Itando Mission of Hope and Health Care v Munyasi & 2 others (Civil Appeal E030 of 2022) [2024] KEHC 11421 (KLR) (24 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11421 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CIVIL APPEAL E030 OF 2022

JN KAMAU, J

SEPTEMBER 24, 2024

BETWEEN

ITANDO MISSION OF HOPE AND HEALTH CARE .... APPELLANT

AND

VIOLET MUNYASI .... 1ST RESPONDENT

THE REGISTERED TRUSTEES CHRISTIAN HEALTH ASSOCIATION OF KENYA .... 2ND RESPONDENT

THE REGISTERED TRUSTEES MUDAVADI MEMORIAL FOUNDATION .... 3RD RESPONDENT

(Being an appeal from the Ruling of Hon R. Ndombi (SRM) delivered at Vihiga in Senior Principal Magistrate's Court Case No 43 of 2018 on 7th July 2022)

JUDGMENT

Introduction

1. In her decision of 7th July 2022, the Learned Trial Magistrate, Hon R. Ndombi, Senior Resident Magistrate, dismissed the Appellant's Notice of Motion application dated 10th March 2022 seeking to set aside Judgment dated 16th September 2021.

2. Being aggrieved by the said decision, on 16th December 2022, the Appellant filed a Memorandum of Appeal dated 13th December 2022. It relied on twelve (12) grounds of appeal.

3. Its Written Submissions were dated 6th March 2024 and filed on 7th March 2024 while those of the 1st Respondent were dated 21st March 2024. However, they did not bear a court stamp. In view of the fact that documents were being filed through the e-filing platform, this court admit the same as there was a likelihood of the Registry having omitted to stamp the same. Notably, the 2nd and 3rd

Respondent did not file any written submissions. The Judgment herein is therefore based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

4. Having looked at the grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the only issue that had been placed before it for determination was whether or not the Learned Trial Magistrate erred in dismissing the Appellant's said Notice of Motion application that was dated and filed on 10th March 2022.

5. The Appellant submitted that the right to fair hearing was a sacrosanct right in *the Constitution* of Kenya, 2010 and could not be limited by whatsoever reason. It asserted that the rules of natural justice demanded that courts hear both parties before rendering themselves and not condemn any party unheard.

6. It referred to Article 48 and 50(1) of *the Constitution* of Kenya and submitted that the ultimate goal and purpose of the justice system was to hear and determine disputes fully and that no person who approached the court seeking an opportunity to ventilate his or her grievances fully should be locked out.

7. It placed reliance on the cases of Sangram Singh vs Election Tribunal, Koteh, AIR 1955 SC 664 at 771 cited in the case of Gerita Nasipondi Bukunya & 2 Others vs A.G[2019]eKLR and Wachira Karani vs Bildad[2016]eKLR which was quoted in the case of David Gicheru vs Gicheha Farms Limited & Another[2020]eKLR where the common thread was that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absences and that they should not be precluded from participating in them.

8. It averred that it was usually a measure of last resort as was held in the case of Sodha vs Hemraj (1952) LR which was cited with approval in the case of Stephen Ndichu vs Monty's Wines & Spirits [2006] eKLR. It submitted that it was in the rarest of circumstances for a court to drive a willing party from the justice seat. It asserted that equity would not suffer harm without remedy. It was emphatic that there was a remedy in the circumstances of its appeal that necessitated this court to balance its rights and that of the 1st Respondent.

9. It submitted that the right to fair hearing had both substantive and procedural aspects as it was not merely a cosmetic show and/or ticking of boxes but was a live issue and the soul of the Bill of Rights in *the Constitution*. It argued that it was not afforded substantive fair hearing due to the mistakes of its advocates who failed to properly advise it on the documents to be filed in court, court attendances during hearings and mentions. It asserted that the said advocate consented to the Bill of Costs and lodged an appeal without its instructions.

10. It placed reliance on the case of Edith Gichungu Koine vs Stephen Njagi Thoithi [2014] eKLR where it was held that the court ought to be guided by consideration of several factors which included but were not limited to the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application was granted and whether the matter raised issues of public importance amongst others.

