



REPUBLIC OF KENYA



KENYA LAW
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**Kisuna v Mbugua & another (Civil Appeal 588 of 2019)
[2024] KEHC 8244 (KLR) (10 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8244 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL 588 OF 2019
DKN MAGARE, J
JULY 10, 2024**

BETWEEN

PRISILA KANINI KISUNA APPELLANT

AND

G. K. MBUGUA 1ST RESPONDENT

KETAH OMARE 2ND RESPONDENT

*(Being an appeal from the Ruling of Hon. P. Muholi (SRM) in
Nairobi CMCC No. 12879 of 2006, delivered on 2nd October, 2019)*

JUDGMENT

1. This is an appeal from the Ruling and order of the Hon. P. Muholi delivered on 2/10/2019 in Nairobi CMCC 12879 of 2006. The Appellant was the Plaintiff/Applicant.
2. The Appellant set forth the following grounds of appeal:-
 - a. That the learned magistrate erred in fact and in law in refusing to review its ruling delivered on 28/10/2018 dismissing the suit for want of prosecution.
 - b. That the learned trial magistrate erred in law and fact in not taking into account the Appellant's attached affidavit explaining the Appellant's plight and delay.
3. The Appellant filed a Record of Appeal and a Supplementary Record of Appeal on 17/3/2023.
4. The matter proceeded for directions to be heard before one Judge. On 4/3/2024 the Presiding Judge Civil Division directed that the matter be heard before my court during the Service Week. Parties filed submissions. They appeared before me on 11/4/2024 when I gave them today's date for judgment.



Appellant's Submissions

5. The Appellant filed submissions dated 10/8/2023. They stated that the Appellant sought damages for an accident on 9/11/2006. They stated that the appellant was not satisfied thus applied for review. They relied on *John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR where the F. GIKONYO J posited as hereunder: -

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of *the Constitution*. Article 50 coupled with article 159 of *the Constitution* on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such act are comparable only to the proverbial “Sword of the Dancles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”

6. They further buttressed their position with the case of *Martha Kagiria Gitonga v Kenya Wildlife Service & another* [2021] eKLR, where J. K. Serگون J, stated as follows: -

“ 14) I am satisfied that the learned Senior Resident Magistrate merely paid lip service to the arguments put forward by the appellant in support of the motion dated 30th April 2019. Had he seriously considered the aforesaid grounds he would have come to the conclusion that the appellant’s motion dated 30th April 2019 was meritorious.”

Respondent's Submissions

7. The Respondent submitted one issue for determination, that is whether the court erred in dismissing the application for review. They stated that there must be:-

- i. Some mistake
- ii. Error apparent
- iii. Other sufficient reason

8. They relied on *Republic –Vs- Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR. In that case, the court stated, and I fully agree that: -

“ 8. The term “mistake or error apparent” by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules



and Section 80 of the Act. To put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.

9. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it. In the instant case therefore, I am not convinced that there is an error apparent on the face of the record. What the applicant is raising requires examination and argument. He argues that he was not supplied with a copy of the judgment. The Respondent's position is different. Its position is that the applicant was personally present in court when the judgment was delivered. It also states that the applicant was supplied with a copy of the judgement. The Respondent denies that the judgement was delivered to the applicant's office as he alleges. It is common ground that the judgment was annexed to the Respondent's Replying Affidavit. The applicant also states that the judgment was signed by a different panel other than the panel that heard the case. The Respondent's explanation to this allegation (which is supported by the record) is that the panel, which heard the case, prepared the judgment. However, a different panel on its behalf delivered it."
10. They stated that the moratorium was in regard to payment to its creditors but the Appellant was neither a policy holder nor a creditor. In their submissions dated 5/12/2023, they beseeched the court to dismiss the appeal.

