



**Keengwe t/a Keengwe & Co Advocates v Mohamed (Civil Appeal
1 of 2024) [2024] KEHC 10626 (KLR) (Civ) (7 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10626 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 1 OF 2024

CJ KENDAGOR, J

AUGUST 7, 2024

(FORMERLY HCCOMM E19 OF 2024)

BETWEEN

SAMUEL B KEENGWE T/A KEENGWE & CO ADVOCATES APPELLANT

AND

AMINA MOHAMED RESPONDENT

JUDGMENT

1. The Appellant filed a claim against the Respondent vide Milimani Small Claims Court Claim No. E1368 of 2022 where he sought judgment against the Respondent for Kshs 550,000/=. The court dismissed the claim for the Appellant's non-attendance on 25th May, 2022. The Appellant filed an application for reinstatement of his claim against the Respondent, but the application was also dismissed by the lower court on 8th July, 2022. Subsequently, the Appellant filed a fresh claim vide Milimani Small Claims Court Claim No. E4677 of 2022 in an attempt to have his matter heard and decided on merit. In this new claim, the Appellant sought the very orders he had sought in the dismissed suit, including a claim of Kshs. 550, 000/=. The trial court dismissed the claim.
2. The Appellant was dissatisfied by the ruling of the court and filed a Memorandum of Appeal dated 5th July, 2023 seeking to have his suit reinstated at the lower court. He listed three grounds of appeal, namely:

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- “(a) That the learned magistrate erred in law and fact in dismissing the Appellant's Statement of Claim without hearing and determining the same.



- (b) That the learned magistrate erred in law and fact in dismissing all the subsequent applications made by the Appellant in an attempt to reinstate the said claims.
- (c) That the learned magistrate erred in law and fact in denying the appellant his right to be heard as the right to be heard is a constitutional right of the appellant.
- (d) The appeal was canvassed by way of written submissions which this court gave due consideration’.

The Appellant’s Case

- 3. The Appellant argues that the learned magistrate erred when she dismissed the Appellant’s claim against the Respondent without hearing them on merit. He submitted that the lower court failed to give adequate reasons for denying the appellant his fundamental right to fair hearing. The appellant seeks that the court set aside the ruling of the subordinate court and substitute it with an order reinstating the suit.
- 4. The respondent opposed the appeal. She argued that the chronological events that led to the dismissal of the suit suggest that the appellant was not keen to prosecute the matter and thus occasioned the previous dismissals. She also argued that the appeal is incurably and hopelessly incompetent and defective, and hence this Honorable Court lacks the jurisdiction to hear and determine it. She argued that the record of appeal was incomplete because it does not contain a certified copy of the typed proceedings of the trial court.
- 5. In addition, the respondent submitted that the instant appeal is incompetent for having being filed by an advocate or firm of advocates that has not properly come on record for the Appellant in these proceedings, contrary to the provisions of Order 9, Rule 9 of the Civil Procedure Rules. She argued that the Trial Court did not err in disallowing the Appellant’s Applications for Review. She opines that the trial court dismissed the Appellant’s Statement of Claim after hearing the same on merit and hence it did not err or violate the Appellant’s Constitutional Rights to be heard.

Analysis And Determination

- 6. I have considered the grounds contained in the memorandum of appeal and the rival submissions by the parties. The appeal from the Small Claims Court is on issues of law only. Section 38 of the Small Claims Court provides that:-

38. (1)

A person aggrieved by the decision or an order Appeals. of the Court may appeal against that decision or order to the High Court on matters of law.

- (2) An appeal from any decision or order referred to in subsection (1) shall be final.”

- 7. The issues for determination are as follows:

Whether the instant appeal is competently before this Honorable Court

- 8. The Respondent submitted that the record of appeal as prepared by the appellant does not include certified copies of the lower court’s typed proceedings. The Respondent argued that there is nothing



to guide this court on how the lower court arrived at its findings, and that the appeal out to be struck out. The Respondent cited several precedents to support her position.

9. I have perused the documents before me and I agree with the respondents that the Appellant's record of appeal does not contain a certified copy of the typed proceedings of the trial court. In addition, there is no evidence on record showing that the Appellant herein even requested for a copy of the typed proceedings of the trial court.
10. However, it is clear to me that the original file of the lower court together with typed copied of proceedings and judgment were forwarded to this court vide a letter dated 18th August 2023. The file was available to me for perusal. There is then no substance in this argument.
11. This is also supported by the High Court's decision in *Adan Chuda Sode v Madina Oshe Jira & another* [2021] eKLR, where the court entertained an appeal despite the fact that initial record of appeal did not include the typed proceedings of the lower court. In the case, the typed copies of proceedings were forwarded later to the High Court vide a letter. The Court in *Adan Chuda Sode v Madina Oshe Jira & another* observed thus;

“Mr. [Advocate] argued the appeal should be struck out as the record of appeal did not include the typed proceedings of the lower court. It is however clear that the original file of the lower court together with typed copies of proceedings and judgment were forwarded to this court vide a letter dated 5th February 2021. The file was available to me for perusal. There is then no substance in this argument.

