



REPUBLIC OF KENYA



**Kosgey v Okal & 6 others (Civil Appeal E011 of 2023)
[2024] KEHC 5420 (KLR) (Civ) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5420 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E011 OF 2023

CW MEOLI, J

MAY 2, 2024

BETWEEN

JOSEPH KIPLIMO KOSGEY APPELLANT

AND

MICHAEL OTIENO OKAL 1ST RESPONDENT

ABIGAE AWINO WERE 2ND RESPONDENT

JOAN JEPCHIRCHIR 3RD RESPONDENT

JARDINE MWANYUMBA 4TH RESPONDENT

ROSELINE MUTHONI MUGO 5TH RESPONDENT

MOSES MUGO MWAI 6TH RESPONDENT

ABEDNEGO MUTUNGA KITILI 7TH RESPONDENT

RULING

1. Joseph Kiplimo Kosgey (hereafter the Applicant) brought the Notice of Motion dated 24th July, 2023 (hereafter the Motion) supported by the grounds laid out on its face and the facts stated in his affidavit. The applicant is seeking reinstatement of the application dated 13th March, 2023 (hereafter the application). The Motion is expressed to be brought under the provisions of Sections 1A and 3A of the *Civil Procedure Act* (CPA); Orders 45 and 51 of the *Civil Procedure Rules* (CPR); and Article 159 of the *Constitution of Kenya*, 2010.
2. In his supporting affidavit echoing the grounds, the Applicant stated that when the application came up for directions on 11th July, 2023 his advocate had instructed one Albert Seneti to hold his brief, as he was engaged in a separate matter in Kajiado High Court, namely Succession Cause No. 31 of



2019. The Applicant further stated that any inadvertence on the matter of the counsel who had been instructed to hold brief cannot therefore be visited upon him. In the circumstances, the Applicant urged the court to exercise its discretion by granting the order sought in the Motion, adding that he has since complied with orders earlier issued, directing him to deposit a sum of KShs. 500,000/- as security regarding the temporary stay of execution issued.
3. From a perusal of the record, the court observed that no response was filed to the Motion, which goes to show that it stands unopposed.
 4. Directions were given by the court, for the Motion to be canvassed by way of written submissions. Only the submissions filed on behalf of the Applicant were on record at the time of writing this ruling.
 5. Counsel for the Applicant in his submissions essentially reiterated the averments in the Motion and supporting affidavit, further arguing that the Motion being unopposed ought to be granted.
 6. The court has considered the affidavit material and the submissions filed in support of the Motion. In essence, the Applicant is seeking review of dismissal orders and the reinstatement of the application dismissed on 11th July, 2023.
 7. The events preceding the instant Motion are as follows. The Applicant filed the dismissed application, seeking to stay execution of the judgment delivered by the Co-operative Tribunal on 16th December, 2022 in Tribunal Case No. 458 of 2018, pending the present appeal. The record shows that when the application came before the court on 14th March, 2023 under a certificate of urgency, the court certified it urgent and directed that it be served for inter partes hearing on 3rd May, 2023. The court further granted a temporary stay order conditional upon the Applicant depositing into court a sum of KShs. 500,000/- by close of business on 14th April, 2023.
 8. When the parties appeared before the court on 3rd May, 2023 the application could not proceed and was rescheduled for 11th July, 2023. On the latter date, the court noted that Mr. Seneti who was holding brief for Mr. Obare for the Applicant, appeared not to have clear instructions on how to proceed with the matter. In the circumstances, the court issued orders for Mr. Obare to present himself later that morning at 10.30 a.m. Following failure by Mr. Obare to appear at the scheduled time, the court proceeded to dismiss the application. The said order prompted the instant Motion.
 9. Order 45 Rule 1 of the [CPR](#), invoked here by the Applicant echoes the provisions of Section 80 of the [Civil Procedure Act](#) Cap. 21 Laws of Kenya as follows:

“ 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.”
 10. The grounds upon which an application seeking to review can be made are :



- a. the discovery of new and important matter or evidence, or
 - b. some mistake or error apparent on the face of the record, or
 - c. any other sufficient reason.
11. The Supreme Court in the case of *Parliamentary Service Commission v Martin Nyaga Wambora & others* [2018] eKLR cited with approval the holding of the East Africa Court of Appeal in *Mbogo and Another v Shah* [1968] EA and stated that:
- “Consequently, drawing from the case law above, particularly *Mbogo and Another v Shah*, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:
- i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.
 - ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
 - iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
 - iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.
 - v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
 - vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
 - a. as a result, a wrong decision was arrived at; or
 - b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.”
12. It is clear from the foregoing that the exercise of review jurisdiction is discretionary. Resultantly, an applicant ought to tender sufficient and credible material to persuade the court to exercise its discretion in his or her favour.
13. The Applicant did not cite the grounds under Order 45 (*supra*) that the Motion was premised on. He alluded to the fact that the dismissal of the application resulted from a mistake/inadvertence on the part of the counsel who had been instructed to hold brief for his advocate, and hence such inadvertence should not be visited upon him.
14. It is apparent from the record that while the Applicant’s counsel had asked a colleague to hold his brief, the said colleague did not have adequate instructions in respect of the application. Moreover, the court The Applicant’s advocate, Mr. Obare, attended court at 10.30 a.m. instead of 10.00am on the material morning, after the application had already been dismissed. In the premises, the court is persuaded by the Applicant’s averments that this was a case of mistake of counsel. It is trite law that a party should not be made to suffer for the inadvertence of his advocate, as a general legal principle.



15. The Court of Appeal in the case of *CFC Stanbic Limited v John Maina Gitbaiga & another* [2013] eKLR held with regard to mistake of counsel that:

“On the issue of the mistake of counsel, it is not in dispute that the appellant gave instructions to its advocates in good time once it was served with the pleadings and summons to enter appearance. Therefore, the failure to enter appearance and file a defence is clearly attributable to its advocate who failed to enter appearance and file defence in good time. This being the mistake of counsel, the same ought not to be visited upon the appellant. This Court is guided by the case of *Lee G Muthoga v Habib Zurich Finance (k) Ltd & Another*, Civil Application No. Nai 236 of 2009, where this Court held:

“It’s a widely accepted principle of law that a litigant should not suffer because of his advocate’s oversight.” In the instant appeal, we are of the view that the appellant should not suffer because of the mistakes of its counsel.” ”

16. In view of all the foregoing circumstances, the court is inclined to exercise its discretion in favour of the Applicant. The court will therefore allow the Notice of Motion dated 24th July, 2023 as prayed. The reinstated Notice of Motion dated 13th March, 2023 will be heard on the date to issue immediately upon the delivery of this ruling. In the circumstances, there shall be no order on costs in respect to the Motion dated 24th July, 2023.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 2ND DAY OF MAY 2024.

C.MEOLI

JUDGE

In the presence of:-

Applicant: present in person (Counsel absent)

For the Respondents: Mr Okal in person

C/A: Erick

