



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**CIVIL APPEAL NO. 7 OF 2018**

**JAMES KAMAU MWANGI..... APPELLANT**

**VERSUS**

**AHMED CHEGE GIKERA..... RESPONDENT**

*(Being an Appeal against the Ruling of the Honourable L.W Wachira (SPM), delivered on the 9<sup>th</sup> April 2018, in the Chief Magistrate Court at Gatundu in Civil Suit No. 308 of 2010)*

**BETWEEN**

**JAMES KAMAU MWANGI..... PLAINTIFF**

**VERSUS**

**AHMED CHEGE GIKERA..... DEFENDANT**

**JUDGMENT**

The Appellant herein **James Kamau Mwangi** was the Plaintiff/ Applicant in **Civil Suit No. 308 of 2010** at **Gatundu Chief Magistrate Court**. The Respondent herein **Ahmed Chege Gikera**, was the Defendant/ Respondent in the above stated suit. The Plaintiff/Appellant had via a Notice of Motion Application dated **22<sup>nd</sup> January 2018**, sought for the following orders against the Defendant (Respondent) herein:-

***a) THAT the Honourable Court be pleased to set aside, vary or discharge its orders given on 15<sup>th</sup> January 2018 dismissing the Plaintiff's Application dated 23<sup>rd</sup> November 2017 and reinstate the same for hearing on merit.***

***b) That the costs of the Application be provided for.***

The Application was premised on the grounds that the Plaintiff/Appellant had fixed the matter for inter-parties hearing of the Application dated **23<sup>rd</sup> November 2017** on **15<sup>th</sup> January 2018** for purposes of reinstating the suit and served it upon the Defendants/ Respondents. However, the Plaintiff's counsel was held up in **Kandara Law Courts** where his matter had been given a last adjournment. That the Counsel then instructed his clerk who sought for assistance from another Advocate to hold brief and proceeded to the registry to file an Affidavit of service. Further, upon the clerk's return, he found that the Advocate who had been briefed had left the Court room and upon follow up with the Court's clerk, the clerk was informed that the application had been dismissed for non attendance.

In his **Supporting Affidavit**, the Plaintiff's/Appellant's Advocate **Mr. Kanyi Kiruchi**, reiterated the contents of the grounds on the face of the Application. He further contended that he was remorseful for the oversight by his Clerk and the negligence of the instructed Advocate. He averred that failure to attend Court for the hearing of the matter on **15<sup>th</sup> January 2018** was not intentional. It was his contention that the matter in question being a land matter was emotive and dismissing the suit and the Application would intensify the matter as there are issues that would still remain unresolved.

**James Wanyiri Mwangi** a clerk at the Law Firm of **Kanyi Kiruchi & Company Advocates** also swore a supporting Affidavit and averred that he had been instructed by his boss to seek for an Advocate to hold his brief and have the matter canvassed by way of written submissions. That he informed the Plaintiff who was present in Court together with his brother to await as he filed an affidavit of service and sought assistance from another Advocate. He further averred that when he came back from the Registry, he did not find the Advocate and when he inquired from the Plaintiff/ Appellant, on what had transpired, he informed him that he did not hear his name as it had not been called out. He contended that he was remorseful for the blunder which he had caused.

The Plaintiff/Appellant also filed a supporting affidavit in which he averred that he attended Court on **15<sup>th</sup> January 2018**, in the company of

his brother. It was his contention that he called his Advocate to confirm if he had arrived in the Court room who in turn informed him that he had sent his clerk. He confirmed having seen the clerk and also having had a chat with him. He further averred that the Clerk then left the Court room and after some time, he came back and signaled them to follow him and informed them that the application had been dismissed. He contended that he was surprised as he had not heard his name being called out. He also averred that he was interested in pursuing the case and determined to have the case concluded and that he would abide by any terms made by the Court.

The Defendant/Respondent filed grounds of opposition and urged the Court to dismiss the Notice of Motion Application dated **22<sup>nd</sup> January 2018** as reasons cited by the Plaintiffs/ Appellant for not attending Court on the said date had no basis and should be dismissed. Further that the Plaintiff/ Appellant's Application was misconceived, incompetent, misinformed and an abuse of the Court process and incurable defective and ought to be dismissed with costs to the Defendant/Respondent.

