Nyagaka v Onkoba (Civil Appeal E962 of 2022)
[2024] KEHC 5337 (KLR) (Civ) (2 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5337 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E962 OF 2022

REA OUGO, J

MAY 2, 2024

BETWEEN

ALFRED SAGINI NYAGAKA ..... APPELLANT

AND

JOHNSON NYARANG'O ONKOBA ..... RESPONDENT

(Being an appeal from the ruling of the Hon. Judith Omollo (SRM) Milimani Commercial Court delivered on 15/11/2022 in Milimani Small Claims Court No. E648 of 2021)

JUDGMENT

1. This appeal relates to the Memorandum of Appeal dated 21/11/2022. The appellant's application to have his suit reinstated at the lower court was dismissed and he has filed this appeal on the following grounds:

    1. The learned trial magistrate decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

    2. The learned trial magistrate erred both in law and in fact by failing to consider the circumstances within which the matter was dismissed.

    3. The learned magistrate erred both in law and in fact by dismissing the claimant's case when the matter was coming up for directions contrary to Order 12 Rule 1 of the *Civil Procedure Rules*.

    4. The learned magistrate erred both in law and in fact by dismissing the entire suit when there was an error on the face of the court record.

5. The learned magistrate erred in law and fact by failing to consider the reasons given by the appellant for failure to attend court on time.

6. The learned trial magistrate erred in law and fact in relying on extraneous circumstances which were not supported by the evidence on record, hence arriving at a wrong finding as regards the no attendance by the claimant's counsel.

7. That the learned trial magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision unstained in law.

2. The appellant seeks that the court set aside the ruling of the subordinate court and substitute it with an order reinstating the suit.

3. The appellant filed his submissions dated 31/4/2024. He submitted that the sole issue for determination is whether the appellant has established sufficient cause to set aside the ruling delivered on 15/11/2022. He submits that the lower court in its ruling made technical arguments and failed to give adequate reasons for denying the claimant's fundamental right to fair hearing. At page 33 of the record of appeal, in paragraph *4*, the lower court observed the cardinal principles that guide courts with the reinstatement of suits and further stated that it is a matter of judicial discretion and that it depends on the facts of each case. Were the claimant's evidence and exhibits considered and was the period between 28/7/2022 and 29/9/2022 inexcusable delay that justice cannot be done?

4. The appellant invited the court to the finding in *Price & Another v Hilder* (1984) where the Court of Appeal interfered with the judge's exercise of discretion where the judge took into account irrelevant factors in reaching its decision. It was submitted that the lower court exercised its discretion improperly by failing to appreciate the evidence and relevant matters before it. They also advanced that the respondent will suffer prejudice if the appeal is allowed. If the appeal is allowed it will accord both parties an opportunity for the issues in question to be determined on merit and breathing life and giving meaning to Articles 50 and 159 of the *Constitution*.

5. The respondent opposed the appeal. They argue that the chronological events that led to the dismissal of the suit suggest that the appellant was not keen to prosecute the matter and thus occasioned the delay. He relied on the case of *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another* (2014) eKLR where the court of appeal held that there is no set as to what constitutes inordinate delay and whether or not a party is guilty of inordinate delay depends on the circumstances of the case. The appellant's selective provision of a reason for missing court on 26/9/2022 while omitting an explanation for their absence on 28/7/2022 raises significant concerns regarding their commitment to prosecuting the case. They submit that reinstatement of a suit is at the discretion of the court which ought to be exercised judiciously. He cited the case of *Bilha Ngonyo Isaac v Kembu Farm Ltd & another* [2018] eKLR and *Mobile Kitale Service Station v Mobile Oil Kenya Limited & another* [2004] eKLR. According to the provisions of section 34 (1) of the *Small Claims Court Act* No. 2 of 2016, the appellant ought to have abided by the strict timelines of the honourable court for the suit to be determined within 60 days.

6. The respondent contends that it stands to be prejudiced by the reinstatement of the suit noting that the final prayers being sought by the appellant are not attainable. The suit is not meritorious and ought not to be reinstated. The respondent have a right to speedy resolution of a dispute pending before the court and that there should be an end to litigation.

Analysis And Determination

7. I have considered the grounds contained in the memorandum of appeal and the rival submissions by the parties. The appeal from the small claims court is on issues of law only. Section 38 of the *Small Claims Court* provides that:

> " -38. (1) A person aggrieved by the decision or an order Appeals. of the Court may appeal against that decision or order to the High Court on matters of law.
>
> (2) An appeal from any decision or order referred to in subsection (1) shall be final."

8. The appeal in question challenges the discretion of the adjudicator and it has been settled that the exercise of judicial discretion is a point of law. In the case of *Peter Gichuki King'ara Vs Iebc & 2 Others*, Nyeri Civil Appeal No. 31 Of 2013, (Court of Appeal) (Visram, Koome & Odek, JJA) of 13.02.2014, the Court of Appeal stated as follows:

> " It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanor – is an issue of law."

