Attorney General v Mohamed & another (Civil Appeal E113 of 2022) [2024] KEHC 8474 (KLR) (11 June 2024) (Ruling)

Neutral citation: [2024] KEHC 8474 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E113 OF 2022

DKN MAGARE, J

JUNE 11, 2024

BETWEEN

THE HON ATTORNEY GENERAL ..... APPELLANT

AND

ALI MUHUMED MOHAMED ..... 1ST RESPONDENT

SAID ABDALLA MBARAK ..... 2ND RESPONDENT

RULING

1. This is a Notice of Motion dated 19/2/2024 and amended Notice of Motion dated 24/4/2024 seeking to set aside the judgment delivered on 24/10/2023. The main ground is that the Respondent was not served.

2. The two applications are basically the same. I can see no difference except the supporting affidavit. The application sought the following: -

    a. Spent

    b. This Honourable court be pleased to set aside judgment delivered on 24/10/2023.

    c. The Appeal be heard afresh.

    d. N/a

3. According to the Respondent they were not served. The Applicant's advocate swore an affidavit stating that the court served though gikandiadvocates@yahoo.com instead of gikandiadvocate@yahoo.com The email sent to them bounced. That may be so. However, the matter proceeded. At the time there was CTS working. Any update on CTS automatically updates.

4. The respondent did not file documents but left to the court.

Analysis

5. This matter had proceeded for hearing after the court issued initial directions for hearing. In between the CTS was introduced in Mombasa. Further there is a General Notice issued through the cause list. The matter was cause listed both for 24/7/2023 and 24/10/2023.

6. The case had first been listed as per the CTS on 3/5/2024. The matter was listed for hearing on 24/7/2023. On the said hearing date the matter was fixed for judgment on 24/10/2023.

7. The respondents in the Appeal, who are the Applicants filed a notice of appointment on 25/9/2023. At the time of filing notice of appointment, though not necessary since the said advocates had acted for the said parties in the lower court. Definitely, even if the Applicants was not served, which is not the case, they must have seen the status on the CTS.

8. The CTS notifies parties once a date is allocated. It is therefore not necessary to deal with emails, which were issued ex abundanti cautela.

9. In setting aside the court has to find whether this was a regular judgment, in which case the Appellant must show that they are entitled to be heard. If it is irregular then the court can only set aside if there is a reason to set the same aside.

10. In the case of *Patel v E.A Cargo Handling Services Limited* (1974) E.A :-

> " The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on merits does not mean, in my view, a defence that must succeed. It means, as Sheridan J put it, "a triable issue" that is, an issue which raised a prima facie defence and which should go on trial for

11. Though this matter is not about a defence, the theme of regular judgment reigns.

12. The only question that the Applicants are raising are that submissions were not filed. Mwera, J (as he then was) in *Erastus Wade Opande vs. Kenya Revenue Authority & Another* Kisumu HCCA No. 46 of 2007 stated as follows: -

> " Submissions simply concretize and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."

13. In *Ngang'a & Another vs. Owiti & Another* [2008] 1KLR (EP) 749, the Court held that:

> " As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallize the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

14. In the case of *Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi* Nairobi HCCC No. 36 of 1993, the court stated as follows:

> " Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

15. The Court of Appeal in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

16. The Court of Appeal in *Avenue Car Hire & another v Slipha Wanjiru Muthegu* Civil Appeal No. 302 of 1997 held: -

> " "That no judgement can be based on written submissions and that such a judgement is a nullity since written submissions is not a mode of receiving evidence set out under Order 17 Rule 2 of the *Civil Procedure Rules* [now Order 18 rule 2 of the *Civil Procedure Rules*. (See *Kenya Alliance Insurance Co. Ltd v Thomas Ochieng Apopa* [2020] eKLR where the Court determined the position of submissions".

17. The next issue is whether there was proper service. Since service was though CTS and the Applicant even accessed the CTS and noted that the time he was filing a notice of appointment, there was judgment pending. The same was delivered on the due date.

18. I have also perused the cause list for both days, that is 24/7/2023 and 10/10/2023. The matter was listed together with other matters where the said advocates were also present. They did not participate. The cause list was equally sufficient. I find that proper service was effected. Further, I find as a fact that the said advocates had knowledge of the date independent of service. The respondent was represented by Ms. Gikandi & Co. advocates in the lower court. They were served with the record of appeal.

19. Further, there is nothing shown that will change if they are re-heard. Having been satisfied with service, I find no reason to dismiss the judgment. It appears that an email sent on 12/7/2023 was not delivered.

20. However, the CTS delivery was not questioned. The said firm was on record. The applicant does not disclose that they knew the status as at 25/4/2023. Knowledge of proceedings is key to this matter. Hon. Mr. Justice Lenaola, in *Kariuki & 2 Others vs. Minister For Gender, Sports, Culture & Social Services & 2 Others* [2004] 1 KLR 588 expressed himself as follows:

> " The instant matter is a cause of anxiety because of the increasing trend by Government Ministers to behave as if they are in competition with the courts as to who has more "muscle" in certain matters where their decisions have been questioned, in court! Courts unlike

politically minded minister are neither guided by political expediency, popularity gimmicks, chest-thumping nor competitive streaks. Courts are guided and are beholden to law and to law only! Where Ministers therefore by their actions step outside the boundaries of law, courts have the constitutional mandate to bring them back to track and that is all that the courts do. Judicial review orders would otherwise have no meaning in our laws..... Court orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to, move the court to discharge the same. To blatantly ignore it and expect that the court would turn its eye away, is to underestimate and belittle the purpose for which courts are set up..... If those who have knowledge of court orders and also have knowledge that the way to avoid those orders is to avoid personal service are sleeping well in the guise that by hiding behind the shield of muscle they can escape the long arm of the law, let this be a warning that they will not. The law is as applied by the courts studiously and unceasingly, will never sleep, and some day will catch up with those who flout the law and walk away unscathed."

21. The same delivery of judgment was only against communication by the court system. I do not fault. Accordingly, I dismiss the Notice of Motion dated 19/2/2024 and amended Notice of Motion dated 24/4/2024.

22. Given that no replying affidavit was served, each party shall bear their own costs.

Determination

23. I make the following orders: -

    a. Notice of Motion dated 19/2/2024 and amended Notice of Motion dated 24/4/2024 are dismissed with no order as to costs.

    b. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF JUNE, 2024.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for the Attorney General

Murage for for the Respondent

Court Assistant – Jedidah