Mombasa Maize Millers (Nakuru) Limited & another v Geoffrey (Civil Appeal E094 of 2021) [2024] KEHC 11533 (KLR) (19 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11533 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E094 OF 2021

SM MOHOCHI, J

SEPTEMBER 19, 2024

BETWEEN

MOMBASA MAIZE MILLERS (NAKURU) LIMITED ..... 1ST APPLICANT

ANTHONY GICHUNGA ..... 2ND APPLICANT

AND

PETER MACHARIA GEOFFREY ..... RESPONDENT

RULING

1. Before me is a Notice of Motion application dated 26th May, 2023 seeking the following orders:

   i. Spent

   ii. That pending the hearing of this Application inter-partes, the Honourable Court be please to stay any execution of the subject judgment/Decree issued on 25th November, 2020 in Molo CMCC No. 382 of 2018 together with any consequential orders and proceedings.

   iii. That the Honourable Court be pleased to set-aside its Order dated 26th January, 2023 dismissing the Appeal herein and reinstate the Appeal for hearing and determination on its merit.

   iv. That this Honourable Court do make any such further order(s) and issue any other relief it may deem just to grant in the interest of justice.

   v. That the costs of this Application be provided for.

Applicants' Submissions

2. The Applicant in its written submissions dated 21st day of June 2023 submits that; the Court be pleased to set-aside its Orders dated the 26th day of January 2023 dismissing the Appeal for want of prosecution and to reinstate the Appeal for hearing and determination on its merits.

3. That, dismissal of the appeal without its hearing and determination as contemplated both by substantive law and procedure risks depriving the Applicants of their constitutionally recognized and grounded right to have their appeal heard on merits.

4. That the premise of its dismissal was created by factors or fault not of the Applicants making or indeed their contemplation, rather by circumstances beyond their control.

5. The Judgment against which the dismissed Appeal was brought and has been pending was entered in favor of the Respondent by the Honourable A. Mukunga (SRM) in Molo CMCC No 383 of 2018 on 2nd December, 2020. Being dissatisfied with the decision by the Honourable Court, the Applicants chose to lodge an appeal vide Memorandum of Appeal dated 25th August, 2021. The Applicants also immediately thereupon requested for typed proceedings and certified copy of the subject decree to facilitate the preparation of the record of appeal but were not supplied with the same or with any update on the status thereof as at the time the appeal was unfortunately dismissed on 26th January, 2023.

6. The Applicants believe that, the main and perhaps the only ground for the said dismissal was because their advocates did not attend Court to proffer any reason or cause why no concrete step had been taken on the appeal since its lodgment. In the supporting affidavit, it is explained sufficiently in the Applicants submissions that the failure to attend Court when the matter came up was caused by;

    i. firstly, the extant fact that the Applicants' advocates had not been served with the Notice to Show Cause. This would have offered an occasion for the Applicants' advocates to file an explanatory affidavit explaining the circumstances that have made it impossible to take any step in the appeal.

    ii. Ultimately, when the date for the disposal of the Notice to Show Cause came the Applicants' advocate were totally unaware that it had been fixed for hearing on the said date. It is on the 24th May 2023 when the Applicants' advocates clearly and innocently oblivious of the fact that the appeal had long been dismissed proceeded to file the record of appeal that it was discovered that the appeal had been dismissed. This application was then promptly filed on the 26th day of May 2023 hardly two days later seeking to reinstate the appeal.

7. That the crux of the Applicants' submissions is to set out the basis upon which this Court ought to exercise its discretion and set-aside the order for dismissal and reinstate the Applicants' appeal in order to have the same heard and determined on merits on two major issues

    Issue(s)

    i. Whether the Honourable Court ought to set aside the order of the Court dated 26th January 2023 dismissing the Appellants'/Applicants' appeal.

    ii. Whether the Appellants/Applicants ought to shoulder the consequences of their Advocate's failure to attend Court.

8. As to whether the Honourable Court Ought to Set-Aside the Order of the Court dated 26th January 2023 dismissing the Applicants' Appeal? It is the Applicants' assertion that, the law is now settled

with regards to the wide and unfettered discretion that is donated by law to Courts to set-aside orders relating to dismissal of cases and the principles that govern the exercise are expressed and couched in clear and unambiguous terms.

9. That an exegesis into this discretion would be remiss without addressing its cogent legal underpinnings. As such, Order 12, Rule 7 of the Civil Procedure Rules provides as follows:

> Where under this Order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as maybe just.

10. That, Section 3 of the *Civil Procedure Act* defines a suit to be any proceedings however commenced, therefore, the cited rule though not directly in references to appeal is still quite apposite in the circumstances.

