REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 8 OF 2019

DANIEL OMONDI OKOTH.....APPELLANT

VERSUS

CHARLES KIRIMI.....RESPONDENT

(from the ruling of Hon. Cheruto C. Kipkorir, SRM, in Mumias SPMC Civil Case No. 171 of 2014 dated 10/5/2018)

JUDGMENT

1. The appellant has appealed against the ruling of the learned trial magistrate dated 10/5/2018 wherein the magistrate declined to grant prayers sought in an application by the appellant dated 14th March, 2018 where he was seeking that:-

(a) Spent

(b) This honourable court be pleased to review its order herein on 7/3/2018 refusing the defendants an adjournment the consequential order of closing the defendant/applicant's case.

(c) Consequent to the review, the court does order that orders of 7/3/2018 set-aside and allow the defendant's last witness the motor vehicle assessor to testify.

(d) Costs of the application be provided for.

2. The appellant was dissatisfied with the ruling of the learned trial magistrate and filed this appeal. The grounds of appeal are that:-

(1) The learned trial magistrate erred in law and fact when she dismissed an application which apparently was unopposed for good reason and which application in the circumstance of the matter ought to have been allowed.

(2) The learned trial magistrate erred in law and fact when in her ruling took into account irrelevant matters and failed to take into account relevant matters to the prejudice of the appellant and the wider interest of justice.

(3) The learned trial magistrate erred in law and fact when she dismissed the appellant's application upon basis of things/matters that do not find foundation in the record.

(4) The learned trial magistrate erred in law and fact when in her ruling raised matters that were never raised before her, or by the court when she declined an adjournment, contrary to the tenets of natural justice.

(5) The learned trial magistrate greatly erred in law and fact when she failed to appreciate that the importance of authorities cited is not the facts theory but the principles of law propounded therein.

3. The application dated 14/5/2018 was premised on the grounds on the face of the application and supported by the affidavit of the advocate for the applicant **Mr. Ocharo Kebira**. The advocate for the respondent **Mr. Mukisu** did not oppose the application.

4. The court record indicates that the defencne was remaining with the evidence of motor vehicle assessor. Mr. Ocharo stated in his supporting affidavit that it is a Mr. Anwar who was dealing with the matter but he left Mr. Ocharo's law firm in November, 2017. That all through he, Mr. Ocharo, did not know that the appellant had been given a last adjournment. That their office was served with a hearing date of 7/3/2018 but their clerk failed to indicate the hearing date in their diary. That he only came to learn that the matter was coming up on 7/3/18 when their file was placed at his desk on the evening of 6/3/2018. That he called the motor vehicle assessor who said that he was in Nakuru. That he instructed his assistant madam Juliet to request for adjournment. That on 7/3/18 madam Juliet called him and informed him

that the matter was on last adjournment. That he called the motor vehicle assessor who agreed to leave Nakuru and be at Mumias by 2.40 p.m. That he sought the indulgence of Mr. Mukisu to have the matter placed aside upto 2.30 p.m. That Mr. Mukisu was willing to do so but the trial magistrate declined to place the matter aside upto that time on the grounds that its policy was not to sit at 2 p.m. That by 2.15 p.m. he was in court and the motor vehicle assessor was near Kakamega. That he was not aware of the court's policy not to sit in the afternoon hours. That their mistakes as counsel ought not to be visited on their client. That they were undertaking to pay the respondent's costs.

5. In declining to grant the application for adjournment the learned trial magistrate stated that it had given four adjournments in the matter. That two were orders for last adjournment. That the appellant was given sufficient time to defend himself in the matter and failed to do so. That though it was important for the case to be determined on merit the appellant had been given sufficient time to defend himself in the case and had not. That as a policy her court did not sit in the afternoons which are reserved for writing judgments.

6. The grounds of appeal were expounded by the written submissions of the advocates for the appellant, Ocharo Kebiro & Co. Advocates. The appeal was opposed by the advocates for the respondent, Mukisu & Co. Advocates.

7. Mr. Ocharo urgues in the appeal that Mr. Mukisu had not opposed the application dated 14/5/2018. That an unopposed application can only be dismissed if it appears to the court to be hopeless. He cited the Supreme Court decision in **Gideon Sitela Konchellah –Vs- Julius Lekakeny Ole Sunkuli & Others (2018) eKLR** where the court considered the manner of proceeding with unopposed applications and stated that:-

> ***"It is not automatic that for any unopposed application the court will as a matter of cause grant the sought orders. It behoves the court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The court is under a duty to look at the application and without making any inferences on facts, point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter ……."***

8. That the trial magistrate did not proceed in this manner. That Mr. Mukisu had not opposed the application on the reason that he had indulged him for the matter to be heard at 2.30 p.m.