9. The only question before the court is whether the appellant has demonstrated that the trial magistrate abused its discretion when it failed to have the suit reinstated. Therefore, it is important to understand the chronology of events before the subordinate court. The appellant on 14/4/2022 made an application before the court for reinstatement of the suit because they recorded the wrong date for the hearing in their diary. The application was allowed. Thereafter, the matter was slated for mention for taking directions and the appellant was not present. The parties were thereafter served with a hearing notice and the appellant failed to attend the hearing prompting the court to dismiss the matter for want of prosecution on 26/9/2022. The court noted that there was no appearance for parties and that the suit had not been prosecuted after it was reinstated and therefore set aside the order reinstating the suit.

10. The appellant filed an application dated 26/9/2022 in which it sought an order that the ruling of the subordinate court dismissing the appellant's claim be set aside and that the court reinstate the suit. The appellant alleged that his counsel logged in but her call dropped and by the time she resolved her internet challenges, the matter had been called out and the suit dismissed. The applicant argued that the mistake of counsel should not be visited on an innocent litigant.

11. The trial magistrate in her ruling on the latter application held as follows:

> " The suit was filed on 15th November, 2021 1 year ago. The suit was dismissed for want of prosecution and the claimant made an application for reinstatement of the suit which the court allowed. The matter was fixed for mention for directions on 28/7/2021 where the claimant attended took the date. On 28th July, 2022 the claimant did not attend court and the court gave another mention date on 26th September 2022 and ordered the registry to notify the parties on the new mention date. The registry wrote an email to the parties informing

them on the new mention date on 26th September, 2022 when none of the parties attended and the suit was dismissed again. The claimant has explained that on 26th September they had technical internet problems, however the claimant has not explained the non-attendance on 28th July 2022. The court tried its best to have the claimant prosecute this suit and it be heard on merit however the claimant has been indolent. The Small Claims Court is a Court of Strict timelines where matters are supposed to be heard within 60 days from the date of filing."

12. The reason why the suit was dismissed was the non-attendance of the appellant on 26/9/2022 which was sufficiently explained by the appellant. The reason why the matter has hit a snag is due to the mistake of the appellant's counsel. First, on 29/3/2022 when the matter was before the court, the appellant's advocate entered the hearing date as 15/4/2022 as opposed to 13/4/2022 leading to their non-attendance on said date. Later, on 26/9/2022, the matter was similarly missed because the counsel for the appellant had technical issues with her internet. Madan, JA in *Murai v Wainaina* (No 4) [1982] KLR 38, quickly come to mind:

> " A mistake is a mistake. It is not a less mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."

13. The Court of Appeal in *Ngugi v Thogo* (Civil Application 372 of 2018) [2021] KECA 88 (KLR) (22 October 2021) (Ruling) factors to be considered by the court when dealing with reinstatement of an appeal dismissed for want of prosecution as follows:

    i. It is more just if litigation is brought to an end after all parties have been heard on merit and substantive justice administered.

    ii. The very Rules of the court that provide for timelines for the performance of an act under the said Rules are the same Rules of the court that allow the court to exercise its discretion and extend time within which to comply in the event of any noncompliance with any of those Rules.

    iii. Article 159 of the *Constitution* of Kenya, 2010 enjoins the court to administer substantive justice.

    iv. Sections 3A and 3B of the *Appellate Jurisdiction Act* through the overriding objective principle mandate the court to act justly and fairly.

    v. The overriding objective principle is not aimed at giving justice to one party at the expense of another but for ends of justice to be met to all the parties involved or stand to be affected by the matter.

    vi. In seeking the court's intervention upon default and or noncompliance with a procedural step in litigation before the court, demonstration of existence of a reasonable explanation for delay in the supporting documents is sufficient basis for the exercise of the court's discretion in favour of a deserving party.

vii. Consideration of the nature of the substratum of the litigation is also of paramount consideration in an application for extension of time within which to comply with the Rules.

viii. Article 50 coupled with Article 159 of the *Constitution* on the right to be heard and the need for a court of law to frown upon procedural technicalities in favour of substantive justice are meant to ensure substantive justice to all parties.

ix. In an application for reinstatement of a court process, there is need to balance the requirement as to whether reasonable grounds have been proferred for reinstatement and the prejudice to be suffered by the opposite party if such an order for reinstatement were to issue bearing in mind at the same time that dismissal is a draconian order that drives parties away from the seat of justice and should therefore be employed sparingly.

14. The appellant provided the court with a reasonable explanation why they were not in court and his application was filed without any delay. I also find that no prejudice would be occasioned to the respondent if the matter is heard to its logical conclusion. In the premises, I allow the appeal and set aside the order of 15/11/2022 dismissing the application dated 26/9/2022 and order that the same be and is hereby reinstated for hearing on merit before another judicial officer in the small claims court. The DR will remit the lower court file to the Judicial officer in charge of the small claims court for further directions on the hearing and disposal of the suit. The costs of the appeal and suit shall be in the cause.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT BUNGOMA THIS 2ND DAY OF MAY 2024.

R. OUGO

.....

JUDGE

I certify that this case is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Mr Ocharo Ongeri -For the Appellant

Miss Nyaboke H/B Mr. Mose -For the Respondent

Wilkister -C/A