The Plaintiff's /Appellant's Advocate filed a supplementary affidavit and averred that the failure to attend Court was inadvertent as the matter he was dealing with at the **Kandara Law Court's** involved a minor and the Court was having their service week and therefore it needed to be concluded

The Application was canvassed by way of written submissions and parties filed their respective written submissions. Thereafter the trial Magistrate delivered her determination on **9<sup>th</sup> April 2018**, and dismissed the Plaintiff's (Appellant's) Application and held that:-

***“And having considered the circumstances in the case herein, I find that the reasons given and the grounds of seeking review or variation are not sufficient. I will thus dismiss the Application dated 22<sup>nd</sup> January 2018, with costs to the Respondent.”***

The Appellant herein was aggrieved by the above determination and sought to challenge the said determination through the **Memorandum of Appeal**, filed in Court on **20<sup>th</sup> April 2018**. He sought to set aside the Ruling of the lower court given on **9<sup>th</sup> April 2018**, and the application dated **23<sup>rd</sup> November 2017**, be reinstated for hearing on merit.

The grounds upon which the Appellant has sought for the Appeal to be allowed are as follows:

***1) That the Learned Trial Magistrate erred in law and in fact by holding that the appellant/ Plaintiff had lost interest in the case whilst history of the matter since 2017 found in the Court proceedings portray differently thereby arriving at a wrong decision.***

***2) That the Learned Trial Magistrate erred in law and in evidence on failing to appreciate generally the circumstances of the case in that the Plaintiff was ready to proceed with his case on 22<sup>nd</sup> November 2017, but proceeded to dismiss the suit and also the application to reinstate the said suit thereby arriving at a wrong conclusion.***

***3) That the Learned Trial Magistrate erred in law and in fact by failing to appreciate the reasons advanced by the counsel for failure to attend court in person, the weight of the authorities submitted that dismissal of a suit should be a last resort of a court thereby arriving at a wrong decision.***

***4) That the Learned Trial Magistrate erred in law and in fact by holding that the dismissal of a suit plus the reinstating application would serve justice to the Defendants whilst costs would have been best available alternative thereby arriving at a wrong decision.***

***5) That the Learned Trial Magistrate erred in law in failing to appreciate the reasons that counsel on record was held up in Kandara Law Courts with a sexual offences case and further that the respondent had not put in a replying affidavit to the application dated 23<sup>rd</sup> November 2017 hence the application was unopposed thereby arriving at a wrong decision.***

***6) That the Learned Trial Magistrate erred in law and in fact by failing to appreciate that in essence by dismissing the suit, the application dated 23<sup>rd</sup> November 2017 and yet again the application dated 22<sup>nd</sup> January 2018, the problem was not solved, in fact the dispute escalated since the appellant's land to wit RUIRU/KIU BLOCK2(GITHUNGURI)3883 in his name whilst the Respondent has the appellants title and the same is still in the appellants name hence by holding that justice will be best served by dismissing the application plus suit is a misnomer on law and a lot of injustice and thereby gravely erred in law.***

***7) That the Trial Magistrate erred in law and in fact by failing to appreciate the expeditious or time with which the application dated 23<sup>rd</sup> November 2017 was filed after the dismissal of the suit on 22<sup>nd</sup> November 2017 and equally the time the application dated 22<sup>nd</sup> January 2018 was filed after dismissal of the application dated 23<sup>rd</sup> November 2017 on 15<sup>th</sup> January 2018 thereby arriving at a wrong decision.***

***8) That the Trial magistrate erred in law and in fact by treating the land issue casually and leaving the parties over a deadlock that will never be resolved and therefore in actual fact told the parties to resolve to the rules of the jungle as the deadlock between the parties can never be unlocked thereby arriving at an unjust decision.***

***9) That the Learned Trial magistrate erred in law and in fact by failing to observe sections 1A, 1B of the Civil Procedure Act and Article 159 of the Constitution of Kenya 2010, thereby arriving at a wrong decision.***

***10) That the Learned Trial magistrate erred in law by dismissing the appellant's application dated 22<sup>nd</sup> January 2018 without considering the repercussions it would do to the parties and without giving due consideration to the legal question thereby arriving at a wrong decision.***

The Appeal is contested by the Respondent. It was canvassed by way of written submissions. The Appellant filed his submissions on **15<sup>th</sup> April 2019**, through the Law Firm of **Kanyi Kiruchi & Company Advocates**. It was his submission that there are two remedies available for a party whose suit has been dismissed being **review** or an application to **set aside** and that the same are discretionary remedies. It was further submitted that the Appellant has always been ready to prosecute the case and that he has never at any one time delayed the case. It was his further submissions that the Court ought to look at factors that led to the dismissal of the application and the key ground being that the Applicant had lost interest in the matter and the reasons advanced by the Counsel are not sufficient.

