



**Surumo v Republic (Criminal Revision E003 of 2021)
[2023] KEHC 18467 (KLR) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18467 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL REVISION E003 OF 2021
HK CHEMITEI, J
JUNE 14, 2023**

BETWEEN

JAMES OKEMWA SURUMO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant herein, was charged with 5 counts of Obtaining Money by False Pretense Contrary to Section 313 of the *Penal Code*: Republic v James Okemwa Surumo at the Chief Magistrate’s Court in Nakuru. Upon taking plea in the said case, the applicant was released on bond pending trial and thereafter at the hearing of the case 5 prosecution witnesses testified against the applicant. At the close of the prosecution case the applicant was put on his defence and thereafter the court directed parties to file their submissions. On February 8, 2021 the applicant herein filed an application for re-opening of the defence case by the trial court and the same was dismissed so he filed for revision at the High Court but his application was dismissed for want of prosecution.
2. The applicant has now filed a Notice of Motion dated June 6, 2022 brought under Section 150 of the *Criminal Procedure Code* seeking that the order issued on October 19, 2021 dismissing his earlier application dated March 2, 2021 to be set aside and the said application be listed for fresh hearing on merit.
3. The application is supported by the grounds on the face of it and the Affidavit of the applicant sworn on June 10, 2022. He averred that the trial Magistrate refused to reopen his defence hearing and he therefore filed a Revision before the High Court on March 4, 2021 dated March 2, 2021. That after about one month after he had filed his application the Court file went missing. The file was later retrieved and upon perusing the same he noticed that one Mr Ochieng Gai filed a response to the application purporting to be appearing for the state.



4. The applicant averred further that the said response was never served on him nor was he asked to appear before the Court. That the proceedings were ex-parte as no hearing notice was issued and that Mr Ochieng Gai was not a state counsel. Further, that the said Mr Ochieng Gai proceeded to prosecute his application unprocedurally and illegally as he had no audience before Court. He also did not bother to inform him on what was happening in Court and therefore, it was only fair and just that he be granted the orders sought.
5. The respondent filed a replying affidavit dated October 3, 2022 in response to the application. The learned state counsel averred that the applicant was an accused in criminal case 58 of 2016, having been in Court arraigned in 2016 and the matter was at the final stage as the learned magistrate was supposed to deliver judgment but the applicant did not turn up on the said date so the court issued warrants of arrest. That the applicant did file a High court revision E003/2021 and the application was dismissed for want of prosecution. Further, that the applicant had filed another application under the same revision number challenging the decision of Honorable Justice Ngetich which was unprocedural and amounted to forum shopping and that the applicant should instead file for a review of the same in the Court of Appeal.
6. The learned state counsel further averred that the applicant would have sort leave to file a second application and thus the same had no locus in this court and should be struck out. That the applicant had suggested that Mr Ghai should have informed his counsel of the hearing date but it was his counsel's duty to pursue his matter. Further, that from the proceedings in the high court, the applicant's application was never heard as the applicant nor his counsel never made an appearance and the matter was dismissed for want of prosecution. The learned state counsel added that Mr Ghai did have an audience in court by virtue of counsel watching brief for the complainants and the court was never deceived in dismissing the matter but it was due to no appearance of the applicant.
7. The learned state counsel went on to aver that the applicant had not annexed proceedings confirming that he was denied the opportunity to call witnesses in support of his case. That the matter was dismissed on the February 8, 2022 and it was not Mr Ghai who made the application but their prosecutor on the said date concurred with the learned judge that the matter was dismissed as several adjournments had been given to the applicant.

Further, that the said application lacked merit and was a delay tactic to derail the lower court proceedings.
8. The applicant in response to the respondent's application filed a supplementary affidavit dated November 7, 2022. He deposed that he never jumped bail, and he was not aware of any warrant of arrest and had advised his advocates to make necessary application to lift the said warrant if any. He deposed further that he had filed a revision against the decision of the subordinate Court and Mr Ochieng Gai had no audience. That he had been informed which information he verily belief to be true that revision proceedings did not need to be heard between the parties but the Court may proceed to deliver its ruling in the absence or presence of the parties notwithstanding. In addition, that the respondents should not be allowed to rely on technicalities to defeat justice. He urged the Court to do substantive justice on its own motion as it was clear that injustice is being done to him.
9. The learned state counsel on behalf of the respondent filed a response to the applicant's supplementary affidavit. He averred that the issues raised by the applicant's counsel could be traced from the proceedings in the lower court and application made in the high court. He urged this court to look at the issues raised both in the lower court and high court and give a fair ruling. He also reiterated his earlier response in the affidavit dated October 3, 2022. The learned state counsel averred further that



the applicant upon dismissal of his application should have filed his appeal in the Court of Appeal as the same high court cannot vary orders given by a court of similar stature.