11. It invited the court to consider that the said factors were consistent with the overriding objective of civil proceedings litigation which was the just, expeditious, proportionate and affordable resolution of disputes before the court. It argued that based on the materials it annexed to its application, the Trial Court should have exercised its discretion to allow the suit begin afresh. It added that the decretal sum having been earmarked by the garnishee orders of 23rd February 2022, the monies at its bank,

Co-operative Bank, was sufficient to have acted as security to ensure that the matter was processed expeditiously and a judgment on merit delivered.

12. It pointed out that the court record showed that its advocates never actively participated in the proceedings and were perennially absent from court during the mentions and hearings of the matter until the Judgment was delivered on 21st September 2021 which greatly affected its rights.

13. It referred this court to the case of Philip Chemwolo & Another vs Augustine Kubende[1986] eKLR where it was held that blunders would continue to be made from time to time and it did not follow that just because a mistake had been made, a party should suffer the penalty of not having his case heard on merits.

14. It was emphatic that it had a triable case which was meritorious and had demonstrated a merited prima facie defence which should go to trial. It placed reliance on the case of Murai vs Wainaina[1982]KLR 38 where it was held that the door of justice was not closed because a mistake had been made by a lawyer of experience who ought to know better and the case of Patriotic Guards Ltd vs James Kipchirchir Sambu[2018]eKLR where it was held that where an application to set aside orders are sought without unreasonable delay, that conduct shows a litigant willing to rectify its shortcomings.

15. It further relied on the case of Tana & Athi Rivers Development Authority vs Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR where it was held that courts will readily excuse a mistake of counsel if it afforded a justiciable, expeditious and holistic disposal of a matter.

16. It pointed out that it had merited the exercise of the court's discretion in the circumstances to order for a re-trial and for the court to be at liberty to impose strict timelines for compliance by the parties. It added that it was in the best interest of justice to afford it its day in court and for the court to impose reasonable conditions for compliance including payment of costs.

17. It argued that the judgment complained of had not been perfected and therefore the court was not functus officio. It therefore prayed to be allowed to set the record straight in the matter through a full hearing. It quoted Proverbs 18:17 in the Bible which said that any story sounded true until someone told the other side and set the record straight.

18. On her part, the 1st Respondent submitted that the Appellant herein was presented by an advocate throughout the proceedings and that the advocate later taxed the Bill of Costs by consent and sought for stay of execution. She added that subsequently, the Appellant started making payment by issuing a cheque for the sum of Kshs 250,000/= but it later stopped the payment and filed the application which was eventually dismissed by the Trial Court.

19. She argued that the Trial Court was right to have dismissed the application since it had heard and determined the matter on merit and thus functus officio. She pointed out that the Trial Court had also found that the Appellant had an advocate who represented it throughout the trial and that it was upon it to follow up its case to ensure that it was prosecuted by its advocates as per the instructions. She described the Appellant as indolent for waking up at the execution stage and that the mistake if any was not excusable.

20. She contended that the Appellant had also challenged the jurisdiction of the court which had been determined vide Preliminary Objection dated 29th May 2019 which was also dismissed on 18th July 2019.

21. She asserted that the orders that the Appellant sought applied to Judgment obtained in default of a defense or non-appearance but that that was not the case herein as the matter had been heard and dealt with on merit and an appeal, HCCA No E019 of 2021, filed but which was later withdrawn.

22. She cited Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules and submitted that the documents that the Appellant purported to have been used were not new documents which could not be obtained by the Appellant even after due diligence. She added that a review could only succeed where no appeal had been preferred. She pointed out that in the instant case, the Appellant had preferred an appeal and that even though the same was withdrawn, it could not be said that it did not prefer an appeal.

23. She placed reliance on the case of Re Estate of Kwasila Luharo (Deceased)[2020]eKLR Succession Cause No 695 of 2010 (eKLR citation not given) where it was held that in an application for review based on discovery of new and important evidence, the court must exercise caution to prevent a party against whom a decision had been entered from procuring new evidence so as to change the complexion of the case. She further cited the cases of Mwaura Wang'ombe & Another vs James Muite Ruguya & 4 Others [2021]eKLR and Ajit Kumar Rath vs State of Orisa & Others(eKLR citation not given) where the common thread was that for material to qualify to be new and important evidence or matter, it must be of such a nature that it could not have been discovered had the applicant exercised due diligence.

