Kimani (Suing on behalf of New Jerusalem Church) v Mungai & 2 others (Civil Appeal 49 of 2019) [2023] KEHC 702 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEHC 702 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CIVIL APPEAL 49 OF 2019

CM KARIUKI, J

FEBRUARY 9, 2023

BETWEEN

MOSES MBUGUA KIMANI (SUING ON BEHALF OF NEW JERUSALEM CHURCH) ..... APPELLANT

AND

STEPHEN MUNGAI ..... 1ST RESPONDENT

EZEKIEL CHERUIYOT ..... 2ND RESPONDENT

MARGARET NJOKI ..... 3RD RESPONDENT

RULING

1. By Notice of Motion dated April 12, 2022. The applicant seeks the prayers that the orders of February 22, 2022 be reviewed, set aside, or varied and application dated February 22, 2022 be reinstated *inter-alia*.

2. The same is supported by the grounds on the application and the affidavit sworn by Moses Mbugua Kimani, applicant sworn on April 12, 2022.

3. Respondent opposes the same via affidavit of David K Kaburu sworn on April 19, 2022.

4. The parties were directed to canvass the same via the submissions applicant field, but the respondent relied on Replying Affidavit.

5. Applicant submissions

6. The appellant filed the present appeal to impugn the ruling of the honourable Resident Magistrate Victoria Ochanda in Nyahururu PMCC no 175 of 2011, delivered on November 25, 2014, on grounds set out in the Memorandum of Appeal. However, the trial court had dismissed the appellant's suit on grounds of non-attendance of the advocate then acting for the appellant (the plaintiff).

7. During the pendency of this appeal, the appellant was served with a Notice to Show Cause why the appeal should not be dismissed under order 42 rule 35(2) of the *Civil Procedure Rules*, 2010, where the applicant was required to attend court on September 18, 2019.

8. The appellant appeared in court on September 18, 2019 when he requested to be given time to look for legal representation as the advocate failed to appear. it is then that he instructed the firm of Wangechi Wangare & Associate Advocates to appear on their behalf.

9. That the said advocates appeared before court on October 17, 2019, where the court directed that the file be transferred to Nyahururu for hearing and determination of the appeal. It took too long for the file to be transferred to Nyahururu High Court.

10. That upon perusal of the court file, it appeared that the appeal was dismissed on June 2, 2016. However, the court proceeded and misdirected the appellant that the appeal was still pending hearing and determination.

11. The appellant obtained an order issued on March 16, 2016 which gave orders that the appeal was dismissed for want of prosecution and that the costs were awarded to him.

12. That it is surprising, therefore, that the responded proceeded to have costs taxed in his favour yet according to him and the directions of the court:-

    i. The appeal was transferred to Nyahururu for hearing and determination.

    ii. The appeal had never been dismissed while at Nyahururu.

    iii. In any event, the costs were awarded to the other side.

13. That applicant swore an affidavit in support of his application for leave to reinstate the appeal for purposes of hearing and determination on merit.

14. The principles governing reinstatement of the suit are cited in the case of *John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR.

15. In the circumstance of this case, it is submitted that the court has misled the appellant. Indeed, when the Notice to Dismiss the appeal was issued, it appeared that the suit was still active. Accordingly, it was transferred to the Nyahururu High Court for hearing and disposal, notwithstanding that "it had been dismissed in 2016" but continued to be active in court.

16. This application is governed by the provisions of order 12 rule 7 of the *Civil Procedure Rules*, which states as follows —

> "7. Where under this order judgment has been entered, or the suit has been dismissed, the court, on application, may set aside the judgment or order upon such terms as may be just".

17. Indeed, the dismissal of this appeal for want of prosecution and its reinstatement is an act of exercising this court's discretionary power. Thus, the principles in the case of *Mbogo & Anor & vs – Shah* (1968) E A 93 apply.

18. The honourable court has been told that the trial court file and the original appeal files are missing, but the same can be reconstructed in the interest of substantive justice. Accordingly, the court considers the special circumstances of this matter vide article 159 of the *Constitution*, the balance of convenience,

and the great prejudice occasioned to the appellant and allow the application, reinstate the appeal for hearing, and determination on merit.

19. Respondent reply affidavit

20. The said application has already been overtaken by events in view of the consent order recorded on April 12, 2022 before the deputy registrar.

21. The appellant confesses in paragraph 8 of his Supporting Affidavit that his appeal was dismissed with costs on June 2, 2016 for want of prosecution; hence there was no appeal pending subsequently which is capable of being tried and determined as insinuated by the appellant.

22. The application before the court is one of reinstatement of the application dated February 22, 2022, which was dismissed for want of prosecution. The applicant has not tendered any evidence in his affidavit or otherwise why the Appellant was not in court by himself or through his advocates.

23. There is absolutely no explanation why they did not attend the court virtually or physically or send anybody to hold their brief and seek any other orders before the honourable court on March 14, 2022, when their application was listed to be heard.

24. That he verily believes there is no explanation why the Appellant delayed from March 14, 2022, when the application aforesaid was dismissed, till April 12, 2022, when he was arrested under a warrant issued in execution herein for him to file the current application.

