



REPUBLIC OF KENYA



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**Sweta v Karani & 3 others (Civil Appeal 109 of 2019)
[2023] KEHC 18300 (KLR) (2 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18300 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 109 OF 2019**

WM MUSYOKA, J

JUNE 2, 2023

BETWEEN

JAMES WANDANJE SWETA APPELLANT

AND

PAUL OMACHI KARANI 1ST RESPONDENT

EDWARD WALUSALA 2ND RESPONDENT

DUNCAN MBURU 3RD RESPONDENT

REGTON SABUNI MUNIALO 4TH RESPONDENT

*(Being an appeal from the ruling of Hon. H. Wandere, Senior Principal Magistrate,
SPM, delivered on 1st October 2019, in Kakamega SPMCCC No. 4 of 2006)*

JUDGMENT

1. The suit before the primary court was by the appellant against the respondents, for compensation, for personal injury, allegedly arising from a motor traffic accident. The proceedings commenced on July 7, 2009, with entry of an interlocutory judgment against the respondents. The matter came up several times for formal proof, and was adjourned. The formal proof eventually happened on April 8, 2013, when the appellant testified. The defence called 2 witnesses. Judgment was delivered on April 14, 2014. The judgment, based on the formal hearing, was set aside on October 12, 2014, on an application, dated September 9, 2009. A third party was joined to the proceedings, by a ruling delivered on February 16, 2016.
2. After the ruling of February 16, 2016, the matter came up several times. It came up on February 16, 2016, December 6, 2016, February 14, 2017, March 14, 2017, June 20, 2017, October 10, 2017, March 27, 2018, June 26, 2018, October 9, 2018, November 23, 2018, February 19, 2019 and March 12, 2019. The suit was dismissed on March 12, 2019, for non-attendance by the parties. An application was filed,



dated April 24, 2019, by the appellant, for setting aside/reinstatement of the suit. That application was dismissed, vide a ruling delivered on October 1, 2019. The appeal herein arises from that dismissal order.

3. The grounds of appeal are that the appellant's case in the application for reinstatement were not considered; the trial court did not consider that the appellant had always attended court, and the delay in the prosecution was caused largely by the respondents; and that the trial court disregarded the presence of the appellant and of the Advocate who had been requested to hold brief.
4. Directions were taken on May 23, 2022, for canvassing of the appeal by way of written submissions. All the parties did file written submissions, which I have read through, and noted the arguments made.
5. I note, from the record, that the suit was coming up for hearing on March 12, 2019, when it was dismissed. That date, March 12, 2019, had been given in open court, by the trial magistrate, on February 19, 2019, in the presence of the Advocates for all the parties participating, that is to say Miss Masakhwe for Mr Fwaya for the appellant, Mr Anziya for the 2nd respondent, Mr Luchivya for the 3rd respondent and Ms Luyali (the record indicates that Ms Khatashi was also holding her brief) for the third party. Come March 12, 2019, the record reflects that neither the parties nor their Advocates were in attendance, and the court proceeded to dismiss the suit.
6. For avoidance of doubt, the record is as follows:

' March 12, 2019

Before: H Wandere – SPM

Court assistant: Chesos

Plaintiff;)

Defendant:) Absent not represented

Court

On February 19, 2019 today's date was taken by consent of the parties. This file having been called out and there being no response from any party or representative this is hereby dismissed under order 12 R 1 CPR.

H WANDERE – SPM

March 12, 2019'

7. Order 12 Rule 1 of the [Civil Procedure Rules](#), under which the dismissal was premised, states as follows:

'1. When neither party attends [Order 12, rule 1.]

If on the day fixed for hearing, after the suit has been called out for hearing outside the court, neither party attends, the court may dismiss the suit.'

8. Under Order 12 Rule 1 of the Civil Procedure Rules the trial court has discretion to dismiss a suit for non-attendance by all the parties. A dismissal order can be set aside or vacated by the trial court under Order 12 rule 7 of the Civil Procedure Rules, and the application dated April 24, 2019, was premised on that provision, among others. Like Order 12 rule1, order 12 rule 7 is also discretionary. Order 12 rule 7 states:

'7. Setting aside judgment or dismissal [Order 12, rule 7]



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.'