24. It was her case that the Appellant did not present any evidence of communication between its advocates and itself to show that they presented the said documents and had encountered difficulties or that its advocates refused to file them in court. She was emphatic that the same could not therefore constitute new and important evidence to warrant review of the Trial Court's Judgment. She added that if there was any mistake on the part of the Appellant's advocates then the same should not be visited on her as her case had dragged for over five (5) years.

25. She pointed out that the Appellant had not shown what steps it had taken to ensure that it was in touch with its advocates. She submitted that not every mistake of an advocate will form the ground of setting aside a judgment or court order. In this regard, she relied on the case of Christopher Muriithi Ngugu vs Eliud Ngugu Evans [2016] eKLR where the court found the indolence of the part of the appellant to be inexcusable.

26. She further asserted that the Appellant had delayed in bringing the application subject of this appeal as it lodged the same seven (7) months after the delivery of the Trial Court's Judgment. She was emphatic that the Trial Court did not have the jurisdiction to set aside its Judgment as it was functus officio. She further placed reliance on the cases of *Peterson Ndung'u & 5 Others vs Kenya Power & Lighting Co Ltd CA No 208 of 2015*(eKLR citation not given), Hesbon Obote Vikiru vs Michel Mugera Kahunga [2021] eKLR and OGM vs FG & Another [2020] eKLR where the common thread was that a court after passing judgment becomes functus officio and could not revisit the judgment on merit.

27. She also relied on the case of Telkom Kenya Limited vs John Ochanda (Suing on his own behalf & on behalf of 996 Former Employees of Telkom Kenya Limited) Civil Appeal No 60 of 2013(eKLR citation not given) where it was held that the trial court was wrong for failing to declare itself as functus officio and devoid of jurisdiction to grant the respondent's prayers.

28. She pointed out that she had even commenced execution by filing garnishee proceedings. She was categorical that setting aside the Trial Court's Judgment would be prejudicial to her as it would deny her the chance to enjoy the fruits of her Judgment that she had waited for too long. She was emphatic that the same could not be compensated by way of costs or interest as the Appellant had claimed. She blamed the Appellant for not having adduced evidence to show that its advocate was not attending court or that it sought to know from its advocates on the status of its case.

29. To buttress her point, she relied on the cases of Joseph Lekodi Teleu vs Jonathan Paapai & Another[2022]eKLR, Savings and Loan Limited vs Susan Wanjiru Muritu HCCC No 397 of

2002 (eKLR citation not given), Duale Mary Ann Gurre vs Amina Mohamed Mahamood & Another[2014]eKLR and Michael Kanyi Mwarano vs Festus Murimi Mwarano[2021]eKLR where the common thread was that a case belonged to a litigant and not his or her advocate and therefore, the litigant had a duty to pursue the prosecution of his or her case. She pointed out that an advocate was only an agent in executing the instructions given by a party as was held in the above-mentioned cases.

30. It was her contention that the Appellant's right under Article 50 of *the Constitution* of Kenya was realised and that if at all it felt that its rights were not fully defended in court, it had the right to change its advocates before the conclusion of the case. In this regard, she cited the case of Elias Mwororo Kamau vs Co-operative Bank of Kenya Ltd [2018] eKLR where it was held that whereas *the Constitution* of Kenya, 2010 accords to every citizen the right to be heard, the onus was upon that citizen to pursue that right.

31. She submitted that the Appellant was seeking to be given a second chance to defend the case again which was an afterthought and another way of chancing if the matter could be heard again so that the court could arrive at a different Judgment. She was categorical that the appeal herein lacked merit and urged this court not to allow the same.

