Dodhia Motors Limited v Ntheka & another (Civil Appeal 19 of 2016) [2024] KEHC 6850 (KLR) (7 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6850 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 19 OF 2016

FR OLEL, J

JUNE 7, 2024

BETWEEN

DODHIA MOTORS LIMITED ..... APPELLANT

AND

CASTER MUMBUA NTHEKA ..... 1ST RESPONDENT

DESMOND MANDELA MUTINDA ..... 2ND RESPONDENT

RULING

A. Introduction

1. The Application before this court for determination is the notice of motion application dated 24.03.2023 brought pursuant to the provisions of section 1A, 1B, 3A of the *Civil Procedure Act*, Order 17 (2) of the *Civil Procedure Rules* and Article 47 of the *Constitution of Kenya* seeking the following orders;

    a. The Honourable Court be pleased to set aside and/or review the orders made on the 19th November 2021 dismissing the Appellant's Appeal and reinstate the same for hearing.

    b. That upon reinstatement, this Appeal be consolidated with HCCA No 188 of 2010 before the Honourable Court for determination.

    c. The Honourable court be pleased to make any other appropriate orders as meets the ends of justice in the circumstances of the case.

    d. That the costs of this Application be in the cause.

2. The Application is supported by a supporting affidavit of the Elizabeth K. Isika, Advocate dated 24th March, 2023 where she deposed that by some inadvertence, the notice to show cause to dismiss this appeal, was not placed before her by the concerned staff and the dismissal would cause hardship on the

Appellant because the Appeal herein arose from two cases; Machakos 1568 of 2010 and 1569 of 2010 which were part of a series arising from the same road Traffic accident. The other matters filed were Machakos PMCC No 1565, 1566, 1568, 1570, 1571, 1572, 1573, 1574, 1575 and 1576 all of 2010.

3. It was deposed that in Machakos PMCC 1570, 1572 and 1575 all of 2010, were decided in favour of the Appellant in the primary suit where interlocutory judgment was set aside. In Machakos PMCC 1571 and 1575 of 2010, the matters proceeded for full trial and were subsequently determined in favour of the Appellant, whereas Machakos PMCC 1572/2010 was still pending and had not been heard. The ruling in Machakos PMCC 1565, 1576 and 1570 all of 2010 were the subject of Machakos HCCA no 188 of 2015 which was due to come for mention of 20.04.2023 and since the issues for determination in the said appeal were the same, as the issues raised herein, the court's time would be saved if the said Appeals were determined jointly.

4. She further deponed that, the dismissal was due to an inadvertence and a genuine excusable mistake of the advocate, for which the Appellants should not be punished. It was worthy to note that the issues raised in the Appeal were weighty matters worth considering as it was confusing how the trial Magistrate would make different findings on the same issues raised in all the files, to wit; where in some files he set-aside the interlocutory judgment and in others he refused to set aside the said interlocutory Judgment.

5. This application was opposed by the Respondents who filed their grounds of opposition dated 17.05.2023. They averred that the said application was misconceived, frivolous, bad in law, was an afterthought and brought in bad faith. The said application had been brought after an inordinate delay and no good reason had been given to so explain the said delay. The respondent therefore urged court to proceed and dismiss the same.

B. Analysis & Determination

6. I have carefully considered the Application, the responses thereto and the submissions on record filed by both parties and find that the issues for determination is whether; the orders dated 19.11.2021 dismissing the Appeal should be set aside and have the Appeal reinstated for hearing.

7. The Court of Appeal in *Murtaza Hussein Bandali T/A Shimoni Enterprises v. P. A. Wills* [1991] KLR 469; [1988-92] held that the court has inherent power to restore a case for hearing after it has been dismissed. However, the decision whether or not to reinstate a dismissed appeal is no doubt an exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must be based on fixed principles and not on private opinions, sentiments sympathy, benevolence, arbitrarily, whimsically or capriciously but on deserving cases. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. See *Gharib Mohamed Gharib v. Zuleikha Mohamed Naaman* Civil Application No. Nai. 4 of 1999.

8. The circumstances under which a court sets aside its default orders were also set out in *Shah v. Mbogo* (1967) EA 166 in which the Court stated that:

> " this discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

9. It is now settled that wherever there is a delay, even for one day, there must be some explanation for it, otherwise an extension may not be granted. See *Kenya Ports Authority v. Silas Obengele* Civil

Application No. Nai. 297 of 2004; *Reliance Bank Limited (In Liquidation)*; *Grand ways & 2 Others v. Southern Bank Corporation Limited* Civil Application No. 118 of 2007; *Business and Economic Research Company Limited & 2 Others v. Jimba Credit Corporation Limited* Civil Application No. Nai. 281 of 2006.

10. Finally the above factors to be taken into account or consideration for the purpose of reinstatement of suits were also addressed in *Ivita v. Kyumbu* [1984] KLR 441 (Chesoni J), where the court stated:

> " The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

11. The reason for put forth by counsel for the appellant, while appears genuine is not convincing under the circumstances when the entire record of the Appeal file is considered. The Appeal was lodged on 30.02.2019 and no action whatsoever was taken by the Appellant to move court and ensure that the record of Appeal is filed on time and the Appeal heard on merit. The lower court records was received on 22.06.2018 and by the time the said Appeal was dismissed on 19.11.2021, the Appellant had not moved court in any manner. The court was therefore right in dismissing the said Appeal.

12. Secondly there has been two years delay in bringing this Application seeking to reinstate the Appeal. No reason whatsoever has been proffered as to why it took the Applicant so long to file this Application, and even if counsel mistakenly did not diarize the dismissal notice sent, unfortunately both counsel and the Appellant slept on their rights for over two years and have woken up too late when the horse has bolted and the door has been shut. It would be inappropriate to exercise discretion in the Appellants favour as that would obviously prejudice the respondent when the scales of justice are balanced. In the case of *Mobile Kitale Service Station v. Mobil Oil Kenya Limited & another* [2004] eKLR Warsame J held that:

> " I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/ or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders."

13. Also In the case of *Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd* [2018] eKLR, the Court held that:

> " It's an old adage that, justice delayed is justice denied and that justice is weighed on a scale that must balance. Therefore, as much as the Court is obligated to promote the provisions of Article 159(2)(d) of the *Constitution of Kenya*, 2010 and uphold substantive justice against

technicalities, the law must protect both the Applicant and the Judgment Creditor for justice to be seen to be done. Even then a mistake by a Counsel is not a technicality. In the same vein the provisions of Section 1A and 1B of the *Civil Procedure Act* obligates the parties to assist the Court in the expeditious disposal of cases."

14. Finally, the Appellant also urged the court to find in their favour based on Article 159 of the *constitution of Kenya*, and emphasized that it was of utmost importance and in the interest of substantive justice that the Appeal be heard on merit. Again, the court reiterates that substantive justice must be balanced in the interest of both parties. Also In *Raila Odinga v. I.E.B.C & others* (2013) eKLR, the Supreme Court further observed that:

> " Article 159(2) (d) of the *Constitution* simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court."

C. Disposition

15. The upshot is that the court finds that the Notice of Motion Application 24th March 2023 lacks merit and the same is dismissed with costs.

16. The costs are assessed at Kshs.20,000/=, with a stay of execution issued for 30 days from the date of this ruling.

17. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 7TH DAY OF JUNE, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 7TH DAY OF JUNE, 2024.

In the presence of:-

Ms Evalia for Appellant

Mr Mutinda for Respondent

Sam Court Assistant