Karite v St Mary's Teachers Training College & another (Civil Appeal 205 of 2019) [2023] KEHC 5 (KLR) (4 January 2023) (Ruling)

Neutral citation: [2023] KEHC 5 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 205 OF 2019

OA SEWE, J

JANUARY 4, 2023

BETWEEN

CHARLES RUTO KARITE ..... APPELLANT

AND

ST MARY'S TEACHERS TRAINING COLLEGE ..... 1ST RESPONDENT

CATHOLIC DIOCESE OF MOMBASA ..... 2ND RESPONDENT

RULING

1. Before the Court for determination is the appellant's Notice of Motion dated 4th May 2022. It was filed pursuant to Sections 3 and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010, for the following orders:

   (a) That the Court be pleased to set aside the directions delivered on 17th September, 2020 and 22nd April 2021;

   (b) The Court be pleased to reinstate the appellant's appeal for hearing and determination;

   (c) The costs of the application be provided for.

2. The application was premised on the grounds that, vide the directions given herein on 17th September 2020, this appeal was summarily rejected for having been filed out of time, yet the appellant had obtained leave of the Court *vide* High Court Miscellaneous Case No. 145 of 2019: *Charles Ruto Kiarie v St. Mary's Teachers Training College & Another* to file the appeal out of time. It was further the contention of the appellant that the rejection of the appeal was done in error; and therefore the said order ought to be set aside *ex debito justitiae*.

3. The application was supported by the affidavit of Pauline Awino Osino, Advocate, sworn on 4th May 2022 in which counsel explained that she was unaware of the directions dated 17th September 2020 until 31st March 2022 when she got to know of the orders while in the process of filing an Affidavit

of Service. She reiterated the appellant's stance that the summary rejection of the appeal was done in error; and therefore ought to be set aside in the interest of justice. She annexed to her affidavit copies of the ruling in High Court Miscellaneous Case No. 145 of 2019: *Charles Ruto Kiarie v St. Mary's Teachers Training College & Another* in support of the application.

4. The application was resisted by the respondents on the following grounds, per the Grounds of Opposition dated 10th June 2022:

   (a) That the appellant's appeal was considered on its merits by Hon. Justice P.J.O. Otieno who issued directions on 17th September 2020 summarily dismissing the appeal for lacking merit as well as for having been filed out of time. The said directions have not been set aside and/or vacated and as such, the only available remedy for the appellant is to appeal against the said directions/orders as opposed to seeking for review.

   (b) That instead of appealing against the aforesaid directions of Hon. Justice P.J.O. Otieno, the appellant in a further attempt to circumvent the rules of procedure and the orders of the Court re-lodged the present appeal though the backdoor before Hon. Lady Justice D.O. Chepkwony and the same was also summarily dismissed on 22nd April 2022. As such, it is clear that the appellant's application is yet another attempt by him to circumvent the rules of procedure to illegally extend the time for filing an appeal to the great prejudice of the respondents.

   (c) That the issue of extension of time for filing an appeal was properly litigated upon between the same parties and a determination issued on 14th October 2019 through a ruling delivered by Hon. Lady Justice D.O. Chepkwony in High Court Miscellaneous Civil Application No. 145 of 2019. As such, the appellant is disentitled to the orders sought because his application is res judicata.

   (d) That the appellant's application is incompetent and an abuse of the court process in so far as it seeks to review two directions/orders that were issued by two different courts before a court that never made/issued any of the said orders.

   (e) That the appellant's application is ill-conceived, an abuse of the court process and just another ploy by the appellant to circumvent the orders issued by Hon. Lady Justice D.O. Chepkwony directing the appellant to file his appeal within 30 days from 14th October 2019.

   (f) The delay in filing the appeal is inordinate, inexcusable and a clear indication that the appellant is only using the contemplated appeal to tie up the respondents in a continuous malicious litigation cycle.

   (g) That the delay in filing the present application by the appellant is inordinate and inexcusable since the directions/orders sought to be reviewed were issued close to over two years ago.

   (h) That the present application should be struck out as the same is an afterthought that has been made too late in the day with the sole purpose of wasting this Court's precious judicial time.

5. The application was urged by way of written submissions, pursuant to the directions given herein on 6th May 2022. In her written submissions filed on 13th October 2022, Ms. Osino faulted the respondent for relying on Grounds of Opposition only, and therefore proposed the following issues for determination:

   (a) What is the consequence of failure to file a Replying Affidavit.

   (b) Whether the application has merit.

6. Ms. Osino submitted that, since the respondent filed Grounds of Opposition only, the same ought to have been restricted to matters of law and not fact. On the basis of *Mustano Rocco v Aniello Sterelli* [2019] eKLR; HCCC No. 2143 of 1999: *Kipyator Nicholas Kiprono Biwott v George Mbuguss and Kalamka Ltd* and *Mohammed & Another v Haidara* [1972] EA 166 counsel urged the Court to find the appellant's averments unrebutted.