32. Notably, a perusal of the proceedings in the lower court showed that the Appellant was represented by an advocate throughout the proceedings. This court agreed with the 1st Respondent's submissions that the Appellant did not annex any evidence to show the days that its advocates failed to attend court and/or act contrary to its instructions and/or filed and relied on documents that were contrary to its preferred documents. Be that as it may, the fact that there was an advocate that represented it all through the proceedings did not mean that the said advocates could not have erred and/or acted without instructions.

33. The Trial Court's Judgment was delivered on 16th September 2021. The Appellant filed the application to set the said judgment aside on 10th March 2022. This was about five (5) months and twenty two (22) days. In the mind of this court, this was not so inordinately and/or unreasonably. This was excusable.

34. This court appreciated the fact that blunders by advocates ought not to be visited upon innocent litigants unless of course, the negligence was occasioned by the litigants themselves after being properly advised by their counsel.

35. In the case of Republic vs Speaker Nairobi City County Assembly & Another Ex Parte [2017] eKLR, it was held that blunders would continue being made and that just because a party had made a mistake, it did not mean that he should not have his case heard on merit. This court arrived at the same conclusion in several cases amongst them the case Kenindia Assurance Company Limited vs Kling Development Limited [2020] eKLR.

36. Courts must therefore exercise great caution not to deny litigants their right to fair trial. Indeed, every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of *the Constitution* of Kenya, 2010. Even where a party delays in doing an act, there is always a provision that would give it reprieve to seek justice.

37. Against this backdrop, this court perused the annextures to the Appellant's application that was dated and filed on 10th March 2022 but without considering the merits or otherwise of the appeal herein and noted that the Appellant had demonstrated that it had an arguable case herein.

38. In cases such as this, the court was also required to consider if the opposing side would suffer any prejudice if the orders sought were granted. This court did not see any prejudice that the 1st Respondent

would suffer or was likely to suffer if the Appellant herein pursued its constitutional right to be heard. If there was any prejudice, then the same could be compensated by way of payment of costs.

39. Taking all the factors hereinabove into account, it was the considered view of this court that it was in the interests of justice (emphasis court) that the Appellant be given an opportunity to have its case heard on merit as it would suffer prejudice if it was denied an opportunity to fully present its case to be heard on merit.

40. Indeed, the power to grant orders in the interest of justice and/or for the ends of justice (emphasis court) is well captured in Section 3A of the *Civil Procedure Act* that states that: -

> " Nothing in the 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 (emphasis court) or to prevent abuse of the process of the court."

41. Having said so, it was the Appellant's responsibility to have followed up to check on its matter. Failure to do so showed that it was indolent. It could therefore not be allowed to go scot free and had to pay throw away costs to the 1st, 2nd and 3rd Respondents herein to compensate them for being taken back in litigation when they were expected to have presumed that there would be no further litigation in view of the long period the Appellant had taken to move the court.

Disposition

42. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal dated 13th December 2022 and filed on 16th December 2022 was merited and the same be and is hereby allowed in the following terms: -

    1. That the decision of the Learned Trial Magistrate, Hon R. Ndombi, Senior Resident Magistrate that was delivered on 7th July 2020 in which she dismissed the Appellant's Notice of Motion application dated and filed on 10th March 2022 seeking to set aside her judgment dated 16th September 2021 be and is hereby set aside and/or vacated. The effect of this decision was that the Appellant's Notice of Motion application that was dated and filed on 10th March 2022 be and is hereby allowed in terms of Prayers Nos (3), (4), (5) and (6).

    2. It is hereby directed that the lower court file be returned to Vihiga Principal Magistrates Court and placed before the Head of Station on 3rd October 2024 for further orders and/or directions on the hearing of this matter de novo before any court other than that of the Learned Trial Magistrate, R. Ndombi, Principal Magistrate.

    3. In view of the fact that the Appellant has taken back to re-litigate and thus suffer costs, it is hereby directed to pay the 1st Respondent throw away costs in the sum of Kshs 75,000/= within forty five (45) days from the date of this Judgment failing which the 1st Respondent will be at liberty to commence legal proceedings for the recovery of the same in the normal manner.

    4. Each party will bear its own costs of this appeal.

43. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 24TH DAY OF SEPTEMBER 2024

J. KAMAU

JUDGE