Background

11. The Appellant filed suit on 16/11/2006 claiming damages for cut wound on the upper lip and loosening of three upper incisor teeth. The suit has not been prosecuted to date. A police abstract on the file shows that the suit motor vehicle was insured by Standard Assurance Co. Ltd.
12. The Respondent entered appearance by 5/12/2006 and filed defence on 7/12/2006. The matter was first in court on 9/3/2009 but the matter did not proceed as the court disqualified itself. The matter was next in court on 18/8/2009. It was stated to be stood over generally as the High Court had stayed the matter.
13. Subsequently the matter was fixed for hearing on 19/7/2010. The matter was stood over generally as this was a Standard Insurance matter. Next the parties took out the matter as the matter was a Standard Insurance Matter. This was the position on 31/1/2013.
14. However the matter came for hearing on 27/11/2018. The plaintiff requested if they could have time to confirm whether the moratorium is in place. The court dismissed the suit. This was because there was no logical relationship. The Respondent then made an application for review from the decision. The court stated that it cannot sit on appeal.

Analysis

15. There is a tendency to eschew a higher court with catastrophic consequences. The Ruling given on 28/11/2018 was on shaky grounds. However it was not appealed. The merit or otherwise of that decision is not in contention. It is true that there was a moratorium at some stage. However, the court, overruled a moratorium as a reasonable cause for not prosecuting this suit. The best option available was to appeal to this court.



16. The Appellate court could have ruled whether there was a reason for delay. If this court had been sitting, it could have ruled otherwise. However, it was Honourable the learned magistrate who was sitting. He exercised his discretion. No appeal was preferred from the decision of that court. They preferred a Review on the same facts. Had they appealed, a question of whether a moratorium was a ground could have surfaced. We now have a different issue, whether there is a new issue.

17. 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”.

Section 63 (e) of the *Civil Procedure Act* states that:

“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

18. Order 45 of the Civil Procedure Rules provides for Review and it states as follows:

“(1) Any person considering himself aggrieved—

- (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”

19. 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.”

20. In the case of *Danson K Cheboi & 5 others v Chesang Kiptalai & 10 others* [2021] eKLR, Justice Kibjunja stated as doth; -

7. I have considered the grounds on the application, the affidavit evidence, the submissions by the learned counsel, the superior courts decisions cited, the record and come to the following findings;

a. That Section 80 of the *Civil Procedure Act*, Chapter 21 of Laws of Kenya, and Order 45 of the Civil Procedure Rules provide the jurisdiction and the scope of orders of review. That section 80 of the *Civil Procedure Act* provides as follows:

“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.”

That in the case of *Richard Francis Malelu v Odhiambo Asher & Another* [2020] eKLR, the court made the following observation regarding the contents of Section 80 of the Civil Procedure Rules:

“It is clear that section 80 of the *Civil Procedure Act*, unlike the provisions of Order 45 aforesaid, does not prescribe the conditions upon which an application for review may be granted. In the case of *Official Receiver and Provisional Liquidator Nyayo Bus Service Corporation vs. Firestone EA (1969) Limited Civil Appeal No. 172 of 1998*, the Court of Appeal held that section 80 of the *Civil Procedure Act* enables a court to make such orders on review application which it thinks just so that the words “or any sufficient reason” as used in Order 44 Rule 1 of the Civil Procedure Rules are not ejusdem generis with the words “discovery of new and important matter” etc. and “some mistake or error apparent on the face of the record” and that those words extend the scope of the review. Accordingly, the said court held that there is no reason why “any other sufficient reason” need be analogous with the other grounds in the Order because clearly section 80 of the *Civil Procedure Act* confers an unfettered right to apply for review.”

21. There is no new ground. Having gone the review mode they look away from court, the power of this court to decide the decision on merit. In the circumstances, the Appeal lacks merit and is accordingly dismissed.

22. Having perused the file, I note that other than their failure to appeal, they had a good case. In the circumstances I shall decline to award them costs.



23. 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.

24. Each party shall bear its costs.

Determination

25. Accordingly, I make the following orders: -

- a. There is no merit in the Appeal and as such the same is dismissed with no order as to costs.
- b. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 10TH DAY OF JULY, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

Represented By:

L.W. Wang’ombe & Co. Advocates for the Appellant

Modi & Co. Advocates for the Respondents

Court Assistant - Jedidah