7. On the merits of the application, Ms. Osino relied on Articles 25 and 50 of the *Constitution*, which guarantee the right to a fair trial and Sections 3, 3A and 79G of the *Civil Procedure Act* to buttress her argument that a plausible justification has been given by the appellant to warrant the exercise of the Court's discretion in his favour. She then went on to discount the grounds of opposition presented by the respondent, contending that they have no legal basis. In counsel's view, the res judicata doctrine is inapplicable, granted that the instant application seeks to have the appeal reinstated while the first application was for leave to file the appeal out of time. She concluded her submissions by quoting from *Joseph Kinyua v G O Ombachi* [2019] eKLR as to the powers of the Court under Articles 50 and 159 of the *Constitution* to do substantive justice to the parties.

8. On behalf of the respondents, Mr. Wafula relied on his written submissions dated 13th October 2022. He proposed two issues for determination, namely:

   (a) whether the appellant is entitled to the orders sought; and

   (b) who should be awarded costs?

9. He approached the matter from the prism of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules* and urged the Court to find that the appellant failed to establish discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or any other sufficient reason to warrant review. Counsel further urged the Court to find that there was unreasonable delay in filing the instant application; and therefore that the appellant has not met the threshold for the grant of the review orders asked for in the instant application.

10. As for the appellant's submissions on failure by the respondent to file a replying affidavit, Mr. Wafula urged the Court to dismiss the same. He relied on Order 51 Rule 14 of the *Civil Procedure Rules* which stipulates that a party may oppose an application by filing any one or a combination of the following documents: a notice of preliminary objection, a replying affidavit or a statement of grounds of opposition. He therefore posited that, by filing Grounds of Opposition, the respondents have sufficiently opposed the appellant's application. He therefore urged the Court to dismiss with costs the appellant's application, which he termed ill-advised.

11. I have carefully considered the application dated 4th May 2022 in the light of the averments set out in its Supporting Affidavit and the Grounds of Opposition filed by the respondent. I have likewise considered the proceedings and the other documents on the record. The story that emerges therefrom is that this appeal was filed on 17th October 2019 against the ruling and order of the Chief Magistrate in Mombasa CMCC No. 2212 of 2012: Charles Ruto Karit v St Mary's Teachers Training College & Another, delivered on 12th February 2019. The record further shows that, a few days later, the appellant filed his Record of Appeal and thereafter awaited directions of the Court for purposes of Section 79B of the *Civil Procedure Act*; which provision states:

    Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily.

12. Those directions were given on 17th September 2020 by Hon. Otieno, J.; whereupon the appeal was summarily dismissed. There is no indication that this order was brought to the attention of the parties. Hence on 22nd April 2021, the file was again placed for directions before Hon. Chepkwony, J., who declined to give directions in the matter in the light of the previous directions by Hon. Otieno, J. The record shows that the orders of Hon. Chepkwony, J. were extracted and served on counsel for the parties on 26th and 27th April 2021, respectively. It was thereafter that the appellant brought the instant application on 4th May 2022.

13. In the premises, the issues falling for my determination are as hereunder:

    (a) Whether the instant application is res judicata; and if not,

    (b) Whether sufficient cause has been shown by the appellant for the setting aside of the orders of the Court dated 17th September 2020 and 22nd April 2021.

14. Ms. Osino did pose the question as to what the consequences of failure to file a replying affidavit are in this instance. She took the view that, since the Grounds of Opposition raised herein by the respondent entail factual details, the same ought to have been presented by way of a replying affidavit. I have given that argument due consideration and would agree with the position taken by Mr. Wafula, that Order 51 Rule 14 of the Civil Procedure Rules permits the filing of Grounds of Opposition as one of the three ways of responding to an application; and therefore the respondent cannot be faulted in that regard.

15. It matters not therefore that the Grounds of Opposition filed by the respondent do not adequately respond to the factual averments raised by the appellant. Ultimately, the Court has the duty to render a decision on the basis of the material placed before it. I therefore fully agree with the position taken in *Mustano Rocco v Aniello Sterelli* [2019] eKLR; HCCC No. 2143 of 1999: *Kipyator Nicholas Kiprono Biwott v George Mbuguss and Kalamka Ltd* and *Mohammed & Another v Haidara* [1972] EA 166 for the principle that grounds of opposition address only issues of law as opposed to facts. I however hasten to add that the issues of law arise within the context of particular factual situations which if not disputed need not be responded to by way of a replying affidavit.

16. In this instance the factual details narrated in the respondent's Grounds of Opposition are all borne out of the court proceedings and therefore require no proof. As to res judicata, the ruling relied on by the respondent in Ground 3 is the very ruling that the appellant annexed to his Supporting Affidavit. It would have been superfluous for the respondent to prepare a replying affidavit for the sole reason of exhibiting that ruling. It is therefore my finding that the respondent's Grounds of Opposition are valid and constitute a proper response to the appellant's application dated 4th May 2022.