12. The Respondents also submitted that the instant appeal is incompetent for having been filed by an advocate or firm of advocates that has not properly come on record for the Appellant in these proceedings. He argues that the upshot it that the memorandum of appeal and the entire record of appeal should be struck out. He cited numerous decided cases, and Order 9 Rule 9 of the *Civil Procedure Rules* to support his argument.
13. However, I am not persuaded by the Respondent's argument that the Advocates for the Appellant are improperly on record. I also do not agree with her argument that the Appellant had to file a consent between the outgoing and incoming advocates or file an application to seek leave of the Court to come on record.
14. The prevailing jurisprudence is that Order 9 Rule 9 of the *Civil Procedure Rules* does not apply in instances of an appeal because the advocate's instructions in a lower court are exhausted at the conclusion of a matter.
15. In *Francis Omondi Odhiambo v Hippolitus Omondi Ochieng* [2022] eKLR, the Environment and Land Court held thus;

“17. In my considered view and as has been held in various court decisions and rightly posited by the respondent, the intent of Order 9 Rule 9 and 10 of the *Civil Procedure Rules* was to cure the mischief of litigants sacking their advocates at the execution stage or at the point of filing their bill of costs thus denying their advocates their hard-earned fees. Had this court been the first court of call, I would not have hesitated but upheld that once judgement has been rendered, leave has to be sought from the trial court.

18. However, the scenario is different in the instant, this court is sitting as an appellate court. Does one need to seek leave in such circumstances? Bearing in



mind the provisions of Section 1A of the Civil Procedure Actthat courts have to ensure that cases are conducted in a manner that are just and expeditious. It is my view that Order 9 Rule 9 and 10 of the Civil Procedure Rules does not apply in instances of an appeal because the advocate's instructions in a lower court are exhausted at the conclusion of a matter and requiring such leave would be tantamount to denying such an appellant a right to legal representation of his choice at an appellate stage thus negating the intent of just and expeditious disposal of a dispute”.

16. The Court of Appeal in the case of Tobias M. Wafubwa v Ben Butali [2017] eKLR held that;

“Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, ... Parties should therefore have the right to choose whether to remain with the same counsel or to engage other Counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous Advocate”.

17. I am also persuaded by the decision of the Environment and Land Court in Koske v Langat (Environment and Land Appeal E005 of 2021) [2023] KEELC 21958 (KLR) (30 November 2023) (Ruling), where the court held that;

“The Applicant herein has submitted that an Appeal process represented an independent and distinct legal procedure, particularly when considering the intent and purpose behind Rule 9 of Order 9 of the Civil Procedure Rules. I am fully persuaded of the correctness of the said submissions, indeed where a firm of Advocates had acted for a party in the lower court, those instructions are terminated and/or are spent or exhausted with the conclusion of the trial in the lower court. An appeal is different ball game; it can be filed by any other firm of Advocates on instructions of the Appellant without necessarily having to file Notice of Change of Advocates or filing an application to come on record in place of the previous Advocates. However, in the present scenario, by seeking stay of execution of the orders of the trial court, in effect is not related to an independent Appeal but to a suit that was that is ongoing. The provision of the law envisages a situation like this one where after judgment has been entered, a new Advocate desires to come on record for purposes of applying for stay of execution or to proceed with the execution proceedings in the previous suit. This scenario is different from one where an incoming Counsel directly files his Appeal (fresh proceedings) challenging the decision by the lower court”.

18. In the instant case, the Appellant is not applying for stay of execution or to proceed with the execution proceedings in the previous suit. The incoming Counsel has directly filed his Appeal (fresh proceedings) challenging the decision by the lower court. Thus, I hold that the memorandum of Appeal and the record of appeal filed by the firm of Keengwe & Co. Advocates are competent and properly filed.

Whether the Lower Court erred in disallowing the Appellant's Application for Review dated 10th June, 2022

19. The next issue for consideration is whether the trial court did err in disallowing the Appellant's application for Review dated 10th June, 2022 in which he sought to have the claim that the court



had dismissed for non-attendance reinstated. The trial Court heard the said application, and upon considering the grounds supporting the said application, the trial court was unsatisfied by the grounds advanced thereon and dismissed the said application.

