Kariuki (Suing for the personal representative of the Estate of Stephen Ngige Njoroge) v Benjo Kenya Limited (Civil Appeal 124 of 2023) [2024] KEHC 14686 (KLR) (9 August 2024) (Ruling)

Neutral citation: [2024] KEHC 14686 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL 124 OF 2023

TW OUYA, J

AUGUST 9, 2024

BETWEEN

NETTAN NYAMBURA KARIUKI (SUING FOR THE PERSONAL REPRESENTATIVE OF THE ESTATE OF STEPHEN NGIGE NJOROGE) ..... APPELLANT

AND

BENJO KENYA LIMITED ..... RESPONDENT

(Being an Appeal from the Ruling and of the Chief Magistrates Court of Kenya at Thika (Hon. N.M Kyanya – Nyamori (R.M) delivered on the 26th June 2019)

RULING

Background

1. This is an Appeal against Ruling of the Chief Magistrates Court of Kenya at Thika (Hon. Nyamori (R.M) delivered on the 26th June 2019 dismissing an application for reinstatement of a suit THIKA CMCC No. 828 of 2012 which had been dismissed by the same court on 28 February 2018.
2. The Appellant filed a Memorandum of Appeal on the following grounds:
    i. Spent
    ii. Spent
    iii. Spent.
    iv. The Learned Magistrate erred in law and in fact by failing to take note that the suit was initially dismissed by an error of the court when the court served the dismissal notice upon another advocate and advocate for the plaintiff.

v. The Learned Magistrate erred in law and in fact by failing to consider the suit was then dismissed by an error of the advocate and the plaintiff yet the mistake of an advocate should not be occasioned upon an innocent litigant.

vi. The Learned Magistrate erred in law and in fact in failing to accord the plaintiff the right to be heard and a palace in the judgment table.

3. The Appellant prays that this appeal be allowed and the orders of the Hon. Magistrate made on 26th June 2019 be varied and/or set aside and the suit be reinstated.

Submissions

4. The parties have filed submissions and made oral highlights of the same for consideration by this court. It is the Appellant's case that the dismissal of the initial suit on the 28th February 2018 was by error of the court having served the hearing notice on the wrong firm of advocates other than the Appellant's firm of Advocates.

5. Regarding the second dismissal on 28th February 2018 which is the subject of this Appeal, the Appellant argues that the error/mistake was occasioned by the Appellant's Advocate and not the Appellant himself. He argues that it is trite law that the mistake of the advocate should not be visited upon the litigants. The Appellant argues further that by dismissing the Appellants Application, the court denied the Appellant a chance to be heard and a place in the judgement table.

6. The Appellants Application dated 7th June 2018 was based on the grounds that the Notice to show cause for 21st February 2018 was served on the wrong firm of Advocates to wit, Shem Kebongo and Company Advocates as opposed to Karanja Kanyiri and Company Advocates. That on 21st February,2018 the matter was adjourned to 28th February 2018 when it was mentioned and dismissed. That the Advocates on record were never served with the mention notice for the matter and as such the failure was not occasioned by the firm of Advocates on record for the Appellant. On 28 February 2018 when the matter was dismissed neither counsel for the Appellant, Karanja Kang'iri nor for the Respondent Kairu and McCourt were present in court. There is no indication that the two firms were ever served with the mention notice.

7. The Appellant has cited order 12 Rule 7 at paragraph *9*

> " where under this Order judgement has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgement or order upon such terms as may be just."

8. The Appellant raises issue as to whether the mistake of an advocate should be visited on the litigant... After the suit was dismissed the advocate filed an application for reinstatement dated 7th June, 2018 and hearing was fixed for hearing/mention on 5th September 2018. The Appellant states that this particular date was not diarized by error on the part of the Advocate.

9. The Appellant urges the court to find that the appeal is merited and afford the Appellant an opportunity to be heard by reinstating the suit in the lower court. He also demonstrates keenness on prosecuting the matter as it had been set down for hearing after it was stood down on 24th November 2014. He states that what is at stake for the Appellant high in the event that the instant prayers are not granted and adds that the Respondent will not be prejudiced in any way.

10. The Respondent on the other hand, opposes the application and argues that the appellant's case was dismissed for non-attendance and that the Appellant has not demonstrated keenness on prosecuting the matter.

Issues For Determination

11. I have read and considered pleadings and submissions by both parties and appreciate the following to be the issues for determination:

    i. Whether the Application is merited in law

    ii. Whether the explanation provided is justifiable

    iii. Whether the Respondent stands to suffer prejudice, loss or injustice

Analysis

12. The Appellant has narrated two scenarios and circumstances leading to dismissal of the main suit on 28th February 2018 and of the application for reinstatement on 5th September 2018. Regarding the main suit, it was dismissed for non-attendance by both parties. The Appellant has explained that their absence was occasioned by the error of the court whereby the wrong firms of Advocates were served with the hearing notice. I will not dwell on this aspect since it is not contested by the parties save for observing that dismissal of a main suit is a serious measure and should only be taken as a last resort after confirming reasons for non- attendance by the parties.