17. Although the application is expressed to have been filed under Sections 3 and 3A of the *Civil Procedure Act* of the *Civil Procedure Rules*, a decision under Section 79B, being a merit decision can only be reviewed or appealed (see for instance, *Timsales Ltd v Stanley Njihia Macharia* H.C. Nakuru C.A. No. 148/2005 and *Philip Ochilo -V- Ambrose Seko* C.A. Kisumu C.A. No. 53/1984). I will therefore proceed to treat the application as an application for review, as did counsel for the respondent. From that perspective I found Mr. Wafula's arguments that the instant application is *res judicata* to be misplaced.

18. Needless to say that the Court is vested with the powers to review its decisions by dint of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*. Section 80 provides:

    Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

19. Order 45 Rule 1 of the *Civil Procedure Rules*, on the other hand, provides as follows: -

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

20. It is plain therefore that an application for review must, of necessity, be restricted to discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made; or some mistake or error apparent on the face of the record; or for any other sufficient reason. It is also a prerequisite that the application for review be made without unreasonable delay.

21. The appellant seeks the review of two orders on the ground that the first order dated 17th September 2020 was wrongfully made. The appellant averred that by the time the appeal was rejected for having been filed out of time, the Court had, in a separate matter, being Mombasa High Court Miscellaneous Civil Application No.145 of 2019, granted the appellant leave to appeal out of time. Since that ruling had been made by the time the appeal was rejected on 17th September 2020, it cannot be said to be new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made.

22. In the same vein, it cannot be said that there is an error on the face of the record in connection with the order of 17th September 2020 because the ruling of 14th October 2019 by which the appellant obtained enlargement of time to file his appeal was not brought to the attention of the Court. As explicated by the Court of Appeal in *Muyodi v Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243 the error must be on a substantial point of law that is evident on the record. Thus, the Court of Appeal held:

> "...In *Nyamogo & Nyamogo -vs- Kogo* (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long

drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us..."

23. Having found the order of 17th September 2020 to be proper, the subsequent order by Hon. Chepkwony, J. dated 22nd April 2021 is unassailable.

24. That said, the next issue to consider is whether there exists any other sufficient reason for granting a review of the order dated 17th September 2020. As was acknowledged by the Court of Appeal of Tanzania in the case of The *Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman Bunju Village Government & Others* in Civil Appeal No. 147 of 2006 what constitutes sufficient cause ought to be given a liberal construction in order to advance substantial justice. Here is what the Court had to say:-

> " It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant"

25. Similarly, in The *Official Receiver and Liquidator v Freight Forwarders Kenya Limited*, Civil Appeal No. 235 of 1997; {1997} LLR 7356, it was held:

> " these words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot without at times running counter to the interests of justice 'be limited to the discovery of new and important matters or evidence, or occurring of a mistake or error apparent on the face of the record"

26. Lastly, in (para 29) *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR, it was held:

> As repeatedly pointed out in various decisions of this Court, the words, "for any sufficient reason" must be viewed in the context firstly of Section 80 of the *Civil Procedure Act*, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order."

27. Guided by the foregoing precedents, I have taken into consideration the appellant's grounds for review, namely that by the time the order dated 17th September 2020 was made he had been granted enlargement of time in Mombasa High Court Miscellaneous Civil Application No.145 of 2019. He annexed a copy of the ruling in that regard, dated 14th October 2019. Ms. Osino further explained in her affidavit that the appeal was filed thereafter on 17th October 2019. Thus, by the time the appeal was rejected, the appellant had already filed and served his Record of Appeal. I also note that, while the order of 22nd April 2021 was duly extracted and served on counsel for the parties, there is nothing on the file to show that similar action was taken in respect of the order dated 17th September 2020.

28. In the premises, I am satisfied that sufficient cause has been shown by the appellant for the review and setting aside of the order of 17th September 2022 and the consequential proceedings herein, bearing in mind the holding in *CMC Holdings Limited -vs- Nzioki* [2004] 1 KLR 173 that:

> " In law, the discretion that a Court of law has, in deciding whether or not to set aside an ex-parte order...was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would...not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error..."

29. In the premises, I find merit in the application dated 4th May 2022 and would grant the orders prayed for therein, namely:

    (a) That the order dated 17th September, 2020 by which this appeal was summarily rejected for having been filed out of time be and is hereby reviewed and set aside;

    (b) The consequential order made herein on 22nd April 2021 be and is likewise hereby set aside;

    (c) The appeal is hereby reinstated and is accordingly admitted to hearing for purposes of Section 79B of the *Civil Procedure Act*;

    (d) The costs of the application be costs in the appeal.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MOMBASA THIS 4TH DAY OF JANUARY 2023.

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OLGA SEWE

JUDGE