20. The general legal principle is that in a first appeal, the duty of the court is to analyze and re-evaluate the evidence adduced at the lower court and draw its own conclusions. This Honorable Court is, therefore, required, as was also stated by the Court in *Selle and Another v. Associated Motor Boat Company Limited & 2 Others* (1968) EA 123 to ‘reconsider the evidence, evaluate itself and draw its own conclusion.’
21. I have re-looked at the Appellant’s Notice of Motion dated 10th June, 2022, together with the Supporting Affidavit sworn by Samuel Keengwe dated the same day, and filed in court on 23rd June, 2023. In the affidavit, the Appellant states that the initial hearing date was scheduled because the date was declared a Public Holiday. He also states that he did not attend because the Advocate who was acting on his behalf failed to check the Judiciary E-portal to furnish him with the new hearing dates.
22. I have also read the Respondent’s replying affidavit sworn by Amina Mohamed on 24th June 2022, in which she sought to oppose the Appellants application for reinstatement. She stated that the e-filing system has an automatic way of communicating new dates to the respective parties through their emails and text messages and thus the Appellant’s Advocate could not have missed the notification.
23. The record of the lower court indicates that the court did not discuss at length the merit of the Appellant’s application. Despite the lengthy affidavits and submissions submitted before it, the court did not particularly address itself on the merit or demerit of the application. The entire ruling of the Lower court dated 8th July 2022 was as follows;

“It is my considered view that the reasons advanced by the Applicant are not plausible. I find that the application has failed to meet the threshold for reinstatement since upon perusal of the court record, I have noted that the Claimant has been indolent. The claim herein was filed on 15th March 2022. Time has already lapsed due to the strict timelines wherein matters before this court are to be heard and determined within the 60 day’s timelines as envisaged under the SCC Act. I find that the notice of motion application dated 10th June 2022 is devoid of merit. It is dismissed with costs.

24. Upon my evaluation of the evidence on record, I have formed the opinion that the Lower court erred in disallowing the Appellant’s allocation for review dated 10th June 2022, because the mistake was largely caused by his advocate. This is in line with numerous court decisions that have held that courts should not punish litigants for the mistakes of their advocates.
25. The High Court in the case of *Geoffrey Oguna & another v Mohamed Yusuf Osman & 2 others* [2022] eKLR held thus;

“This Court is of the view that in the interest of justice, the mistake of the Advocate who had conduct of the matter in the lower Court should not be visited on the applicants herein.

26. In the case of *CFC Stanbic Limited versus John Maina Githaiga & another* [2013] eKLR, the Court of Appeal held as follows:-

“On the issue of the mistake of counsel, it is not in dispute that the appellant gave instructions to its advocates in good time once it was served with the pleadings and summons to enter appearance. Therefore, the failure to enter appearance and file a defence is clearly



attributable to its advocate who failed to enter appearance and file defence in good time. This being the mistake of counsel, the same ought not to be visited upon the appellant. This Court is guided by the case of *Lee G Muthoga V Habib Zurich Finance (k) Ltd & Another*, Civil Application No. NAI 236 OF 2009, where this Court held: "It's a widely accepted principle of law that a litigant should not suffer because of his advocate's oversight." In the instant appeal, we are of the view that the appellant should not suffer because of the mistakes of its counsel."

27. Similarly, the court in *Tana & Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 Others* [2015] eKLR, held that mistakes of counsel should not be visited on an innocent litigant. It held;

"From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side."

28. In the case of *Belinda Muras & 6 Others – v- Amos Wainaina* [1978] KLR in which Hon Madan JIA (as) he then was defined what constitutes a mistake as follows:-

"A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate." [own emphasis]

29. Similarly, in *Phillip Chemwolo & Another – v- Augustine Kubede* [1982-88] KLR 103 at 1040 Apaloo, J.A as he then was stated thus:-

"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 heard on merit". [own emphasis]

30. It is also not lost to the court that dismissal of a suit is a draconian act that drives a litigant away from the seat of justice and as such, discretion ought to be exercised judiciously. This position was amplified in the case *John Nabashon Mwangi v Kenya Finance Bank Limited* (in Liquidation) [2015] eKLR as follows: -

"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 acts are comparable only to the proverbial 'Sword of the Damocles' which should only draw blood where it is absolutely necessary."



31. In the case of *Wachira Karani v. Bildad Wachira* (2016) eKLR as was quoted in the case of *David Gicheru v Gicheba Farms Limited & another* [2020] eKLR the Court held that: -

“The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter...”

Conclusion

32. In the circumstances of this case, there was no reason grave enough that would warrant the locking out of the appellant from pursuing its claim and allowing the trial to proceed to its logical conclusion. The interest of justice warrants this Court’s intervention. In the circumstances, I take the view that the error of the appellant’s Advocate on record ought not be visited upon him by denying the Appellant an opportunity to canvass their Claim on merit.

33. Therefore, and in the interests of justice I am inclined to allow the Appellant’s Appeal presented by the Memorandum of Appeal dated 5th July 2023. Subsequently, the Lower Court’s order dated 25th May 2022 dismissing the Appellant’s Claim E1368 of 2022 suit for non-attendance is hereby set aside and the Claim is reinstated. The SCC court will issue a mention date for directions as to hearing within 14 days of the date herein.

34. That the Advocates for the Appellant, Keengwe & Company Advocates, do pay the Respondent throw away costs of Ksh.20,000/- to be made within 14 days of the date herein.

35. No order as to Costs of the Appeal.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF AUGUST, 2024.

JUDGMENT DELIVERED THROUGH TEAMS ONLINE PLATFORM.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant - Beryl