11. That, Order 42 Rule 21 of the Civil Procedure Rules sufficiently addresses the wide and unfettered discretion that is donated by Courts to set aside orders relating to dismissal of cases as a consequence of non-attendance by a party or for want of prosecution. The rule provides as follows:

> " Where an appeal is dismissed under Rule 20, the appellant may apply to the Court to which such appeal is preferred for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit."

12. That the stated rule, is geared towards avoiding hardships or injustice resulting from an accident, inadvertence or excusable mistake. In this respect, the Applicants respectfully urge the Court to be guided by the decision of the Court of Appeal in Mbogo v Shah [19681 EA 93 where Judge Briggs (as he then was), stated as follows:

> " I consider that under order 9 rule 20 the discretion of the Court is perfectly free and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting said relief."

13. That, further, in Mureithi Charles & another v Jacob Atina Nyagesuka {2022) eKLR, the Court, in discussing the scope and role of the discretion afforded to Courts to set-aside orders relating to dismissal of cases stated as follows:

> " That the decision whether or not to set aside exparte judgement is discretionary is not in doubt and that the discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice" (Emphasis ours).

14. That the Court in Mureithi (Supra) also quoted, with approval, the decision of the Court in CMC Holdings Ltd v Nzioki [2004] KLR 173 where the Court stated thus:

> " In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously... ln law the discretion that a Court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or

hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle."

15. Courts have risen to the occasion in buttressing the role of the law and its application by Courts to ensure that justice is administered to litigants in a fair manner. Such aspects include ensuring that all litigants have their day in Court and have their chance to be heard and their matter (s) decided by a fair arbiter.

16. Reference is made to the case of David Gicheru v Gicheha Farms Limited & another [2020] eKLR where 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..."

17. That in applying these principles set out clearly in the line of authorities cited in the instant case, it is clear in the Applicants' humble submissions that, the only merited order or determination of the application is for the Honorable Court to exercise its discretion to set aside the orders of dismissal of the Applicants' appeal that were issued on 26th January 2023.

18. That the failure by the Applicants' advocate on record to attend Court on 26th January 2023 when the Notice to Show Cause was canvassed by the Court was inadvertent. This inadvertence explicitly falls under the clear remit of the scope of decisions such as Mbogo v Shah [1968] EA 93 (Supra) where the Court moved to set aside the orders relating to the dismissal of cases as a consequence of inadvertence on the part of the Applicants in the respective cases.

19. In particular, immediately after the judgment by the Court on 2nd December, 2020 in Molo CMCC No 382 of 2018, the Applicants moved to proffer an appeal of the same. One of the germane requirements in the filing of appeals is the preparation of the Record of Appeal. Further, typed proceedings entail a fundamental and rudimentary component of said Record of Appeal. The Applicants have furnished evidence that as soon as the appeal was lodged, the typed proceedings were sought and that after that, their advocates did not sit back but addressed innumerable written and verbal follow ups with the Molo Chief Magistrates' Court Registry, the Registry failed to supply the typed proceedings. (evidenced as "KDG-1" are various letters addressed to Molo Law Courts requesting for typed proceedings).

20. That, from the foregoing, it is apparent that the failure to obtain the typed proceedings from the Molo Law Court Registry, an event purely outside the Appellants/Applicants control, caused the delay in filing the appeal. And without any record of appeal on record, no conceivable proceeding would have been taken. Therefore, the assertion by the Respondent relating to the Applicants' alleged objective to stall the proceedings are devoid of honesty and lack a foundational basis.

21. The Applicants' humbly submit that, they were not aware of the Notice to Show Cause that came up on 26th January, 2023 and only came to have knowledge of the same when we moved to file the record of appeal on the 24th day of May, 2023.

22. That this Court ought to set-aside the Order of the Court dated 26th day of January, 2023 dismissing the Applicants' appeal due to the fact that the Applicants' inability to attend to Court on the said day was necessitated by unique circumstances not of the Applicants making such as not being aware of the Notice to Show Cause.

23. That it would only be fair, and in the wider interests of justice, for the Court to dismiss the orders of the Court on 26th January, 2023 dismissing the appeal and instead reinstate the appeal and allow the Applicants to prosecute the appeal to its logical conclusion.

