REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

(CORAM. A. K. NDUNG'U J.)

CIVIL APPEAL NO. 119 OF 2019

TOM MOMANYI MWAMBA

SAWEL BENJAMIN AOSA

MOGAKA AOSA

JACKSON M. MAKWARA

STEPHEN AOSA

MOKAYA OBAGA

GEKONGE OBAGA.....APPELLANTS

VERSUS

JAMES NYACHWAYA MAKWOLO.....1ST RESPONDENT

MONICA BOSIBORI NYACHWAYA..... 2ND RESPONDENT

JANET MOKE ANGIMA.....3RD RESPONDENT

TIMOTHY ABUGA NYACHWAYA.....4TH RESPONDENT

(Being an appeal from the Ruling of the Chief Magistrate Nathan Shiundu Lutta (C.M.) delivered on 1st October 2019 in Kisii CMCC No.679 of 2016)

RULING

1. The application for consideration before this court was filed by the appellants on 12th February 2021 seeking that the orders issued by this court on 18th day of November 2020 be set aside and the appeal be reinstated and proceed for hearing on merit.

2. The application was expressed to be brought under **Order 10 Rule 11** of the **Civil Procedure Rules**, **Sections 1A,3A,63 (e)** of the **Civil Procedure A**ct and **Article 159** of the **Constitution**. The 2nd appellant swore an affidavit in support of the application on behalf of the appellants on 12th February 2021. In opposition, the 4threspondent swore an affidavit on behalf of the respondents. The 2nd appellant also swore a supplementary affidavit on 25th February 2021 although leave had not been sought to swear a further affidavit.

3. The application was disposed of by way of written submissions which I have duly considered and will refer to in my analysis of the application.

4. In determining whether to allow an application to set aside an ex-parte order, the court is required to exercise its discretion judiciously. The purpose of this discretionary power was explained by the Court of Appeal in ***CMC Holdings Ltd v James Mumo Nzioki CIVIL APPEAL NO. 329 OF 2001 [2004] eKLR*** thus;

"*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 others 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...".

5. The orders sought to be set aside were issued on18th November 2020 after the appellants had been asked severally and unsuccessfully to file their record of appeal.

6. The appeal was first placed before this court on 11th December 2019, when the court directed the Deputy Registrar to facilitate the typing of proceedings for purposes of preparing a Record of Appeal. On 22ndJune 2020, this court noted that the record of appeal had not been prepared. The appellant was directed to file the record of appeal within 21 days.

7. The matter came up for mention on 22nd July 2020, when the court extended time for filing the record of appeal by a further 21 days and scheduled the matter for mention on 28th September 2020 to confirm compliance. However, on that day, the record of appeal had not been filed. The appellants were given an additional 30 days to file their record of appeal, failure to which the appeal would be struck out. By the time the matter came up for further mention on 18th November 2020, the appellants had still not filed their record of appeal and their appeal was dismissed.

8. The appellants' reasons for failing to file their record of appeal, as deposed by the 4th appellant, is that their advocate received a copy of the mention notice for the mention of the matter on 22nd June 2020 but on that day his advocate was unable to join the court session via Zoom. The appellant claimed that from then on his advocate did not receive any other communication to appear in court for the hearing of the case.

9. The appellant deposed that on perusing the court record, their advocate found out that the appeal had been struck out on 18thNovember 2020. The appellant claimed that he would have attended court but the new technology did not allow him. He averred that he had since purchased proceedings from the court and if given a chance he would proceed for appeal. He was of the view that the respondent would not suffer any prejudice if the orders sought were granted. He urged the court not to condemn him unheard for the mistake of his advocate and to grant the application as prayed.

10. The appellant's assertion that their advocate had not received any communication on the matter after the mention on 22nd June 2020 was refuted by the 4th respondent who attached stamped copies of notices for the mention of the matter on 22nd July 2020 and 28thSeptember 2020. This proved that the appellants' advocate was notified of the mentions well in advance. With respect, counsel's failure to follow up on the matter after notices had been served upon him depicts an indifferent and sloppy execution of his duty as an officer of the court.