10. When the matter came up for hearing the court directed that parties to file submissions which only the applicant has complied.
11. The applicant in his submissions reiterated the contents of his affidavits and urged the court to set aside the order given on October 18, 2021 and set the application for revision for hearing on merit.

Analysis and Determination

12. Having considered the present application, the affidavits in support and opposition of the said application, as well as the applicant's submissions, two issues arise for determination by this court are namely; whether this court should set aside the Order issued on October 19, 2021 dismissing the Applicant's application dated March 2, 2021 and whether this court should reinstate the Application dated March 2, 2021 for determination on merit.
13. In addressing the said issues, this court notes that it is not disputed that the applicant's application was indeed dismissed for want of prosecution. The applicant argues that it was his was not his fault but he was not served with hearing notice. The respondent on the hand contends that the applicant was the one who did not appear in court or follow up on the progress or status of his application.
14. It is trite law that this Court has inherent powers to give orders which are necessary to meet the ends of justice. Section 3A *Civil Procedure Act* provides:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.
15. This is further buttressed by Section 1A & 1B of the *Civil Procedure Act* which provides for overriding objectives of the Act which is to facilitate the just, expeditious resolution of disputes.
16. Under Order 12 of the *Civil Procedure Rules* the court will dismiss an application where a party fails to attend court with full notice of the hearing date. Where a party demonstrates that it was not aware of the hearing date through no fault of its own, the court will exercise its discretion in favour of the party. Order 12 Rule 7 *Civil Procedure Rules* (*supra*) provides as follows:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
17. The Court of Appeal in *Njue Njagi v Ephantus Njiru & Another* [2016] eKLR stated that dismissal of a suit for non-attendance by the plaintiff or for want of prosecution amounts to a judgment in that suit.
18. The court has discretion to set aside judgment or order to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake. See *Shah v Mbogo & Another* [1967] EA 116.
19. In *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 the court stated as follows:

“There are no limits or restrictions on the judge's discretion 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 to it by the rules.”



20. In this matter that it is apparent that the applicant was not informed of the hearing date despite the court having directed that his advocate be notified when the matter came up in court on June 29, 2021. In *Philip Chemowolo & Another v Augustine Kubende* [1986] KLR it was stated as follows:
- “I think a distinguished equity Judge has said:
- Blunders 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...”
21. The applicant herein as I have pointed out was not made aware of the hearing date. In my view, the respondent will not suffer any prejudice as he will have a chance to challenge the application. Courts are required to determine disputes on the merits and lean on the principle of natural justice which guides all courts, that is, a party in a dispute must be given an opportunity to be heard.
22. In the premises, this court finds that the applicant has shown sufficient cause to warrant this court to set aside which it hereby does the order issued on October 19, 2021 and reinstate the application dated March 2, 2021.
23. What then should be the next step? It is apparent that an application for revision may not necessarily require the appearance of the parties before the judge unless the court directs so. The provisions of section 364 of the *Criminal Procedure Code* are clear.
24. This means that the court suo moto can issue directives in line with the parameters granted by the Act. In this case therefore I do not see any reason why this court should not do so.
25. In his letter of revision dated March 2, 2021 the counsel for the applicant complains that his client was not granted adequate opportunity to defend himself as the counsel he had sent to hold his brief was not seized of the matter. That the said counsel did not have instructions on how to proceed as there were some crucial evidence which he left behind.
26. He went on to state that efforts to reopen the case were disallowed by the trial court.
27. The court has also seen a rejoinder by a letter dated July 22, 2021 by Ochieng Gai advocate who was watching brief for the complainants. He alleged that the defence had done all the tricks in the book to stall the matter from proceeding. He blamed the counsel for the defence for being complicit in the whole scene.
28. Having read the two letters, the court is unable to decipher the truth as the proceedings from the trial court are not attached. All the issues raised are within the parties themselves and not this court. The court cannot therefore tell who is truthful in the absence of the proceedings.
29. In any case and assuming that the line taken by the applicant is the truth, I do not respectfully think that that is an issue for review. If the trial court has refused an order for reopening of a case, then the same could be a subject of appeal and not review. This is for the simple reason, namely, that the process of revision is not meant to curtail proceedings in a lower court but simply to check any obvious and glaring illegality. Short of that all the issues complained of are tested via an appeal process.
30. In the premises and for the reasons stated above this court does not find that this is a matter fit for revision. Let it go to the final end and if there are any issues the same can be determined in an appeal process.
31. The prayers for revision are dismissed.



**DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 14TH DAY OF JUNE
2023.**

H. K. CHEMITEI

JUDGE

