**Ong'ong'e & another v Harakam Enterprises Ltd & 2 others (Civil Appeal E095 of 2021) [2023] KEHC 19276 (KLR) (23 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19276 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CIVIL APPEAL E095 OF 2021**

**SM MOHOCHI, J**

**JUNE 23, 2023**

**BETWEEN**

**LEONARD MENYA ONG'ONG'E ..... 1ST APPLICANT**

**MENYA & ASSOCIATES ..... 2ND APPLICANT**

**AND**

**HARAKAM ENTERPRISES LTD ..... 1ST RESPONDENT**

**HARICAN PRINTERS STATIONERS ..... 2ND RESPONDENT**

**ROBERT OCHIENG & MARY AGUTU OBUORY (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE SARAH AWUOR ODHIAMBO) ..... 3RD RESPONDENT**

**RULING**

1. By notice of motion dated May 24, 2022 brought pursuant to section 1A, 1B and 3A of *Civil Procedure Act* and order 1 rule 10(2) of the *Civil Procedure Rules* and all other enabling provisions of the law.

2. The applicants pray to be struck out from the appeal and costs of the application be borne by the 1st and 2nd respondents based on the following six (6) grounds: -

    a. That the appeal herein was filed by the 1st and 2nd respondents on 29th February 2021 who erroneously enjoined the 1st and 2nd applicants as the 2nd and 3rd respondents therein;

    b. That the 3rd respondent's herein had consensually withdrawn the suit as against the 1st and 2nd applicants in the trial court in the presence of the 1st and 2nd respondents who did not object to the suit withdrawn and from that day there have been no existing/pending claim against the 1st and 2nd applicants;

c. That judgement in the trial court was delivered in favour of the 3rd respondents against the 1st and 2nd respondents who were the owners and insured of the 3rd party motor vehicle;

d. That the 1st and 2nd applicants are therefore non-suited to be enjoined as parties herein for determination of the appeal which they are not party to;

e. That it is only appropriate that the application is allowed and the 1st and 2nd applicants are struck out the appeal;

f. That this honorable court has unfettered discretion to order for striking out where justice of the demands;

g. That I urge this honorable court to strike out the 1st and 2nd applicants from the suit with costs to the 1st and 2nd respondents; and

h. That in the premises it is only fair and in the wider interest of justice that the 1st and 2nd applicants be struck out from the appeal.

3. The respondent on June 23, 2023 filed a replying affidavit in opposition to the application, sworn by Sonia Aguko Advocate dated June 20, 2022.

4. Directions for hearing and disposal of the application by written submissions was given on the October 27, 2022 and the applicant complied with the directions and filed its written submissions on the December 8, 2022.

5. The matter came up before court for directions on the February 16, 2023 where the respondent sought leave to file its written submissions and craved to be served the applicant written submissions and the same was allowed with the 1st and 2nd respondents being allowed seven (7) days to file and serve its written submissions.

6. The matter came up for mention on the March 14, 2023 and the 1st and 2nd respondents had not filed their written submission's and were absent for the mention and the court reserved the matter for a ruling.

7. The 1st and 2nd respondents elected not to file any written submissions despite repeated opportunities available and the court thus proceeded without the same.

8. It is noteworthy that the 3rd respondent participated without filing any pleadings and submission specifically to the application but the court relies on the 3rd respondent's replying affidavit dated January 21, 2022 that was in response to the 1st and 2nd respondents application for stay of execution of judgment in Molo CMCC No 368 of 2018.

9. It is further noteworthy that, the substratum forming the appeal is aggrievement of a ruling by the trial court setting condition of stay pending appeal and that 1st and 2nd respondents openly admit to filing two (2) appeals with High Court civil appeal No 12 being an appeal against judgment on quantum alone.

10. The applicants submit that the issue for determination is: -

a. Whether the 1st and 2nd applicants should be struck out from the instant suit appeal

11. That the instant appeal arises from Molo CMCC No 386 of 2018 wherein the 3rd respondent sought for damages as against the applicants and the 1st and 2nd respondents as defendants respectively that the matter proceeded and on November 12, 2019 parties recorded a consent that the suit against the

applicants be withdrawn and judgement on liability be entered in the ratio of 5:95% in favor of the 3rd respondent as against the 1st and 2nd respondents. That the said consent was recorded in the presence of the 1st and 2nd respondents who did not object to the suit being withdrawn and from that day there have been no existing/pending claim against the applicants.

