Gachigua v Mihu & 2 others (Civil Appeal 422 of 2021)
[2024] KEHC 8658 (KLR) (Civ) (12 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8658 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 422 OF 2021

AC BETT, J

JULY 12, 2024

BETWEEN

CHARLES MUGANE GACHIGUA ..... APPELLANT

AND

DOUGLAS MAINA MIHU ..... 1ST RESPONDENT

CHARLES KARANJA ..... 2ND RESPONDENT

MARY WANJIRU MWANGI ..... 3RD RESPONDENT

(Being an appeal arising from the ruling, orders issued on 30th April 2020 by the Hon. D.O.Mbeja (Mr) Senior Resident Magistrate in CMCC 4152 Of 2017 in the Chief Magistrate's Court at Nairobi)

RULING

1. The appellant filed a memorandum of appeal dated July 14, 2021 in which he urged the court to set aside the Ruling dated April 30, 2020. The appeal was filed with leave of the court as it was filed out of time. The appellant lodged his record of appeal on June 7, 2023 after the court served a notice to show cause why the appeal should not be dismissed for want of prosecution.

2. On June 16, 2023, the appeal was admitted, and the appellant directed to file written submissions within 30th days with the Respondents being also granted 30 days to file their submissions. The matter was then fixed for mention on October 16, 2023 for the taking of a judgement date. The Deputy Registrar of the court was also directed to call for the original file which was yet to be forwarded by the lower court despite several reminders.

3. When the matter came up for mention as earlier scheduled by court, the appellant sought and was granted leave to file a supplementary record of appeal. The matter was then adjourned to October 30,

2023 on which date the respondent's advocate had filed his submissions but the appellant had not. Once more, the judge called for the original file to be availed. The appeal was fixed for mention for compliance on November 22, 2023 when the court was to give a judgement date.

4. On November 22, 2023, the appellant's advocate who had been present in court during the mentions on all the previous occasions was absent. The court proceeded and dismissed the appeal for want of prosecution. It is the dismissal of the appeal that gave rise to the current application.

5. By a notice of motion dated November 23, 2023, the appellant sought orders *inter alia*, that the court be pleased to review, vacate, vary and or set aside the orders issued on November 22, 2023 dismissing the appeal for want of prosecution. The application was supported by an affidavit sworn by Daniel Wokabi Mathenge, Advocate who stated that on the day the matter was mentioned, he was in virtual attendance having logged into court on time but lost power in his office immediately before the matter was called out and that by the time he secured an alternative internet connectivity and logged in, the appeal had already been dealt with and dismissed for want of prosecution. According to the appellant's advocate, he has been diligent in prosecuting the appeal and in fact he had complied with the orders of the court by filing and serving the supplementary record of appeal and his submissions. It was therefore the appellant's submissions that the appeal was dismissed through no fault of his own and he has therefore been denied the opportunity to be heard and his appeal determined on merit.

6. In response to the appellant's application, the 1st respondent swore an affidavit in which he urged this court to dismiss the application because no valid and reasonable ground had been advanced by the appellant for non-attendance and hence the application was filed with the sole intention of delaying the execution process. He also averred that the application is incompetent and an abuse of the process of the court.

7. When the application came up for mention, the appellant was granted leave to file a supplementary affidavit. The affidavit was sworn by the appellant who reiterated the averments earlier made by his advocate and emphasized that he stood to suffer loss despite being an innocent litigant who was keen on prosecuting his appeal.

8. Both parties filed written submissions as directed by the court after which the file was forwarded to me for the purpose of writing a ruling.

9. The appellant submits that the application to set aside the order of dismissal of the appeal should be allowed. He cites Article 159(2) (d) of *the Constitution*, Sections 1A, 1B, 3B, 63(e) and Section 80 of the *Civil Procedure Act*. He further relies on Order 12 rules 1, 3, 6, 7, and Order 45 rule 2 of the *Civil Procedure Rules*. Order 45 rule 2 provides: -

> " 2
>
> (1) An application for review of a decree or order of the court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.
>
> (2) Where the court is of the opinion that the application for review should be granted, it shall grant the same."

10. According to the appellant he had excusable mistakes for his failure to appear in court and prosecute the appeal. Technology failed his advocate. In any event, even if the court were to find that his Advocate

was at fault, he should not be punished for his Advocate's mistakes. The advocate submitted that he was not negligent in pursuing the appeal and the court ought to have exercised its discretion in favor of the appellant. He cited the case of *Joseph Gathungu Rugendo & Another v. Stanley Kabugi* [2014] eKLR where it was stated:

> " I have carefully considered the appellant's submissions and do agree with Mr. Igati Mwai that the appellant should not be punished for the mistakes of his counsel. Moreover, this court is inclined to grant the appellant the extension of time to file a supplementary record of appeal to enable the applicant to obtain substantial justice."

11. The appellant's advocate submits that failure by court to reinstate the appeal would drive the appellant out of the seat of justice as he would be condemned unheard. Additionally, the respondent would not suffer any injustice that cannot be compensated by costs.

12. The appellant further submitted that the court should not have dismissed the appeal during mention and that it is a cardinal rule of practice that no substantive orders can be made during a mention. In support of this, he relied on the case of *Republic v. Anti-counterfeit Agency & two others Ex-parte Surgipharm Limited* [2014] eKLR where the court held that:-

> " First and foremost, the matter was coming up for mention for directions rather than for hearing. It is trite law that on a day when a matter is fixed for mention the same ought not to be heard unless the parties' consent to the hearing. In *Central Bank of Kenya vs. Uhuru Highway Development Ltd. & 3 Others* Civil Appeal No 75 of 1998 the Court of Appeal held that where a matter is fixed for mention the judge has no business determining on that date, the substantive issues in the matter unless the parties so agree, and of course after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties."

