REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO. 51 OF 2018

SMARTKAR ENTERPRISES.....1ST APPELLANT

GEOFFREY ONDIEKI NYANDORO.....2ND APPELLANT

VERSUS

MARY KEMUNTO OGENDO (suing as mother and legal Representative of the estate of

TOBIAS NYANDORO OGENDO).....RESPONDENT

RULING

1. This ruling is on the notice if motion dated 25th November 2020 filed by the appellants seeking the following orders;

    1. THAT this application be certified as very urgent and service of the same be dispensed with in the first instance.

    2. THAT this Honourable court be pleased to issue an order of stay of execution pending the hearing and determination of this application inter-parties.

    3. THAT this Honourable court be pleased to review, vary and set aside its orders issued on 19/03/2019 dismissing the appeal for want of prosecution.

    4. THAT upon reviewing, varying and setting aside its orders of 19/03/2019 the Honourable court be pleased to reinstate the instant appeal and grant leave to file and serve the same out of time for determination on merit and give directions on its disposal.

2. The respondent had been awarded Kshs 11,443,596/- plus costs and interest before the subordinate court and consequently the appellants instructed their former advocates to file an appeal against the judgment.

3. According to the appellants, the memorandum of appeal dated 6th August 2018 was lodged and the court proceeded to give directions, however the counsel on record failed to communicate to the appellants the directions by the court and their appeal was dismissed for want of prosecution. The appellants later found out that the appeal did not take off once the respondent commenced execution and they paid over Kshs. 3,500,000/- towards the decretal sum. The appellants now contend that it will therefore be in the interest of justice that the orders sought be granted.

4. The appellants submit that section 80 of Civil Procedure Act gives court inherent power to reconsider review applications on grounds that new and important matter has been discovered and which were not within the knowledge of a party. In this case, the Applicants were never informed on the proceedings before this Court till when the Auctioneers proclaimed their assets pursuant to warrant of Attachment obtained by the Responded. The Applicants through their new counsel on records, after exercising due diligence by perusing the trial magistrate's Court file at Ogembo Law Court and the Kisii High Court file discovered that the former Advocate on record did not communicate to the Appellants orders issued hence they discovered new matter and important facts. It was submitted that the Appellants acting in good faith have so far paid Kshs 3,500,000/ to the Respondent.

5. The appellants argued that the overriding objective of Sectional 1A, IB and 3A of Civil Procedure Act is for the courts to facilitate the just, expeditious, proportionate and affordable resolution of Civil disputes governed by Act. Further Article159 (2) (d) of the Constitution of Kenya provides that courts have discretion to do substantive justice without undue regard to technicalities.

6. The application was opposed by the respondent who filed grounds of opposition and a replying affidavit sworn by Dennis Manono Nyatundo. The respondents in the replying affidavit advanced that appellants have come to court after undue delays and are not deserving of favourable discretion. It was also averred that the application has failed to meet the criteria for review applications.

7. In their submissions they cited the case of Paxton-v- Allsopp|1971]3All ER 370 which was adopted in Ivita -v- Kyumbu [1984| KLR 44I Salmon J. stated that in cases of dismissal for want of prosecution, "if he (i.e. plaintiff) is personally to blame for the delay, no difficulty arises. There can be no injustice in his bearing the consequences for his own fault."

8. They also relied on the case of Richard Ncharpi Leiyagu vs IEBC & 2 Others CA 18/2013 where the Court of Appeal was categorical that:

> "We agree with the noble principles which go further to establish that the court's discretion to set aside an ex parte judgment or order for that matter is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice."

9. They submitted that there was therefore no error or mistake apparent on the face of the record to warrant review as contemplated by Order 45 of the Rules. In any case, if the applicants disagreed with the finding of the court, they ought to have appealed.

ANALYSIS AND DETERMINATION

10. It is now settled that for courts to review their decision they must do so in compliance with Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Mativo J in Nasibwa Wakenya Moses v University of Nairobi & Another [2019] eKLR observed that;

> "Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. Put differently, the rules lay down the jurisdiction and scope of review. They limit it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.
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> …..
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> 19. A review is permissible on the grounds of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order was passed. The underlying object of this provision is neither to enable the court to write a second Judgment nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial."

11. The order sought to be reviewed was made on 18th March 2019. There is no dispute that the appellant has paid money to the respondent to partly satisfy the decretal sum. From the record there are 7 cheques drawn in favor of the respondent's advocate that were issued on diverse dates ranging from 25th June 2019 up until 2nd November 2020 and that were intended to satisfy part of the decretal sum.

12. I have observed that it took the appellants 18 months from the time it remitted the initial amount of Kshs 400,000/- to file this instant application. In the circumstance, it can only be concluded that the appellants are using this instant application to deliberately delay the cause of justice. The Court of Appeal in Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another [2014] eKLR observed as follows;

> "9. We have to ask ourselves whether the failure by the appellant to prosecute the appeal in the High Court and/or the delay in filing the application for reinstatement constituted an excusable mistake or was it meant to deliberately delay the cause of justice. The appeal in the High Court was filed on 18th June, 1999 and dismissed for want of prosecution on 13th February, 2009, 10 years after. We note that no explanation was adduced by the appellant as to the steps, if any, she took to prosecute the appeal within the said period. The application seeking reinstatement of the appeal was filed on 13th May, 2013, four years after the dismissal. The reason advanced by the appellant for the delay in filing the application was that her advocates were never served with the notice of the court's intention to dismiss the appeal. The appellant only discovered the dismissal on 2nd April, 2013. Be as it may, why didn't the appellant peruse the court record earlier or follow up on the appeal? Why didn't she set the appeal down for hearing for almost 14 years? The reasonable explanation would be that the appellant had been indolent and had slept on her rights. She was only awakened from her slumber by the dismissal of the appeal.
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> 10. On the issue of the right to be heard, this Court in Richard Nchapi Leiyagu -vs- IEBC & 2 others (supra) held:-
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> "The right to a hearing has always been a well protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."

We find that reinstating the appeal in the High Court would amount to an abuse of the court process and injustice. We see no reason to interfere with the learned Judge's discretion.

13. In the end, the motion dated 25th November, 2021 is found to be without merit. The same is dismissed with costs to respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 14TH DAY OF APRIL, 2021

A. K. NDUNG'U

JUDGE