



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL APPEAL NO. 23 OF 2018**

**BETWEEN**

**GERALD FORD AWINO.....APPELLANT**

**AND**

**EQUITY BANK LIMITED.....RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. A. M. Obura, SPM dated 8<sup>th</sup> August 2018 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 4546 of 1999)***

**JUDGMENT**

1. This is an appeal against an order of the subordinate court refusing to set aside an order dismissing the suit for non-attendance. The appellant was the plaintiff before the trial court and the respondent, the defendant. I shall refer to the parties in their respective capacities before the subordinate court for ease of reference unless the context otherwise dictates.

2. On 18<sup>th</sup> July 2016, the plaintiff's suit came up for hearing. Counsel for the defendant indicated that he was ready to proceed with one witness. Neither the plaintiff nor his advocate was in court on that day. The trial magistrate dismissed the suit on the following terms:

*The plaintiff is absent. There is a return of service indicating that they were served. In their absence I will dismiss the suit for non-attendance with costs to the defendant.*

3. The plaintiff moved the subordinate court by the Notice of Motion dated 22<sup>nd</sup> January 2018 seeking to reinstate the suit under **Order 12 rule 7** of the **Civil Procedure Rules**. The application was supported by the affidavit of Diana Odero, the plaintiff's advocate, sworn on 21<sup>st</sup> January 2018. She deponed that her failure to attend court on the material day was due to a mistake on her part as the matter was not listed on the cause list despite the matter having been diarized. She explained that her clerk, Mr John Waweru, went to court to find out what had happened but was informed at the registry that they were not aware of the hearing date. She submits that as a result of the miscommunication no one attended court on behalf of the plaintiff on that date. She urged that the plaintiff should not be penalized for the mistakes of his advocate.

4. The defendant opposed the application through the replying affidavit sworn on 15<sup>th</sup> February 2018 by its advocate, Mr Fred Oregu. He deponed that the matter had been fixed for hearing several times prior to that date and the plaintiff had not been ready to proceed for hearing. He stated that the plaintiff's advocate was duly served with a hearing notice for the material day but failed to attend court. Mr Oregu accused the plaintiff and his advocate of being casual in the manner they handled the matter and were not deserving of the court's discretion.

5. After hearing the parties' submissions, the trial magistrate held that the plaintiff and his advocate lacked diligence in prosecuting the matter and the fact that they only learnt of the dismissal on 18<sup>th</sup> January 2018 shows that the plaintiff was not keen on prosecuting his suit. Having found that the plaintiff was indolent in prosecuting the suit, the trial magistrate dismissed the application thus precipitating this appeal.

6. The grounds of appeal are set out in the Amended Memorandum of Appeal dated 16<sup>th</sup> October 2019. The appellant contended that the trial magistrate erred in law and in fact in dismissing the application on the ground that the appellant had not established convincing reasons to set

aside the dismissal order. The appellant further contended that the trial magistrate failed to consider the facts of the case and the principles governing the exercise of discretion to set aside a dismissal order. He complained that the trial magistrate failed to consider and evaluate the weight of evidence supporting the application. Counsel for the appellant filed written submissions along the lines set out in the amended memorandum of appeal to support his case.

7. The respondent opposed the appeal based on written submissions. It supported the decision of the trial magistrate dismissing the application to set aside the dismissal order based on the facts of the case. It pointed out that the appellant had not established the threshold for this court to interfere with the discretion of the trial magistrate.

8. The parties cited a plethora of decisions which have affirmed the general principle that an appellate court will not interfere with the discretion of the subordinate or lower court simply because it would have arrived at a different decision. The appellate court will only intervene if the trial court took into account irrelevant facts or failed to take into account relevant matters. It will also interfere if the trial court misapprehended the law or facts before it. Some of the decisions that elucidate this principle include *Mbogo v Shah* [1968] EA 93 and *United India Insurance Company Ltd, Kenindia Insurance Co. Ltd & Oriental Fire & General Insurance Co., Ltd v East Africa Underwriters (Kenya) Limited* NRB CA Civil Appeal No. 36 of 1983 [1985] eKLR.

9. Under **Order 12 Rule 7** of the *Civil Procedure Rules*, the court may set aside a suit dismissed for non-attendance on such terms as may be just. Our courts have held in several cases that there are no limits or restrictions on the court's discretion and that such discretion is intended to do justice to the parties where the dismissal has been occasioned by accident, inadvertence or excusable error but is not intended to assist a party who had deliberately sought to obstruct or delay justice (see *Yamko Yadpaz Industries Limited v Kalka Flowers Limited* NRB HCCC No 591 of 2012 [2013] eKLR, *Shah v Mbogo* [1967] EA 116 and *Shabir Din v Ram Perakash Anand* [1955] 22 EACA 45).

10. The trial magistrate's rested the decision on the basis that the appellant had been tardy in prosecuting the suit as it had been served with the hearing notice and it only applied for setting aside the dismissal order after 6 months. The ground proffered by the appellant before the trial court was that the matter was not listed on the material day when it was scheduled to come up for hearing. Neither the Court nor the respondent dealt with this ground of the application. The issue of the cause listing is an important matter as it notifies the parties that the matter is fixed for hearing before a particular court room and before a particular magistrate. It is not a matter that can be assumed as it goes to the transparent and fair administration of justice. This was a material fact that the trial magistrate ought to have been considered. Further, the trial magistrate did not consider whether the respondent would suffer any prejudice and whether such prejudice would be compensated by an award of costs in view of the fact that the respondent had a counterclaim which was yet to be prosecuted and the same could be heard together with the plaintiff's case. I therefore find and hold that the trial magistrate failed to take into account material facts as I have shown above. The appeal therefore succeeds.

11. I allow the appeal on terms that the appellant's application dated 22<sup>nd</sup> January 2018 before the trial court is allowed and the appellant's suit against the respondent is reinstated. The respondent is awarded thrown away costs of the application before the trial court while the respondent shall bear the costs of this appeal.

**DATED and DELIVERED at NAIROBI this 10<sup>th</sup> day of JULY 2020.**

**D. S. MAJANJA**

**JUDGE**

Ms Odero instructed by Odero and Associates Advocates for the appellant.

Mr Oregio instructed by Oregio and Odhiambo Advocates for the respondent.