9. Mr. Ocharo submitted that one of the key grounds upon which the application was based was that counsel's mistake ought not to be visited on the litigant. That there was sufficient reason to warrant an order for review for reasons given in his supporting affidavit. That errors and lapses should not necessarily bar a party from having his case from being determined on merit. The cases of **Branco Araka Epanol –Vs- The Bank of Uganda 1991 E 22** and **Philip Chemwero & Another –Vs- Augustine Kubende (1986) KLR 495** were cited to emphasize this point.

10. Counsel submitted that the trial magistrate declined to adjourn the matter on the ground that it was her policy not to sit in the afternoon. That in their application they had sought to be excused as her policy was not within their knowledge as they do not regularly practice in that court. That a policy must be known to all those whom it will affect. That it would be dangerous to allow individual policies running parallel to institutional policies which will be a recipe for confusion and judicial unpredictability and inconsistency.

11. Counsel further submitted that the discretion of the court in review matters is unlimited. That they had cited the decision in the case of **Republic –Vs- Anti-Counterfeit Agency & 2 Others Exparte Surgipharm Limited (2014) eKLR** to emphasize this principle but the learned trial magistrate failed to consider the principle.

12. The advocate for the respondent Mr. Mukisu on his part submitted though the application was unopposed he concurred with the decision of the Supreme Court in G**ideon Sitela Konchellah –Vs- Julius Lekakeny Ole Sunkuli & 2 Others** (supra) that the court has a duty to look at the application and make a decision on whether or not to grant the orders sought. That the trial magistrate exercised her discretion in dismissing the application though it was unopposed. That such discretion should not be used to the prejudice of the opposite party as was held by Kasango J. in **Samuel Kiti Lewa –Vs- Housing Finance Company of Kenya Ltd & Another (2015) eKLR** that:-

> ***"The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence."***

13. Counsel submitted that the respondent had closed his case on 22/2/2017. That the appellant had since then been given opportunity and time to present his case till 7/3/18 when their case was closed. That the mistake should be visited on counsel for the appellant. Counsel reiterated the words of Ringera J. (as he then was) in **Omwoyo –Vs- African Highlands & Produce Co. Ltd (2002) 1KLR** that:-

> ***"Time has come for legal practitioners to shoulder the consequences of their negligent act or omissions like other professionals do in their fields of endeavor."***

14. Counsel submitted that Section 1A, 1B, 3 and 3A of the Civil Procedure Act permit the court to exercise its inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process.

15. The application dated 14/5/2018 arose from the proceedings of the court on the 7/3/2018 when the trial court declined to adjourn the matter upto 2.30 p.m. as requested by the advocate for the appellant, Miss Nekeyo. Mr. Mukisu who was representing the respondent was ready to wait upto 2.30 p.m. The court however declined to grant an adjournment upto 2.30 p.m. on the grounds that its policy was not to sit in the afternoons as such time was reserved for writing of judgments. It is that refusal that led to the application dated 14/5/2018.

16. I have considered the appeal and the urguements raised by the advocates for the parties. It is the discretion of the court to allow or to disallow an application for adjournment. Like every exercise of discretion it should be exercised judiciously.

17. In the instant case, the appellant had been granted two last adjournments on the 19/4/2017 and 31/5/2017. However on the 7/3/2018 their witness was not in court in the morning hours. They sought for indulgence from the court for the witness to travel from Nakuru and appear in court in the afternoon. The advocate for the respondent was willing to indulge them but the trial magistrate declined to have the matter heard at 2.30 p.m. on the grounds that it was the policy of her court not to sit in the afternoon hours.

18. I am not aware of any circular from the Chief Justice of the Republic of Kenya that stipulates that a court should only sit in the morning hours and not in the afternoon hours. The policy set by the trial magistrate not to sit in the afternoon hours cannot definitely be known to all the people who appear before her and particularly the advocate for the appellant who does not regularly practice before that court. I therefore find that the refusal to indulge the parties upto the afternoon hours was not based on any law nor was it proper exercise of discretion. The appeal is therefore merited. The orders of the trial magistrate dated 10/5/2018 declining to grant the prayers sought in the application dated 14/3/2018 are hereby set aside. Consequently the said prayers are allowed as prayed.

Delivered, dated and signed in open court at Kakamega this 13th day of February, 2020

J. NJAGI

JUDGE

In the presence of:

Mr. Elungata holding brief for Onkangi for Appellant

No appearance for Respondent

Appellant - absent

Respondent - absent

Court Assistant - Polycap

30 days right of appeal.