25. That the delay in filing the present application is unreasonable, unexplained, unconscionable, and completely unacceptable.

26. That the issues raised in the application herein were raised before the Judge and resolved on March 14, 2021 when he ordered the deputy registrar to tax the costs in favour of the respondents based on the materials available in the file, which is what the deputy registrar did.

27. Issues, analysis, and determinations

The issues I discern from the material before me are whether the application has merit and order as to costs.

28. I have considered the foregoing, the submissions filed on behalf of the parties herein, and the authorities relied upon in support thereof. That the decision whether or not to set aside *ex parte* order or judgment 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. See *Shah vs Mbogo & Another* [1967] EA 116.

29. In this case, the grounds upon which the application to set aside the impugned orders are that the applicant advocates appeared before the court on October 17, 2019, where the court directed that the file be transferred to Nyahururu for hearing and determination of the appeal. It took too long for the file to be transferred to Nyahururu High Court.

30. upon perusal of the court file, it appeared that the appeal was dismissed on June 2, 2016. However, the court proceeded and misdirected the appellant that the appeal was still pending hearing and determination. Accordingly, the appellant obtained an order issued on March 16, 2016 which gave orders that the appeal was dismissed for want of prosecution and that the costs were awarded to him.

31. The appeal was transferred to Nyahururu for hearing and determination, notwithstanding the alleged dismissal order. The appeal had never been dismissed while at Nyahururu. I see no evidence of the notification process to the intended dismissal of the appeal, thus leaving room for inferring that the appellants were never notified of the stages of proceedings before the trial court dismissed the appeal.

32. As was held by the Court of Appeal in *CMC Holdings Ltd vs Nzioki* [2004] KLR 173:

> " In an application for setting aside *ex parte* judgment, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law, the discretion that judgment 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 others, an excusable mistake or error. ....."

33. That the decision whether or not to set aside *ex parte* judgment scretionary 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. See *Shah vs Mbogo & Another*[1967] EA 116. See also *Pindoria Construction Ltd vs Ironmongers Sanytaryware* Civil Sanitaryware16 of 1976

34. The respondents contend that the application before the court is one of reinstatement of the application dated February 22, 2022, which was dismissed for want of prosecution. The applicant has not tendered any evidence in his affidavit or otherwise why the appellant was not in court by himself or through his advocates.

35. There is absolutely no explanation why they did not attend the court virtually or physically or send anybody to hold their brief and seek any other orders before the honourable court on March 14, 2022, when their application was listed to be heard.

36. I agree with the position held by the Supreme Court of India, which stated in *Sangram Singh vs Election Tribunal, Koteh*, AIR 1955 SC 664, at 711 cited in the case of *Gerita Nasipondi Bukunya & 2 others v Attorney General* [2019] eKLR that:

> " [T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, ..."

37. That was the position adopted by the Court of Appeal in *Onjula Enterprises Ltd vs Sumaria* [1986] KLR 651, where it was held that:

> " The rules of the court must be adhered to strictly, and if hardship or inconvenience is caused, it would be easier to seek an amendment to the particular rule. But, on the other hand, it would be wrong to regard the rules of the court as of no substance. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to disregard of the principle involved. See *London Association for the Protection of Trade & Another vs Greenlands Limited* [1916] 2 AC 15 at 38."

38. In my view, this position is supported by the holding of Ojwang, J (as he then was) in *Haile Selassie Avenue Development Co Limited v Josephat Muriithi & 10 others* [2004] eKLR where he held that:

> " The rules of procedure which regulate the trial process are intended to expedite trials and facilitate judicial decision-making with finality. Accordingly, these rules cannot be said to be oppressive to parties or that they necessarily wreak injustice. Nevertheless, on the facts of this particular case, the Defendants ought to have complied with these rules of procedure."

39. In *Wachira Karani vs Bildad Wachira* (2016) eKLR, as was quoted in the case of *David Gicheru v Gicheha 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...."

40. In considering whether or not to set aside a judgment, a judge has to consider the matter in the light of judgments and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed. Hence the just judgment of the matter and the good sense of the matter are certainly matters for the judge.

41. In this case, the applicant's failure to appear in court when the impugned order was made date was attributed to lack of notification and the fact that the appellants' counsel was not present in court on that date set. Even if the absence of the appellants was to be blamed on their counsel, as was appreciated by Apalloo, J A (as then was) in the case of *Philip Chemowolo & Another vs Augustine Kubede* [1982-88] KAR 103 at 1040:

> " Blunder 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. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."

42. That mistakes do occur in the process of litigation was appreciated by the court of Appeal in *Murai vs Wainaina* (No. 4) [1982] KL, R 38, where it was held that:

> A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because senior counsel commits it. In junior counsel's case, the 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 a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which are politely referred to us erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.
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> i. Thus, in the totality of what I gather from the scanty record as the original file is not availed, it is only fair that the application be allowed with costs to the respondent assessed at ksh 5,000 to be paid within 30 days from the date herein.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 9TH DAY OF FEBRUARY 2023.

CHARLES KARIUKI

JUDGE