SWM (A Minor Suing Through Her Next Kin and Friend AMR) v G & another (Civil Appeal 28 of 2018) [2024] KEHC 12596 (KLR) (9 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12596 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL 28 OF 2018

DKN MAGARE, J

OCTOBER 9, 2024

BETWEEN

SWM (A MINOR SUING THROUGH HER NEXT KIN AND FRIEND AMR) ..... APPELLANT

AND

PKG ..... 1ST RESPONDENT

JMM ..... 2ND RESPONDENT

(An Appeal arising from the Judgment of Hon. B. M. Ochoi Principal Magistrate in Mukurweini PMCC No. 30A of 2014)

RULING

1. This appeal was filed on 28/5/2018. The same is on liability and the last correspondence in the file was on 28/10/2021 by Andrew Kariuki (A.K.) & Co Advocates.

2. The main case related to injuries to a minor on 15/7/2014 including a fracture of the lower wrist. The said case was dismissed on liability. The minor was a passenger.

3. The Appellant filed a Record of Appeal on 23/11/2018. Nothing else was done. It is not until 4/5/2023 when the court heard a Notice to Show Cause and dismissed the Appeal for want of prosecution.

4. A notice of Change of Advocate was filed by the Appellant on 30/5/2024. He narrated the history. He posited that his advocate A. K. Kariuki died on 6/1/2023. In other words, at the time of the Notice to Show Cause, the advocate had died 4 months earlier. He also stated that submissions had been filed. These were filed on 25/5/2020. The parties, apparently had agreed that the court writes a judgment.

5. It was their case that the court could not have dismissed the appeal, should have delivered judgment.

Analysis

6. It is not in dispute that at the time of issuance of Notice to Show Cause the Appellant's advocate had died. It was a very short period. They had also filed submissions. The only question is whether the court should exercise discretion in favour of the Applicant.

7. It is clear on record that at no time did the Appellant leave the suit unprosecuted. He promptly filed a record of appeal. The file appears to have fallen through the cracks. To make matter worse, there appears to be a misunderstanding on the position of the file. The Appellants are waiting for judgment while the court was waiting for prosecution.

8. It is not in doubt that the death of the Appellant's advocate greatly affected the attendance for NTSC. It is sad that whoever was serving did not bother to report back that the advocate was deceased. It is unnecessary to go into the issue whether there was merit in NTSC as there was no service.

9. The Rules of natural justice require parties to be heard. It is irrelevant that the court could have reached the same position after hearing parties. The principle of Audi alteram partem, which is a Latin phrase meaning listen to the other side is sacrosanct. It cannot be derogated from unless the party makes it impossible to be heard. In Gulamhussein F. Gulamhussein v Imperial Bank Limited (In Receivership) & another [2018] eKLR, the Court of Appeal Visram, Karanja & Koome, JJ.A) stated as follows: -

> "
>
> " 10. In this case, we find that notwithstanding the fact that there was no appearance for the appellant on the material day, the appellant still had no notice that such an application would be made. For all intent and purposes what had been slated for that day was delivery of a judgment. This being the case we agree with the appellant that it was not afforded an opportunity to be heard on the issue contrary to the rules of natural justice. The centrality of the right to be heard was succinctly put by this Court in Mbaki & Others vs. Macharia & Another [2005] 2 EA 206, at page 210, as follows:
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> "The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."
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> 11. It did not matter that the learned Judge would have arrived at the same decision even after hearing the appellant. This much was appreciated by Nyarangi, JA in Onyango vs. Attorney General [1986-1989] EA 456, at page 460:
>
> "A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at."

10. The Applicant is entitled to be heard before adverse orders are given. The Applicant must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it. In the case of Nesco Services Limited v CM Construction (EA) Limited [2021] eKLR, Odunga, J held

as follows: "As was held by the Court of Appeal in Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998:

> " 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 utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it."

11. Even as way back as 1943 the courts in England made a restatement of Lord Wright's decision in General Medical Council vs. Spackman [1943] 2 All ER 337 cited with approval in R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007 that:

> " If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."

12. In Ridge vs. Baldwin [1963] 2 All ER 66 at 81, Lord Reid expressed himself as follows:

> " Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."

13. In the circumstances, I find that the Applicant was not heard and was entitled to be heard. The application dated 30/5/2024 is merited. In the circumstances, I set aside the order dismissing the appeal. Regarding costs, the court has discretion. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

13. In this case, the parties are not at fault. I shall order that each party bears their own costs. The matter shall be fixed for directions.

Determination

14. The upshot of the foregoing is that I make the following orders: -

    a. The application dated 30/5/2024 is merited and is accordingly allowed.

    b. Each party to bear its costs.

    c. Directions on 20/11/2024 before Court 2.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 9TH DAY OF OCTOBER, 2024.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Gitahi for the Applicant

No appearance for the Respondents

Court Assistant – Jedidah