24. As to whether the Applicants ought to shoulder the Consequences of their advocate's failure to attend Court? The Applicant contends that, even if the their were to be blamed for their failure to attend Court on the material day when the Notice to Show Cause was canvassed by the Court, the same which is still denied, for the non-attendance to the Notice to Show Cause proceedings on the 26th day of January 2023, it would be manifestly unfair and unjust to be forced to shoulder the consequences of the said failure by their advocates, as they would be denied the right to be heard on the intended appeal which is cornerstone of any legal system that lends credence to the dictates of justice and the rule of law. In the legal schema of the country, *the Constitution* of Kenya, 2010 provides for the right to be heard in Article 50 (1). The same provides as follows:

> Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.

25. That, Courts have also lent cogent renditions with regard to the right to fair hearing. Notably, in Pinnacle Projects Limited vs. Presbyterian Church of East Africa, Ngong Parish & another (2018) eKLR, the Court stated as follows:

> "It is important that in any judicial process adjudication parties involved be given opportunity to present their case and have a fair hearing before the decision against them is made by the respective judge or magistrate. It is not lost that procedural fairness is deeply ingrained in our administration of justice system" (Emphasis mine).

26. The Applicants submit that they ought to be granted their day in Court in compliance with Article 50 of *the Constitution* of Kenya, 2010 and any attempts to stifle the enjoyment of said right on the strength of any alleged mistake (s) made by their Advocates on record in prosecution of their cases are illogical and may prove fatal to the fair dispensation of justice.

27. In this regard, the Applicants' place reliance on the case of Philip Chemowolo & Another v Augustine Kubende [1986] KLR, where the Court stated as follows:

> "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..."

28. That, it is trite that mistakes are bound to be made by Advocates in the prosecution and defence of cases on behalf of clients either inadvertently or otherwise. However, said mistakes ought not to be a bar to the client's enjoying their right to be heard and the right to a fair trial.

29. It is the Applicants' submission that, they ought to be granted their right to be heard in compliance with Article 50 of *the Constitution* of Kenya, 2010 by having the orders for dismissal of the appeal vacated and the appeal reinstated. Further, that the mistakes that may have been made by their Advocates on record, the same which is still denied, ought not to visit upon and preclude their right to have their appeal heard and concluded to its logical end.

30. In an analogous case before the magistrates' Court, Molo CMCC No. 382 of 2018 David Karoki Ma/ Na v Mombasa Maize Millers (Nakuru) Limited & Anor(unreported) where the Court deliberated

over a similar application to set aside orders for dismissal of the case, the Court allowed the application in light of the inherent right to be heard encapsulated under Article 50 of *the Constitution* of Kenya, 2010. The Court was convinced that the failure of the Advocate on record for the Applicants to attend Court was occasioned by factors well beyond their control. As such, the Court appreciated the grave injustice that would be occasioned on the Applicants if the prayer to set aside the orders of dismissal was not granted. In a pertinent section of the ruling, the Court stated as follows:

> " Taking the totality of the facts herein it is the conclusion of this Court that the failure to appear virtually on the material day may not have been the making of the applicant. Secondly, the application herein was made the following day noting therefore that there was no inordinate delay."

31. The Applicants' urge this Court to be guided by the holding of the Court in Molo CMCC No. 382 of 2018 David Karoki Ma/Na v Mombasa Maize Millers (Nakuru) Limited & Anor. as the facts and circumstances buttressed in the former are substantially homogenous to those in the instant matter.

32. The Applicants' pray that the Court rises to the occasion in defence of the constitutionally established right to a fair hearing of the Applicants that risks being sacrificed at the altar of inadvertence and the prevalence of circumstances beyond their control.

Respondent's Submissions

33. The Respondent submit that the Appellants have not advanced sufficient reason as to why they failed to attend Court on the fateful date when the Appeal came up for Notice to Show Cause why the same should not be dismissed for want of prosecution. This Appeal was dismissed on 26th January, 2023 and the Respondent awarded costs of Kshs. 45,000/=. The dismissal was pursuant to the failure by the Appellants and their Advocates to attend Court when the matter came up for notice to show cause.

34. That, one of the principles enshrined under Article 159 of *the Constitution* is that justice should not be delayed. The Court has the discretion to dismiss the suit where no action has been taken for over one year as the same is tantamount to justice delayed without explanation.

35. That, Order 42 Rule 35 (2) provides as follows:

> " If within one year after service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal."

36. That it is in the interest of justice that a consideration be made as to whether the party that lodged the Appeal has lost interest in it, or whether the delay in prosecuting the appeal is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the Respondent on account of that delay.

