Harakam Enterprises Ltd & another v Ochieng & another (Suing as the Legal Representatives of the Estate of the Late Sarah Awuor Odhiambo) (Civil Appeal 12 of 2021) [2023] KEHC 18917 (KLR) (13 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18917 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 12 OF 2021

SM MOHOCHI, J

JUNE 13, 2023

BETWEEN

HARAKAM ENTERPRISES LTD ..... 1ST APPELLANT

HARICAN PRINTERS STATIONERS ..... 2ND APPELLANT

AND

ROBERT OCHIENG & MARY AGUTU OBUORY (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE SARAH AWUOR ODHIAMBO) ..... RESPONDENT

RULING

1. On January 24, 2023, Before Hon D M Kizito J the Court dismissed this Appeal for want of prosecution when it came up on a Notice to Show Cause. Miss Guko Advocate, appeared before Court for the Applicants and failed to show cause and provided no sufficient reason as to why the Appellant had delayed in prosecuting its Appeal. The Respondent was equally represented by Mr. Gekonga Advocate who had urged that the delay was unjustifiable and prejudiced the estate of the deceased in enjoying the fruits of its judgment he urged the Court to dismiss the Appeal, and the same was dismissed but with costs to the Respondent of Ksh 95,000/- and a stay of 30 days.

2. By a motion dated 9th February, 2023, filed under certificate of urgency an application brought under Article 159 (1), (d) of the *Constitution* of Kenya, Orders 42 Rule 35, 43 Rule 1, 51 Rule 1 of the *Civil Procedure Rules*, Sections 1, 3, 3A of the *Civil Procedure Act* the Appellants/Applicants seeks the following reliefs: -

    a. Spent

    b. Spent

c. That this honorable court be pleased to set aside and/or vary its Orders made on January 24, 2023 dismissing the Appeal with an order that the Appeal be reinstated to be heard on merits.

d. That this honorable court be pleased to set aside and/or vary its Orders made on January 24, 2023 for the Applicants to pay 95,000/- as costs within 30 days.

e. The Honorable Court be pleased to, consolidate HCCA E095/2021 together with this Appeal.

f. Any other or Further Order as it may deem just appropriate and expedient in the interest of justice.

g. Costs be in the cause.

3. The Appellants/Applicants have formulated fifteen (15) grounds on which they base the Application.

This Court shall not deal with any of the grounds as the same do not speak to the Application at hand but rather appear to attempt to show cause by elaborating a two-year history of the Appeal and measures undertaken towards prosecution. I shall later comment on this issue.

4. The Applicants participated in the notice to show cause proceedings and failed to persuade the learned judge who exercised his discretion in dismissing the Appeal and awarding costs.

5. The decision whether or not to set aside judgment, is discretionary and 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 v Mbogo & Another* [1967] EA 116.

6. In *Pindoria Construction Ltd v Ironmongers Sanytaryware* Civil Appeal No 16 of 1976 it was held that: -

> " It is a common ground that it is a matter for discretion whether or not to set aside a judgment under rule 8 of Order 9B of the Civil Procedure Rules. It is also well settled that the Court of Appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice... The appellant was not altogether free from blame. He could have tried harder to be present at the date of hearing. He delayed considerably in filing his application to set aside the ex parte judgement. The trial Judge's exasperation at his behaviour was understandable. Although he should not have been precluded from defending the claim against him he has to be penalised to some extent in view of his somewhat dilatory actions."

7. The first question for determination is whether the judgment was procedurally entered. As stated hereinabove, the Court had issued Notice Parties obliged Miss Guko Advocate for the Applicant appeared and attempted unsuccessfully to "show cause".

8. Mr Gekonga Advocate had urged that the delay was unjustifiable and prejudiced the estate of the deceased in enjoying the fruits of its judgment he urged the Court to dismiss the Appeal.

9. The Court exercised its discretion in dismissing the Appeal and awarded costs.

10. Order 17, rule 2 provides for Notice to Show Cause why the suit should not be dismissed.

> 2.
>
> (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.
>
> (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks bfit to obtain expeditious hearing of the suit.
>
> (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
>
> (4) The court may dismiss the suit for non-compliance with any direction given under this Order.
>
> Order 17, rule 3. Provides for the Procedure if parties fail to appear on day fixed.
>
> 3. Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 12, or make such other order as it thinks fit.
>
> Order 17, rule 4. Empowers the Court to proceed notwithstanding either party fails to produce evidence.
>
> 4. Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith.