9. In pleading for discretion to be exercised in his favour, the appellant averred that he was in court when the matter was called out, but he did not hear it being called out, as he was elderly. He also averred that his Advocate had briefed another Advocate to handle the matter on her behalf, but the said Advocate was not familiar with the names of the parties, and when the matter was called out he did not respond. He also argued that he had always attended court, and had in fact previously prosecuted the matter to judgment, before the judgment was set aside. He pleaded that a mistake of and Advocate ought not be visited on a party. The 3rd respondent stated that he had not been served with a hearing notice for March 12, 2019, which was evidence that the appellant was not keen on prosecuting the matter. The trial court was not convinced, that the Advocate, asked to hold brief, missed out on the names of the parties, when the matter was called out, as once so instructed, he or she is expected to be familiar with the parties and the title of the case. The court declined to interfere with the order of March 12, 2019.
10. The first ground of appeal is that the trial court relied more on what the other parties said in their replying affidavits, and disregarded what the appellant had to say. In response to that ground, let me set out the portion of that short ruling, where the facts were analyzed and a decision made. The court said:

' On the issue for determination I find that the case against the 3rd party abated on December 11, 2017 going by the burial permit annexure LL-1. I rely on Order 24 Rule 4(3) of the Civil procedure rules which provides;

'Where within one year no application is made under sub-rule 1, the suit shall abate'.

In this case two years down the line there has been no substitution of the 3rd party. I have keenly perused the supporting affidavit of WILLIE CHEBET JULIET the same confirms that there was no response on the part of the plaintiff when this matter was called out in court. There was no medical document annexed by the plaintiff's Advocate to convince the court that this plaintiff is ill or suffers from any hearing impairment. Secondly WILLIE CHEBET JULIUS admits that she was holding brief for plaintiff's Counsel HELLEN MASAKHWE. Therefore once instructions are given the Counsel holding brief must be familiar with the names of the parties and the title of the case by virtue of accepting to take instructions . This case was dismissed for want of prosecution.'

11. From the ruling, it should be clear that the trial court did address the facts set out by the appellant, hence the reference twice to Ms Chebet, the Advocate holding brief, and Ms Masakhwe, the Advocate for the appellant. This should be testimony that the trial court did consider the facts placed before it by the appellant, and analyzed and considered them. There can be no basis, therefore, for the claim that the trial court disregarded the case presented by the appellant.
12. The second ground is about the delay in the prosecution of the suit. What caused the dismissal of the suit was not the delay in prosecution, but rather the non-attendance on March 12, 2019. What the appellant ought to have focused on was why he and his Advocate were not in court on March 12, 2019, and, if they were indeed in court, why they did not respond when the matter was called out.
13. The third ground is that the trial court failed to consider that the appellant and his Advocate were in court, but did not respond for the reasons given. From the recitation of the relevant portion of the ruling, hereabove at paragraph 11, the trial court did consider those facts, as set out in the supporting



affidavits, but was not convinced. There can be no basis that the court did not consider those facts, as the text of the ruling is very clear that those facts were considered, but dismissed.

14. The principles upon which discretion, under Order 12 rule 7, could be exercised were set out in *Shah vs Mbogo (1967) EA 116* (), where the court stated:

' This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.'

15. The discretion is exercisable where there was accident, inadvertence or excusable mistake or error. A party, seeking to have discretion exercised in his favour, ought to demonstrate that there was an accident or inadvertence or excusable mistake. The facts given are that the Advocate for the appellant and the appellant himself were both aware of the matter. The appellant allegedly attended court, but did not respond when the matter was called out, allegedly because of his old age, while the Advocate, briefed to handle the matter, did not hear when the matter was called out, allegedly because she was not familiar with the parties. I am not persuaded that there was an accident or inadvertence of any sought or a mistake. The hearing date was given in open court, but on the due date, the appellant and his Advocate did not attend court. I find it hard to believe that both the Advocate and the appellant were in attendance, and both did not respond when the matter was called out.

16. In *Shabir Din vs Ram Parkash Anand (1955) 22 EACA 48* (Briggs, JA), it was said that:

' A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.'

17. I am not persuaded that the trial court misdirected itself in exercising discretion to dismiss the matter, neither is it manifest, from the proceedings of the trial court, that the court was wrong in the exercise of its discretion, and I see no injustice in the dismissal order, nor the order declining to reinstate the suit.
18. There is no merit in the appeal herein. I hereby dismiss the same, with costs.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS
2ND DAY OF JUNE 2023**

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Ms. Masakhwe, instructed by Gabriel Fwaya, Advocate for the appellant.

Mr. Luchivya, instructed by Marisio Luchivya & Company, Advocates for the 3rd respondent.

Ms. Luyali, instructed by Makokha Wattanga & Luyali, Advocates for the 4th respondent.