12. That in consequence the matter proceeded for assessment of damages and was concluded and judgement delivered on February 16, 2021 in favor of the 3rd respondent as against the 1st and 2nd respondents.

13. In the circumstances that the applicants are non- suited to be enjoined as parties for determination of appeal which they are not party to notably the appeal in Nakuru HCCA 12 of 2021 is purely on quantum as parties had consented on liability.

14. In the premises it is only appropriate that the application be allowed and the 1st and 2nd applicants be struck-out from the appeal with costs.

15. The applicants urge the court to be guided by the provisions of order 1 rule 10 (2) of the *Civil Procedure Rules* which provides that: -

> " The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined whether as plaintiff or defendants, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

16. The applicants submit that indeed this position was laid out in the case of *Pinnacle Projects Limited & 3 others v Beatper Enterprises Limited &4 others* [2016] eKLR, where the court held as follows:-

> " From the passage above, it is clear that the court may on its own motion or on application of any party to the proceedings order the striking out a party who the court finds was improperly joined. In the exercise of that discretion, the court must as a matter of cause, act according to reason and fairness and not according to its whims and caprice."

17. Most importantly that no objection was raised by the 1st and 2nd respondent. Consequently, that the 1st and 2nd respondent preferred an appeal against the court's judgement on quantum. The 1st and 2nd respondent also preferred an application for review seeking to set aside the consent on liability. However, the court *vide* its ruling dated August 24, 2021 dismissed the said application for review.

18. The applicants urge this court to find that the consequent to the consent judgement on liability and the subsequent judgment of the court that the 1st and 2nd applicants were exonerated from the suit and are therefore not parties to the subject appeal. And that it is therefore prudent that this court strikes out the 1st and 2nd applicants from the instant appeal. There stands no issue for determination between the applicants and the respondents in the instant appeal as the judgement only pertains the respondents. As such that the applicants are not necessary parties to the suit and they ought to be struck out of the instant appeal.

19. Reliance was placed on the case of *Alumark Investments Limited Tom Otieno Anyango &4 others* [2018] eKLR, where the court held as follows: -

> " According to the plaintiff, the 5th defendant was a necessary party because he would explain to the court the procedures used in the transfer of the suit property. In my view, the 5th explain the procedures as a witness without necessarily being a party to this suit.
>
> order1 rule 3 provides for who may be joined as defendants as follows:-
>
> "3, All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arose."
>
> in view of the fact that no prayer is sought against the 5th defendant,
>
> 17 l do not find him to be a necessary party whose presence will enable the court to effectively and completely adjudicate upon and settle all the questions involved in the suit. In my view, the 5th defendant can properly be summoned as a witness at the instance of either party. "

20. The applicants submit that it is only proper that the court strikes them out of the instant appeal as the judgment was only against the 1" and 2nd respondent and as such that they have no business in the appeal.

21. The decision whether or not to set aside judgement, is discretionary is 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.

22. 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 judgement 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."

23. The first question for determination is whether the judgement 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".

24. 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.

25. The court exercised its discretion in dismissing the appeal and awarded costs.

26. Order 17, rule 2 provides for notice to show cause why suit should not be dismissed.

(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.

27. 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".

28. 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.

29. 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 v Tabitha Kamau & 3 others* [2014] eKLR where it was held that: -

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

30. 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* judgement except that if he does vary the judgement, 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."

31. 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**

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

33. 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 v 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.

34. 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 v Zuleikha Mohamed Naaman* civil application No Nai 4 of 1999.

35. 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.

36. However, in *Union Insurance Co of Kenya Ltd v Ramzan Abdul Dhanji* civil application No Nai 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."

37. 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."

38. In considering whether or not to set aside the default judgement 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 judgement, 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 judgement 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.

39. Considering all the circumstances of this case I am unsatisfied that any materials are placed before the court warranting reinstatement of the dismissed appeal.

40. No material has been placed before the court warranting consolidation HCCA E095/2021 together with this appeal.

41. I have said enough to show that I find no merit in the notice of motion dated February 9, 2023.

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

43. The costs of this application are awarded to the respondent.

44. It is so ordered.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 23RD JUNE 2023**

**.....**

**MOHOCHI S.M**

**JUDGE**

**23.06.2023**

**Parties: -**

Miss Guko Advocate- Applicant

Mr Gekonga Advocate for the Respondent