It was further submitted that this Court ought to be guided by the fact that there is a dispute between the parties and that while one held title deed the other one is in actual occupation of the suit property. He thus submitted that the learned magistrate erred in dismissing the Application as dismissal was the last option. It was further submitted that the learned trial magistrate misdirected herself in failing to consider that the Application seeking reinstatement was not opposed and thus in law the Court ought to have allowed it. The Appellant relied on the case of ***Price & Another ...vs...Hilder(1984) ektr*** where the Court quoted the case of ***Mbogo vs... Shah*** and noted the instances where an appellate Court can interfere with exercise of the Court's discretion as follows;

- a) *That the Judge misdirected himself in Law*
- b) *That he misapprehended the facts*
- c) *That he took in account consideration of which he should not have taken*
- d) *That he did not take into account of consideration which he should not have taken account*
- e) *That his decision albeit it discretionary is plainly wrong.*

It was the Appellant's further submissions that the Appellant's Counsel has always attended Court and depending on the circumstances, he instructed his clerk to attend Court and further submitted that the Court should not allow the Appellant to suffer a mistake that is not attributable to him. The Appellant relied on various decided cases and provisions of the law and urged the Court to vacate the orders granted on **9<sup>th</sup> April 2018**.

On his part, the Respondent filed his written submissions on **22<sup>nd</sup> May 2019**, and urged the court to dismiss the instant Appeal.

It was submitted that the Appellant's Counsel did not give convincing reasons for non-attendance and that the learned trial magistrate had to balance the interest of both parties, hence the dismissal of the Application. It was further submitted that the Appeal is not about the dismissal of the suit, but on the ruling of an application seeking to have a second review. It was the Respondent's submission that a party having chosen the review route cannot again have the same issues subject of the review being heard as an appeal and the appeal is therefore not tenable. It was further submitted that the Appellant's Advocate was quoting the learned magistrate out of context and the Court was urged to peruse the ruling. The Court was therefore urged to dismiss the appeal.

The above analysis summarizes the pleadings and evidence before the trial court. Further it captures the grounds of Appeal and submissions by the parties herein. Therefore, the court is called upon to make a determination of this Appeal filed by the Appellant as provided by **Section 78 of the Civil Procedure Act**, wherein the court is called upon to analyze the whole evidence, evaluate, assess, weigh, investigate and scrutinize it and give it its own independent conclusion.

However, the court will be alive to the fact that it neither saw nor heard the witnesses. Therefore, it must give allowance for that and the findings of the trial court must be given due deference unless it falls foul of proper evaluation of the evidence on record and that the trial Magistrate acted on a wrong principle in arriving at the findings. See the case of ***Selle -vs- Associated Mobi Boat Co (1968) EA 123:-***

*An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (***Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270***).*

Further the court will only interfere with the discretion of the trial court where it is shown that such discretion was exercised contrary to the law and that the trial court misapprehended the applicable law and failed to take into account the relevant facts or take into account an irrelevant fact or that on the fact and law as are known, the decision is plainly wrong. (see case of ***Ocean Freight Shipping Company Ltd – vs- Oakdale Commodities Ltd, Civil Appeal No. 198 of 1995***):-where the Court held that;

*“.....and for a full bench to interfere with the exercise of the discretion, it must be shown that the discretion was exercised contrary to law, i.e. that the single Judge misapprehended the applicable law, or that he failed to take into account a relevant factor, or took into account an irrelevant one or that on the facts and the law as they are known, the decision is plainly wrong”*

The court has now carefully considered the grounds of Appeal, written submissions and the proceedings and Ruling of the trial court. The court too has considered the applicable law and finds that the issues for determination are;

