldanha's case purported to follow the decision of Windham m C.J. in Mulji v Jadavji, [1963] EA. 217, but all that case decided was that the courts inherent jurisdiction could not be invoked where an l alternative remedy had been available. In the instant case, it is clear that none of the specific provisions for dismissing suits applied to the suit the subject of this appeal. That being so, I do not see how the courts inherent jurisdiction can be said to be fettered, as no alternative remedy existed."

11. There is no reason the mater the court heard the parties and delivered a lawful judgment. The only remedy that was available is to apply and extend time within which to file an appeal or extend time from the 120 days. It is not to challenge a high court decision in the high court.

12. The Applicant was simply indolent and did not follow on the matter. I am not surprised that the matter is an appeal from order to dismiss a suit for want of prosecution. The lower court suit was properly dismissed the suit. The high court set conditions for reinstatement. There has been no appeal from that decision.

13. Finally, I agree with the Respondent that parties are bound by their pleadings. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018]* eKLR, A C Mrima stated as follows: -

> " It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
>
> ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
>
> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

14. The Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of *Raila Amolo Odinga & Another vs. IEBC & 2 others (2017)* eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

15. The order sought in the application dated 1/11/2021 cannot issue. The court is bound by doctrine of precedent. I cannot exercise appellate jurisdiction supervising a high court judge. Once the Judgement was delivered, the entire high court system became functus offficio. The narrow window for review was not met. Accordingly, the application dated 1/11/2021 lacks merit and is accordingly dismissed.

13. In the circumstances, I see no merit in the application dated 1/11/2021. I dismiss the same with cost of Kshs. 25,000/=. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014]* eKLR, 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, before, during, and subsequent to the actual process of litigation.... 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.

16. Costs follow the event. The Application is accordingly dismissed with costs.

Determination

17. The upshot of the foregoing is that I make the following orders: -

    a. The Application dated 1/11/2021 is dismissed with cost of Kshs. 25,000/=.

    b. The file is closed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA ON THIS 17TH DAY OF APRIL, 2024.

KIZITO MAGARE

JUDGE

In the presence of:-

Timamy & Company Advocates for the Appellant

Cootow & Associates Advocates for the Respondent

Court Assistant- Brian