SNW (Suing Through Her Next Friend and Father to DWT) v Gachichi (Civil Appeal E48 of 2018) [2024] KEHC 6651 (KLR) (14 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6651 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E48 OF 2018

DKN MAGARE, J

MAY 14, 2024

BETWEEN

SNW (SUING THROUGH HER NEXT FRIEND AND FATHER TO DWT) ..... APPELLANT

AND

ROBERT WAJOHI GACHICHI ..... RESPONDENT

JUDGMENT

1. This is an Appeal from the Ruling of Hon. W. Kagendo Chief Magistrate given on 3/8/2018 in Nyeri CMCC 874 of 2006.

2. The matter was filed on 6/12/2006. The mater never took off on 18/6/2009 the Plaintiff sought to transfer the matter to the High Court. He was given but the matter did not proceed for one reason or another on 19/5/2011 the Court was informed that the Plaintiff died on 29/1/2011. The plaintiff was given a last adjournment on 18/8/2011 for a full year the issue of substitution was dwelled on.

3. In 2017 there was an indication that there was no longer a moratorium against Invesco. A date was taken for 24/5/2015. On the next hearing date there was another indication that the mater involved United Insurance. Other dates were taken. Later after adjournments Defendant indicated that they had sought instruction in vain. The matter was placed aside. The court dismissed the suit with costs to the Respondent herein.

4. On 25/6/2018 barely a week later an application was filed. The court delivered its Ruling on 3/8/18. This is the ruling subject to of this Appeal.

5. The Appellant filed a 3 paragraph memorandum of Appeal: -

a. That the learned magistrate erred in law and fact in distending the appellant's evidence completely and therefore arriving at the wrong conclusion. A gross misjustice was therefore occasioned.

b. That the ruling of the learned magistrate was in complete disregard of the weight of the evidence adduced by the appellant.

c. That the learned magistrate clearly misdirected herself in law thus causing gross injustice to the appellant.

6. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

7. This was aptly stated in the case of Peters vs Sunday Post Limited [1958] EA 424 where, the court of Appeal therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

8. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

9. This being a first Appeal, I need to add that this is an appeal from exercise of discretion of the lower court. It does not matter that had I been sitting in that court, I could have reached a different conclusion. The question to lacks is whether the court fettered its discretion by;

a. Taking into consideration irrelevant factors.

b. Ignored relevant factors.

c. Was pliantly wrong.

10. The Application dated 22/6/2018 was made under order 12 Rule 7 which provides as follows:-

'Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.'

11. The main ground was that the appellant attended court on 6/3/2018 and was informed that that the court was not sitting. That the date was to be fixed but he was not informed. However, the suit was subsequently dismissed. It was their case that the suit ought not to have been dismissed.

12. The nature of the application is of the Review. The decision to dismiss was made on 25/6/2018. No new facts were paced before the court to show that status had changed. Review in a sense of the word is the same for this Application and under order 45 and section 80 of the *Civil Procedure Act*.

13. 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".
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> Section 63 (e) of the *Civil Procedure Act* states that:
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> "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—
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> (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."

14. The two grounds given are hyperbolic and self-destructing. It is either the suit was stayed or the Appellant did not attend court. It behooves parties to follow up their maters.

15. I do not find any error in the decision of the court. The amount and nature of excuses given for an entire decade is mind boggling. The court was correct in saving the matter from the ignominy of its lack of prosecution. In the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969) EA 696 the court stated as follows: -

> "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."

16. Consequently, the Appeal is not merited. The same is dismissed with costs. Section 27 of the *Civil Procedure Act* provides as follows in regard to costs.

> "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
>
> (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

17. 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.

18. Costs follow the event. The event in this case is the dismissal of the Appeal. Accordingly, I dismiss the Appeal with cost of 65,000/=. The file is closed.

Determination

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

    a. The appeal lacks merit and is accordingly dismissed with costs of 65,000/= payable within 30 days, in default execution do issue.

    b. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 14TH DAY OF MAY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Muhoho for the Respondent

No appearance for the Appellant

Court Assistant- Brian