1. ***Whether the Application was an Application for review and therefore not appealable.***

**2. Whether the learned trial magistrate erred in law by dismissing the Appellant's Application dated 22<sup>nd</sup> January 2018.**

**1. Whether the Application was an Application for review and therefore not appealable.**

In his submissions, the Respondent has submitted that after the dismissal of the suit, the Plaintiff and his counsel sought for review of those orders and that the Application for review was dismissed and therefore the Appellant cannot again appeal against the same. The question that this Court must then answer is whether the Application by the Appellant was one of review. This is so as the Court agrees with the Respondent that in case of an Application for review, the same is not appealable as it means that the party had elected to review the same as opposed to appealing and therefore the same cannot act simultaneously. **Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules** provide as follows;

**Section 80. Any person who considers himself aggrieved –**

**(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**

**(b) by a decree or order from which no appeal is hereby allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.**

**Order 45 (2) of the Civil Procedure Rules:**

**A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for review.**

However the Application by the Appellant in the lower Court was premised on **Order 51 and 12 Rule 1 and 7** Of the Civil Procedure Rules that provides for setting aside of *ex parte* Judgment. It provides;

**Order 12 Rule 7 of the Civil Procedure Rules** provides:-

**"Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."**

**Order 51 Rule 15 of the Civil Procedure Rules** which provides:-

**"The court may set aside an order made *ex parte*."**

Therefore, it is the Court's considered view that the Application before the trial Court was not one for **review** as contemplated by **Order 45 and Section 80 of the Civil Procedure Act**, and thus barring an appeal, but an application to set aside the Order as provided by **Order 12 Rule 7 of the Civil Procedure Rules**.

**2. Whether the learned trial magistrate erred in law by dismissing the Appellant's Application dated 22<sup>nd</sup> January 2018**

The Appellant has appealed against the lower Court's decision seeking to dismiss his Application to reinstate the Application for reinstating his suit which had been dismissed for want of prosecution. It is the Appellant's contention that the trial Court considered irrelevant factors and therefore arrived at a wrong decision and hence it did not exercise its discretion judiciously.

This Court has perused the Ruling delivered by the Honourable learned Magistrate on the **9<sup>th</sup> April 2018**. The Court gave various reasons before it dismissed the Application by the Appellant, First the Court stated that the **Kandara Law Courts** was not a superior Court to the **Gatundu Court** and therefore the Advocate could not contend to have attended the said Court in case of superiority. Secondly, that the matter was an older matter to the one that Counsel attended in **Kandara Law Courts** and therefore ought to have been given priority as the one in Kandara was only a year old. Thirdly that the Plaintiff being the one who had taken the date and being that the same was the first one listed in their diary, Counsel ought to have taken matters that he was able to handle. Fourthly, the names of the Parties were called out before the case was dismissed and finally that the Appellant was not keen on prosecuting the case.

**Order 12 Rule 7 of the Civil Procedure Rules** provides that where under this order judgment has been entered or the suit has been dismissed, the Court on application may set aside or vary the Judgment. The power to set aside *ex parte* orders are discretionary and the Court must use its discretion to come to a conclusion while also ensuring that **Justice** has been done. The Court in **Patel...Vs....E.A Cargo Handling Services Ltd (1974) EA 75**, held that:-

**"There are no limits or restrictions on the Judge's discretion to set aside or vary an *ex-parte* judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the Court is to do Justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the Rules."**

Further it is this Court's considered view that in deciding whether or not to grant the orders sought and exercise discretion, the Court is also guided by whether there is sufficient cause for non-attendance and whether an injustice will be occasioned if the Application is allowed.

**In Wachira Karani ...Vs... Bildad Wachira (2016) Eklr**, in allowing an application to set aside an *ex parte* judgment, the Court held that:-

**"The rationale for this rule lies largely on the premise that an exparte judgment is not a judgment on the merits and where the interests of justice are such that the defaulting party with sound reasons should be heard then that party should indeed be given a hearing."**

Therefore this Court finds that the principles that the trial Court ought to have considered in this case is whether there would have been any prejudice that would be occasioned to the Respondent and whether the explanation for non-attendance was sound.