11. The filing of a Supplementary Affidavit without leave heightens this court's notion that the appellants have a penchant for flouting rules of procedure. **Order 51 Rule 14 (3)** provides that an applicant may file a supplementary affidavit upon being served with a replying affidavit with the leave of the court. No leave was sought or granted to file the supplementary affidavit. However, I will overlook this infraction by the appellants for reasons to be given hereafter.

12. In his supplementary affidavit, the 4th appellant deposed that when the matter was mentioned on 22nd July 2020 and on 28th September 2020, his advocate did not join the online platform. He and other appellants would have attended court but had difficulties with the online platform.

13. He also claimed that they had experienced difficulty in tracing the lower court file to enable them compile the record of appeal as the file was constantly being moved between this court and the lower court for execution purposes. Immediately after execution, the file became available and the appellants were able to make the relevant copies. He also averred that the advocate having the conduct of the matter in the subordinate court passed on recently. He maintained that the application was highly merited and he will have been condemned unheard if the application is not granted.

14. Justice demands that no one should be condemned unheard. Unless there are compelling reasons, courts hesitate to dismiss a matter before its heard on its merits. In ***Lucy Bosire v Kehancha Division Land Dispute Tribunal & 2 others in Miscellaneous Application No. 699 of 2007 [2013] Eklr*** the court cited with approval the case of Branco Arabe Espanol v Bank of Uganda (1999) 2 EA 22 where the court had held;

"The administration of justice should normally require that the substance of all disputes should be investigated on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered."

15. Similarly, the Court of Appeal in the case of ***D. Chandulal K. Vora& Co. Ltd v Kenya Revenue Authority CIVIL APPEAL NO. 283 OF 2012 [2017] eKLR*** held as follows;

"... In this scenario, it is prudent to consider whether locking out the appellant from the seat of justice is justifiable and whether it might as well be considered as visiting the sins of counsel on an innocent litigant. We think that this will be ultimate result if we were not to intervene and allow this appeal...

The main consideration for courts is do justice to the parties in a suit. The discretion to dismiss a suit or strike out an appeal or pleadings generally should be exercised sparingly and judicially and only in deserving cases which cannot be mitigated. The practice nowadays is to elevate substantial justice to the parties over and above the strictures of rules of procedure, which have

been stated to be mere hand maidens of justice. This is especially in view of the saving provisions under sections 1A, 1B and 3A of the Civil Procedure Act, which had been invoked by the appellant. More so Article 159 (2) (d) of the Constitution obligates courts and tribunals to exercise judicial authority without undue regard to technicalities. In ***Abdirahman Muhumed Abdi v Safi Petroleum Products Ltd. & 6 others, Civil Application No. Nai. 173 of 2010****, quoted with approval in* ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others (2013) eKLR,*** *a notice of appeal was served on the respondent out of time and without leave of the court, upon being asked to strike it out, the Court of Appeal stated as follows;*

"The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice…

In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion."

16. Guided by the principles set out above, I find that this is a case deserving the exercise of discretion in favour of the appellants. It is not lost on this court that this appeal was filed in December 2019, a few months before the outbreak of the Covid-19 pandemic. Due to the contagious nature of the disease, courts had to embrace technology to ensure that the wheels of justice did not grind to a halt. The appellants claim that they encountered difficulty attending online court sessions which may well be true. They also claim that it was difficult tracing the trial court file as it kept on being moved between this court and the trial court as the respondents sought to execute the award issued in their favour by the trial court.

17. The appellant's assertion that the trial court entered an ex-parte judgment in favour of the respondents for a sum of over Kshs. 14,000,000/= has not been refuted by the respondents. According to the memorandum of appeal, the appellants seek to challenge the trial court's dismissal of their application to set aside the ex-parte judgment. In my view, the appeal raises substantial issues which ought to be determined on merit. It would not serve the interest of justice to visit the mistake of counsel upon the appellants whose appeal is meritorious.

18. Considering the unprecedented circumstances of the period preceding the dismissal of the appeal which was characterized by uncertainty due to the Covid -19 pandemic, the reasons given by the appellants and the court's duty to elevate substantial justice, the application dated 12th February 2021 is hereby allowed.

19. The appellants are directed to file their record of appeal within 21 days from this ruling failure to which the appeal shall stand dismissed.

20. The costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT KISII THIS 6TH DAY OF JULY 2021.

A. K. NDUNG'U

JUDGE