13. The Appellant's Application for reinstatement of the main suit dated 7th June,2018 was slated for hearing on 5th September,2018. However, on the said date the Appellant's advocate did not attend court and the matter was dismissed. The advocate's explanation is that he did not diarize the date by error. Following the dismissal, the Advocate again moved to court on 24th January,2019 with an application to reinstate the matter and this was also dismissed vide ruling dated 26th June 2019 leading to the instant appeal.

14. The Appellant relies on several authorities one of them being Waitathu Clan (Suing through John Mwangi Njagua & Peter Thun Njoroge) v Kimonjo Family Company & Partners Ltd& 3 Others (ELC 46 of 2020) (2024) KELC1440 (KLR)In which the court stated that:

> " In an application for reinstatement, the Court should also consider whether there would be hardship or injustice occasioned to any of the parties. The case of Mbogo & Another v Shah EALR 1908 which goes further to establish that a court's discretion to set aside an ex-parte judgement or order, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error, but not to assist a person who deliberately seeks to obstruct or delay the course of justice."

15. The Respondent holds the position that the Appellant has not demonstrated any good reason why the court should exercise its discretion to reinstate the matter and that equity does not aid the indolent. He has quoted among others, the authority of Bilha Ngonyo Isacc v. Kembu Farm & Another (2018) eKLR where it was held inter alia that:

> " ...a court should desist from allowing parties to have joy rides over their cases to the prejudice of other parties including the courts."

16. I have considered both views and arguments in line with the available authorities on the subject matter, being the reinstatement of suits dismissed for various reasons. In the case of Catherine Kivai v Earnest Kivai & 5 Others (Kakamega) HCCCA No. 20 Of 2018 the Court observed that:

> " The constitutional underpinnings on conclusion of matters in a timely manner is contained in Article 159 of *the Constitution*, which provides as follows:
>
> "Judicial authority
>
> (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
>
> (2) In exercising judicial authority, the courts and tribunals shall be 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.....

17. The Court observed further that it is the duty of the court, litigants, as well as advocates, to ensure that matters are concluded expeditiously without inexcusable delay. Sections 1A and IB, of the *Civil Procedure Act*, Cap 21, Laws of Kenya, are relevant, with regard to this and they state as follows:

> "1A. Objective of Act
>
> (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
>
> (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
>
> (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.
>
> 1B. Duty of Court
>
> (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
>
> (a) the just determination of the proceedings;
>
> (b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology."

18. The court emphasized that Section 3A of the *Civil Procedure Act* gives the court wide discretion over matters and issues that are before it, including the question as to whether it should or should not reinstate a suit dismissed on account of unreasonable delay on the part of the parties to prosecute it. Section 3A reads:

"3A. Saving of inherent powers of court. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

19. In the same case, Kivai v. Kivai &5 Others was quoted where the Court stated that reinstatement of a suit is at the discretion of the court, which discretion ought to be exercised in a just manner, as was held in Bilha Ngonyo Isaac vs. Kembu Farm Ltd & another & another [2018] eKLR ((JN. Mulwa J), which echoed the decision of the court in Shah vs. Mbogo & Another (1967) EA 116 (Harris J), where the court stated on the matter of discretion:

" The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberatively sought whether by evasion or otherwise to obstruct or delay the course of justice."

20. Taking into account the facts and factors above alongside the relevant law, this court holds that the factors leading to the dismissal of the main suit on 28th February 2018 were occasioned by an error of the court and is not contested. What is contested is the technicalities surrounding the Appellant's attempt to reinstate the suit. The Advocates failure to attend court on a matter which he filed under certificate of urgency to reinstate his clients' suit on the basis of inadvertent failure to diarize the date is grave. This court has to strike a balance between expeditious disposal of maters before it on the one hand and, ensuring that strict adherence to technicalities does not result in injustice.

21. Indeed, the Appellant through her affidavit sworn on 18th October 2018 indicated her keenness to finalize the matter and cried that her Advocates' error should not be visited upon her. I am persuaded that the error by the advocate, no matter how grave can be addressed by this court so as to allow the parties to engage in the substance of the main suit. It has been demonstrated that the Appellant stands to lose much if this appeal is not allowed.

Determination

i. The factors leading to the dismissal of the main suit on 28th February 2018 were occasioned by an error of the court.

ii. The factors leading to the dismissal of the Application for reinstatement of the suit on 5th September,2018 were occasioned by an error of the Appellant's Advocate.

iii. The dismissal of the subsequent Application to reinstate the Application for reinstatement was arrived at by the trial court on the basis that the error by the Advocate was inexcusable.

iv. This court has the power to exercise discretion to reinstate the Appellants suit.

Disposition

i. Ruling of 26th June 2019 dismissing the Application to reinstate the suit hereby is set aside.

ii. Ruling of 28 February 2018 dismissing the main suit herein is hereby set aside

iii. The Appeal is allowed.

iv. Appellant's suit in the Lower Court is reinstated

v. Matter to be listed for hearing on a priority basis.

vi. Each party to bear their costs

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF AUGUST, 2024

ROA 14 days.

HON. T. W. OUYA

JUDGE

For Appellant: Miss Maryanne Mugo H/B For Karanja Kanyiri

For Respondent: Miss Jane Rose Nanjira

Court Assistant Martin Korir