In arriving at its decision, the trial Court considered the above factors already stated by this Court and consequently, the Court will analyze whether the same were exercised judiciously.

Firstly the Court will deal with the two issues considered by the trial Court. The first one was that the **Gatundu Court** was superior and secondly that the instant suit was older and ought to have been given superiority. It is this Court's considered view that each case is unique and each case bears its own misgivings depending on the parties handling it and also the circumstances that were being handled. Therefore, the Court finds that though a Court might be the superior Court, the circumstances of the case before it might be different from the one that is before a different Court of a lesser Jurisdiction. For that reason, a Case in the lower Court may need the Advocate's attention more than say a matter that is before superior Court due to its circumstances and peculiarity.

The Appellant's Advocate had indicated that the hearing of the Application before the **Gatundu Court** was for an Application and that the Defendant/Respondent had not filed a **Replying Affidavit** to the same. Further that he had instructed his clerk to get an Advocate to assist in holding his brief and seek for the matter to be canvassed by way of written submissions. The Court will take Judicial Notice that this is a common practice and therefore this Court is inclined to believe the same. Further it is this Court's considered view that the that the matter at **Kandara Law Courts** being a children matter, criminal in nature and the fact that the Advocate have been given the last adjournment, it required more attention by the said Advocate and therefore attending to it might have been reasonable.

The 2<sup>nd</sup> issue that had been raised by the trial Magistrate in her Ruling is the fact that the matter was called out before it was dismissed and therefore the Appellant could not claim that he was before the Court. The Court has perused the proceedings in the lower Court that before the suit was dismissed on the **22<sup>nd</sup> November 2017**, the Court called out the names of the parties and indicated in its records that the same happened but did not indicate the same before it dismissed the Application. Further this Court notes that the Appellant together with the Advocate's clerk swore Supporting Affidavit and the same have not been rebutted by the Respondents. As per the Court's proceedings, it is clear that the Application was dismissed at **9.28 a.m** and therefore the explanation by the Clerk that he had gone to file an affidavit of service might just be possible.

Having gone through the proceedings, the Court notes that there were several times that the Appellant was present in Court when the matter came up and in particular the **23<sup>rd</sup> October 2014** and the **4<sup>th</sup> August 2014**, when the Court called out the Plaintiff's name he stood up and indicated to the Court that his Advocate was on the way. For the above reasons, the Court gives the Appellant the benefit of doubt that he was in Court and if he had heard his name being called out indeed he would have responded.

Finally in its ruling, the trial Court arrived at a conclusion that the Appellant was not interested in prosecuting his case. However having gone through the proceedings, this Court notes that the Appellant had always been attending Court through his Advocates and there was no reason to think that he had lost interest. While missing Court on two instances and having the matter dismissed consecutively may raise eye brows, this Court notes that on the **22<sup>nd</sup> November 2017**, when the matter was called out in the first instance, the Appellant and his Advocate were actually in Court and were only absent after the time allocation had been given for hearing and they had indicated they were ready to proceed. In fact on various occasions, the Plaintiff were actually ready to proceed.

Does this Court then think that the Appellant had lost interest, certainly not. Further the Application to set aside was brought without any delay and for that reason the Court finds and holds that the Respondent did not demonstrate any prejudice that was going to be occasioned if the Application had been allowed. It is this Court's considered view that the Appellant demonstrated that it had reason for nonattendance which in any way was satisfactorily.

Having now carefully considered the available evidence, having evaluated it and coming to its own independent decision, this court finds and holds that the trial Magistrate did **err** and misapprehended the fact and evidence on record and thus arrived at a wrong finding.

Consequently, the court finds that the Appeal is merited and it is allowed entirely. The upshot of the foregoing is that the Ruling of the lower court dated **9<sup>th</sup> April 2018**, is set aside and the Plaintiff's/Appellant's Application at the lower Court is allowed. The end result is that the appeal is allowed entirely with costs to the Appellant.

Judgment Accordingly.

*It is so ordered.*

**Dated, signed and Delivered at Thika this 15th day of June 2020.**

**L. GACHERU**

**JUDGE**

**15/6/2020**

**Court Assistant – Jackline**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**By Consent of :**

**No consent for the Appellant**

**No consent for the Respondent**

**L. GACHERU**

**JUDGE**

**15/6/2020**