37. The Appellants in the instant case filed an application to file the Appeal out of time having done so over 9 months since the Judgment before the trial Court was delivered following which they filed their Memorandum of Appeal on 26th August, 2021 and the same has never taken off since its filing. The Appellant only claims that they tried to pursue for the typed proceedings in August, 2021, December, 2021 and May, 2022 but the said letters annexed to the application bear no Court stamp to demonstrate that the same were received by the Court. Further, the said letters are allegedly copied to the Respondent's advocates but none of the letters has ever been received by the Respondent's Advocates a clear sign that the said letters may have been done as an afterthought for purposes of being annexed to the application but were never done to follow up on the typed proceedings.

38. As much as the Appellants claim that there were follow-ups on the typing of proceedings, which is highly unlikely, the last letter allegedly written to Court was in May, 2022 over one year before the Notice to Show Cause was issued. It is curious that the Appellants would take such a long time to follow up if at all they were genuinely concerned about the typing of the proceedings and keen on having the Record of Appeal prepared in the earliest. It is evident that the Appellants have not been keen in following up on the typed proceedings and prosecuting the Appeal and as such the said Appeal was rightfully dismissed and this Honourable Court ought to uphold the said decision.

39. The Respondent humbly submit that, "equity does not aid the indolent". It is following the unreasonable and inexcusable delay in prosecuting the Appeal that the matter came up for dismissal for want of prosecution. On the day the matter came up for dismissal the Appellants and their advocates failed to appear in Court despite the notices for dismissal having been circulated through the Advocate's WhatsApp platform hence there is no plausible reason to set aside the orders of this Court dismissing the appeal for want of prosecution.

40. The Applicant's' advocate was well aware of the dismissal date having had the dismissal cause list for about a week. The matter came up in Court on Wednesday further offering the Applicant's advocates time to respond to the notice to show cause but they still failed to attend Court with a view to advance the reasons for delay to enable the Court reinstate the matter. Following the notice that the matter was slated for dismissal, it would have been prudent for counsel for the Applicant's to respond to the same or at least be present in Court to respond to the same.

41. That it is clear that the Applicants have demonstrated a lack of good faith in bringing the present application as they were aware that the matter was coming up for notice to show cause on the material date but they failed to show up. The matter was called out at 9:00a.m and placed aside only to be recalled at about 10:30 a.m. plenty of time for the advocate to have reached out considering that they had attended the same Court for other dismissal matters the same week.

42. That, from the history of this matter, it is clear that the Applicants have not been keen on having this Appeal prosecuted in the earliest. Judgment before the trial Court was delivered on 2nd December, 2020 but the Applicants waited for 9 months before putting in an application to file their Appeal out of time. Even being allowed to file the Appeal out of time, the Applicants filed the Memorandum of Appeal on 25th August, 2021 and since then until January 2023, over 1 year 5 months later, no steps had been taken by the Applicants to pursue typed proceedings and have the Record of Appeal filed in order to have the Appeal prosecuted.

43. The Respondent humbly submit that the Applicant has not justified why the Court should exercise discretion in his favour. No satisfactory reasons have been advanced to warrant the reinstatement of this Appeal and it is in the interest of justice that this Honourable Court dismisses the Applicant's application with costs. In the event this Honourable Court deems it fit to reinstate the Appeal, we humbly pray that we be awarded throw away costs of Kshs. 45, 000/- which were the costs awarded by the Court.

Analysis and Determination

44. Upon considering the Application dated 26th May, 2023 this Court finds the same to be without merit.

45. The want of diligence on the part of the Appellants' advocate cannot be a basis for reinstatement.

46. The Appellant/Applicant was served with a notice to show cause dated 21st December, 2022 in email address:

info@seth&wathigoadvocates.co.ke.

47. The exercise of discretion by Magare J on the 26th January, 2023 is unimpeached and the same cannot be distorted.

48. The reason for non-attendance to show cause on the 16th January, 2023 of failure to be served notice is disallowed.

49. The reason that the Applicant was totally unaware of the date fixed for notice to show cause is disallowed as an email together with an attached notice to sow cause was sent to the Applicant's advocates on the 21st December, 2024 at 5.08p.m. It is noteworthy that the aforesaid email address remains listed in the current pleadings as the Advocates email address

50. Having failed to find basis to disturb the exercise of discretion by the judge in dismissing the Appeal on 16th January, 2023 the application is berift of merit.

51. To exercise discretion to set-aside the dismissal and reinstatement of the appeal must be upon reason and must be judicious.

52. I am not persuaded that the dismissal of appeal on 16th January, 2023 was premised on misdirection or the judge was clearly wrong.

53. The application dated 26th May, 2023 is accordingly dismissed for want of merit.

54. Costs are awarded to the Respondent.

It is So Ordered.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 19TH DAY OF SEPTEMBER 2024.

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MOHOCHI S.M

JUDGE