11. It was Applicant's case that the Principles of reinstatement of suit are provided for in the Case of *John Nahashon Mwangi v Kenya Finance Bank Limited (In liquidation)* [2015] which held inter alia that: -

> "The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of *the Constitution*. Article 50 coupled with article 159 of *the Constitution* on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in deciding on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such act are comparable only to the proverbial ''Sword of the Dancles'' which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated".

12. The Applicant equally sought reliance on the case of *Joseph Kinyua v G.O Ombachi* (2019) eKLR that Dismissal of Suits is a draconian Act.

13. Order 12 rule 7 of the *Civil Procedure Rules, 2010* donates to this court the discretion to set aside its orders where judgment has been entered or the suit has been dismissed and that the decision whether to reinstate a suit and the legal test to be met has been discussed in various cases, reference being made to the case of *Wanjiku Kamau -vs- Tabitha Kamau & 3 Others* [2014] eKLR where it was held that: -

> " The court has the discretion to set aside judgment or order and there are no limitations and restrictions on the discretion of the judge except of the judgment or order is raised. It must be done on terms that are just."

14. In the case of *Patel v E.A. Cargo Handling Services Ltd* [1974] EA 75 at page 76 C and E where the court held that: -

> " There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules."

15. The Respondent urged for dismissal of the Application as being an abuse of the process of the Court and that the dismissal was pursuant to a hearing in with the Appellant participated

Determination

16. I have considered the application herein, the affidavits in support thereof and the submissions filed.

17. There is no doubt that this Court has the power to grant an order reinstating a dismissed suit as was appreciated by the Court of Appeal in *Murtaza Hussein Bandali T/A Shimoni Enterprises vs. P. A. Wills* [1991] KLR 469; [1988-92] where it was held that there is inherent power to restore a case for hearing after it has been dismissed.

18. However, the decision whether or not to reinstate a dismissed appeal is no doubt an exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. See *Gharib Mohamed Gharib vs. Zuleikha Mohamed Naaman* Civil Application No. Nai. 4 of 1999.

19. In this case, the Applicant's case is that he was heard on the notice to show cause and seeks to regurgitate "showing cause" as a basis of the Application. The Decision by the Learned Judge Kizito is not faulted and no material has been placed to show case if the decision was not judicious or was informed by mistake.

20. However, in Union Insurance Co of Kenya Ltd v Ramzan Abdul Dhanji Civil Application No. Nairobi 179 of 1998 the Court of Appeal held that: -

> " Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did

their counsel attend. Clearly, the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

21. In arriving at my decision, I am, however, guided by the decision of the Court of Appeal in *CMC Holdings Ltd v Nzioki* [2004] KLR 173 where it was held that: -

> " 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...In 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. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place ex parte and hence it would appear was true and not if true, the effect of the same on the ex parte judgement was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate...The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the ex parte judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside ex parte judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside ex parte judgement. In the instant case, the defence and counterclaim was already in the file when the matter was heard ex parte and the trial magistrate stated that she considered the same and dismissed the same defence and counterclaim when the appellant was not in court to put forward its case. Further it appears that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant's input...What the Trial Court should have done when hearing the application to set aside the ex parte judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant's appearance were weak, she was in law bound to exercise her discretion and set aside the ex parte judgement so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned Trial Court had concluded on the evidence before her but should have in the same

way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed."

22. In considering whether or not to set aside the default judgment a judge has to judge the matter in the light of all the facts 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 justice of the matter and the good sense of the matter, are certainly matters for the judge. It is, as I have held elsewhere in this ruling an unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the Court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication. The principle obviously is that, unless and until the Court has pronounced a judgment upon the merits or by consent it is to have the power to invoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. While the Judge may not be satisfied with the blunders or inaction of the defendant or his advocate, nevertheless he may hold that it would be just to set aside the ex parte decision. See *Bouchard International (Services) Ltd v M'mwereria* [1987] KLR 193; *Evans v Bartlam* [1937] 2 All ER 647.

23. Considering all the circumstances of this case I am unsatisfied that any materials are placed before the Court warranting reinstatement of the dismissed Appeal.

24. No Material has been placed before the Court warranting consolidation HCCA E095/2021 together with this Appeal.

25. I have said enough to show that I find no merit in the Notice of Motion dated February 9, 2023.

26. Accordingly, application to set-aside the order dismissing this suit and reinstate the same is dismissed for want of merit.

27. The costs of this application are awarded to the Respondent.

28. It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 13TH JUNE 2023

.....

MOHOCHI S.M

JUDGE

13/06/2023

Parties:

Miss Guko Advocate- Applicant

Mr Gekonga Advocate for the Respondent