



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
CIVIL APPEAL NO.38 OF 2019
AT MILIMANI LAW COURTS

PAULINE JANE NJERENGA.....1ST APPELLANT

JUSTINE NJERU NJERENGA..... 2ND APPELLANT

-VERSUS -

KAHAWA SUKARI LIMITED.....1ST RESPONDENT

DAVID PETER OWUOR.....2ND RESPONDENT

JACQUELINE AKINYI ONYANGO.....3RD RESPONDENT

JUDGEMENT

1. The Appellants herein filed Milimani CMCC No.2484 of 2018 against the 1st Respondent on 8th July 2011. The Applicants were seeking orders of specific performance of a sale agreement they had entered into with the 1st Respondent in respect of purchase of two plots.
2. The two plots which were purchased by the Appellants were for Kshs.250,000/- each. The Appellants paid a deposit of Kshs.100,000/= . They did not pay the balance for quite some time. When they finally got the balance, they went to the 1st Respondent's offices where a director told them that they were to pay a penalty of Kshs.100,000/= per plot for late payment.. The Appellants declined to pay the penalty. The 1st Respondent proceeded to sell the two plots to third parties. This is what prompted the Appellants to file the suit in the lower court.
3. The suit in the lower court was not prosecuted for sometime because there were doubts whether the magistrates had jurisdiction to handle land disputes. The Appellants even filed an application in the Environment and Land Court seeking transfer of the suit to the Environment and Land Court. The issues of jurisdiction of magistrates was however resolved and the case remained in the lower court.
4. On 3rd April 2018, the clerk to the Appellants' Advocate took a hearing date for the case which was set for hearing on 6th June 2018. The clerk however diarized the date as being 6th July 2018. On the 6th June 2018 when the case was called out for hearing, there was no appearance and the trial Magistrate dismissed the Appellant's suit for non-attendance.
5. On 6th July, 2018, the Appellants advocate went to court for the hearing of the suit but found that it had not been listed. When he perused the court file, he found out that the file was in court on 6th June 2018 and had been dismissed for non-attendance. The Appellant's Advocate filed an application on the same day seeking setting aside of the court's order of 6th June 2018 and reinstatement of the suit.
6. The Applicant's application was heard and it was dismissed through a ruling delivered on 24th April 2019. This is what prompted the Appellants to file an appeal against the said ruling. The Appellants raised 13 grounds of Appeal which can be reduced to one ground that that is whether the trial magistrate properly exercised her discretion in declining to set aside the dismissal order.
7. As a first Appellate court my duty is to evaluate the evidence on record and arrive at my own findings. The parties' hereby were directed to file written submissions. The Appellants filed their submissions on 5th February 2020. The Respondents were given 14 days within which to file their submissions on 10th June 2021. As at the time of writing this Judgment on 13th August 2021, the Respondents had not filed any submissions.
8. I have considered the grounds of appeal as well as the Appellant's' submissions. The only issue for determination in this appeal is whether the trial magistrate properly exercised her discretion in declining to set aside the dismissal order. The trial magistrate appears to have declined to set aside her dismissal order on the ground that this was an old case.

9. In her ruling the trial magistrate stated that in declining to set aside the dismissal order, she had considered the case in totality. It is not contested that the case was filed in 2011. The Appellant were keen in proceeding with their case. The process of progressing the case was slowed when the issue of jurisdiction of magistrates to hear land matters was in issue. The Appellants had even filed an application seeking to transfer this matter to the Environment & Land Court. When the issue of jurisdiction was sorted out, the Appellants fixed their case for hearing after a pre-trial conference which was held on 13th September 2017. On 3rd April 2018, the Appellant fixed their case for hearing.

10. On the date of hearing, the Appellants Advocate did not attend court. In his application for setting aside, the Advocate clearly indicated that the reason for failure to attend court was because his clerk had mistakenly diarized the case for hearing on 6th July 2018. The Appellants Advocate annexed a copy of his diary of both 6th June 2018 and 6th July 2018 which showed that the case did not appear on 6th June 2018 but was appearing on 6th July 2018.

11. Despite this clear explanation, the trial magistrate refused to set aside the dismissal arguing that the fact that the case was old should have made the Appellant to properly diarize the date for hearing. With due respect to the trial magistrate, this was improper exercise of discretion. The Appellants Advocates had demonstrated that the mistake was inadvertent. The Application for setting aside was made on 6th July 2018, the day the Advocate thought the case was for hearing.

12. The parameters within which a court should exercise its discretion were well captured in the case of **Shah Vs Mbogo (1967) EA** where it was stated as follows:

“ The discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accidental , inadvertent or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the case of justice”.

13. In the instant case, the Appellants’ Advocate had demonstrated that failure to attend court was not intentional. The record will show that the Appellants were keen in prosecuting their case. They went to fix it for hearing but due to inadvertence, the date for hearing was mis-diarized. This was an excusable mistake which the trial magistrate should have considered.

14. In the case of **Philip Keipto Chemwolo & Another Vs Augustine Kubede (1986) eKLR** 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 a party should suffer the penalty of not having his case heard on merit”.

15. It is clear that the trial magistrate did not properly exercise her discretion. She was wrong in refusing to set aside the dismissal order when the Appellants advocate had demonstrated that non-attendance was due to a mistake which was amply explained. I therefore find that this Appeal has merits. The same is allowed with the result that the order dismissing the Appellant’s notice of motion dated 6th July 2018 is hereby set aside

16. In place thereof, I make an order allowing the Appellants notice of motion dated 6th July 2018. The Appellants shall have costs of this Appeal together with costs of the Notice of Motion which has been allowed. The hearing of the lower court case should be heard expeditiously.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 21ST DAY OF OCTOBER,2021

E.O.OBAGA

JUDGE

In the Virtual Presence of :-

M/s Tuwei for Mr Kirimi for Appellants

Court Assistant: Mercy

E.O. OBAGA

JUDGE