13. The 1st respondent in turn submitted that the appellant is employing delaying tactics to deny the respondent the fruits of his judgement and that there were no sufficient reasons to compel the court to allow their application. Further, that since the court gave directions that the parties do file their written submissions within thirty days from October 16, 2023 the respondent was non-compliant with the orders of the court despite another extension on October 30, 2023. Up until November 22, 2023, the appellant had not filed his submissions. The respondent relied on the celebrated case of *Mbogo & Another v. Shah* (1968) EA 93 where the court held:

> " That while the court would exercise its discretion to avoid injustice or hardship resulting from inadvertence or excusable mistake or error, it would not assist a person who has deliberately sought to obstruct or delay the court of justice"

14. The respondent's submissions were that the appellant was in slumber and was woken up only by dismissal of his appeal. He further submitted that before the appeal is heard, directions should be taken as held in *Stephen v. Christine Khatiala Andika* [2019] eKLR and in fact the directions were taken severally in this instant but the appellant was not keen to proceed. He urged the court to dismiss the application.

15. Upon perusal of the file, I have established that whereas the appeal was filed in July 2021 and within a day of filing a request for the lower court record and judgement made, the same was only forwarded to this court on February 5, 2024 by which date the appeal had long been dismissed.

16. Although the appellant had filed a record of appeal on June 7, 2023, the record was incomplete and he was forced to seek leave to file a supplementary appeal. I have checked through the system. The appellant's advocate uploaded their submissions on November 2, 2023. However, the submissions were not paid for. In the circumstances such submissions cannot be deemed to have been filed. Therefore, at the time of dismissal of appeal, there were no submissions on record, either by inadvertence as deliberately.

17. The question before the court is whether the application has merit. In the case of *Wachira Karani -vs- Bildad Wachira* [2016] eKLR the Supreme Court defined sufficient cause as set out by the Supreme Court of India in the case of *Parial vs. Veena* where the court observed:-

> " 'sufficient cause' is an expression which has been used in a large number of statutes. The meaning of the word 'sufficient' is 'adequate' or 'enough', in as much as they be necessary to answer the purpose intended. Therefore, the word 'sufficient' embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances in a case duly examined from the view point of a reasonable standard of a curious man. In this context 'sufficient cause' means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting negligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously."

18. In applying the *Parimal vs. Veena case*, the court stated as follows:-

> " The court in the above case added that while deciding whether there is sufficient cause or not, the court must bear in mind the object of doing substantial justice to all parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated in the basis of the judgement before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of facts and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by sufficient cause."

19. In the instant case, the appeal was admitted on June 16, 2023. On admission, the Judge gave the following directions:-

> " 1. The appeal be and is hereby admitted for hearing before a single judge.
>
> 2. The Appellant to file and serve written submissions within 30 days this date.
>
> 3. The respondents to be served with notice to file their submissions within 30 days.
>
> 4. Mention on 16/10/2023 for a judgement date.
>
> 5. The DR to call for the original file."

20. From the record, the appellant has not been as diligent in pursuit of his suit as he claims. However, I am mindful of the fact that the blame for the inaction rests on his Advocate. Article 159 (2) of our revered constitution calls upon the courts to exercise judicial authority guided by the following principles:-

> " a) Justice shall be done to all, irrespective of status;
>
> b) Justice shall not be delayed;
>
> c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3);
>
> d) Justice shall be administered without undue regard to procedural technicalities, and
>
> e) The purpose and principles of this constitution shall be protected and promoted."

These provisions in the *Constitution* demand that a holistic approach be taken in considering and determining applications such as the instant one. All parties are equal under the law and as much as the appellant is entitled to be heard on merit, the respondent is equally entitled to an expeditious disposal of the case. Nevertheless, to dismiss the appellant's appeal at the stage it had reached would be to condemn him unheard for errors that were not of his own making.

21. In *Philip Kiptoo Chemwolo and Another -vs- Augustine Kubende* [1986] eKLR, the court stated that mistakes and blunders however grave should not stand on the way of parties being heard out on merit. The court stated as hereunder:-

> " I think a distinguished equity judge has said: "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on merits."
>
> "I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of discipline."

22. I have taken the Appellant's advocate's explanation for the failure to attend court on the date of mention into account. I have also taken into consideration the fact that this application was filed a day after the appeal was dismissed for want of prosecution. I have considered the question as to whether the court was right to dismiss the appeal on a mention date and in view of the directions taken earlier, I find that the court was not in error. However, I am persuaded that the events that led to the dismissal of the appeal were not of the appellant's own making. I am also inclined to believe the Appellant's advocate reasons for his failure to attend court on the material date. The two reasons constitute sufficient reasons to review and set aside the orders dated November 22, 2023.

23. Accordingly, I do hereby set aside the orders dismissing the appeal and reinstate the appeal on the following terms and conditions: -

a. The Appellant shall within 3 days from the date of ruling make payments for the submissions already lodged in court.

b. The Appellant shall pay the Respondent costs of ksh.50,000/=.

c. The matter shall be mentioned on July 25, 2024 before the Deputy Registrar for directions.

24. These are the orders of the court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 12TH DAY OF JULY, 2024.

A. C. BETT

JUDGE

In the presence of:

Mr. Mathenge for the appellant

Ms. Adhiambo for the respondent

Court Assistant: Polycap Mukabwa