REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 809 OF 2005

JOHNSON NDUNG'U B. NJOROGE …….. APPELLANT

VERSUS

GEORGE WAWERU MUCHAI ……..……. RESPONDENT

J U D G M E N T

The appeal herein arises from the ruling and order of the Hon. Mrs. C. Meoli (SPM) as she then was delivered on 8th December 2004, dismissing an application dated 12th October, 2004, which sought to set aside the order dated 6th October, 2004 which dismissed the Plaintiff's suit for non-attendance.

The background of the matter is that the suit herein was first instituted in the High Court at Nairobi on 24th May 1995 vide Nairobi HCCC No. 1591 of 1995 by the Plaintiff Johnson Ndungu Njoroge against the Defendants Joel Anthony Muchai and George Waweru Muchai. It is a claim for general damages arising out of a road traffic accident on 29th August 1992 along Naivasha-Nairobi road.

The Plaintiff was a motorist driving motor vehicle Registration No. KWX 929 which collided with the 1st Defendant's motor vehicle Registration no. KTN 829 then being driven by the 2nd Defendant as the latter's servant or agent.

The Plaintiff alleged that his car sustained serious damages for which he sought compensation from the court. He also sustained serious injuries.

On 16th October, 1995, the 2nd Defendant entered an appearance to the summons to enter appearance and filed defence through the firm of G. B. Kariuki & Co. Advocates denying the claim and pleading contributory negligence on the part of the plaintiff. The occurrence of the accident was not denied.

By a letter of consent dated 3rd November, 1995, the parties agreed to dispense with summons for directions and also agreed on and filed a set of issues for determination by the court.

On 24th August, 1999, the Plaintiff instructed the firm of Onesmus Githinji & Co. Advocates to represent him in the place of Vohra & Gitau Advocates.

On 12th March, 2001 the Plaintiff was granted leave to amend his plaint within 7 days by Kuloba J, with corresponding leave to the 2nd defendant to file his amended defence within 14 days from the date of service.

The amended plaint was filed on 16th March 2001 whereas the amended defence was filed on 3rd April 2001. On 15th June 2001, the Plaintiff filed his list of documents and on 12th October 2001 the Plaintiff's Advocates fixed the matter for hearing on 19th and 20th February 2002.

It is on record that the matter was on 27th February 2004 transferred to the Milimani Commercial Court for hearing and final determination by Mugo, Ag. Judge.

At the Milimani Commercial Court which is the Chief Magistrate's Court, the matter was assigned court file No. CMCC 2319 of 2004. The matter was then fixed for hearing by consent of both parties for 6th October 2004 at 9.30 a.m. as shown by the record of 22nd April 2004.

On 6th October 2004 the matter came up for hearing before C. W. Meoli (Mrs) SPM, which was the first time the case was being placed before a judicial officer for hearing from its transfer from the High Court on 27th February 2004. On the said date, Ms. Onyango appeared holding brief for Mr. Kahonge for the defendant. It is recorded that there was no appearance for the Plaintiff.

Ms. Onyango was then recorded as submitting that Mr. Kahonge had HCCC 1659/01 and a part heard No. 1014/93 before Rainsley Judge and Kamau Justice hence, he was not able to attend. Further, that he had spoken to the plaintiff's advocate. A request for judgment was made to the court.

The court on its motion recorded that as this was a 1995 matter, the plaintiff being absent, and as no good reason had been given by the defendant for adjournment, the suit was dismissed for want of prosecution and non appearance by the plaintiff. Following the order of dismissal on 6th October 2004, the plaintiff's counsel swiftly lodged an application pursuant to the provisions of the old **Order IX B rule 8** of the *Civil Procedure Rules* and **Section 3A** of the Civil Procedure Act, on the 13th October 2004 seeking to set aside the order of 6th October 2004 dismissing the plaintiff's suit for want of prosecution and non appearance. He also sought for reinstatement of the said suit. The application was dated 12th October, 2004.

The said application for setting aside dismissal orders of 6/10/2004 was heard on 26/11/2004 before the same magistrate C. W. Meoli (Mrs.) SPM as she then was. It was not opposed by the defendant's counsel and neither did counsel for the defendant attend court at the hearing on 26/11/2004. The plaintiff's counsel argued the application for setting aside the orders of dismissal and relied on her sworn affidavit giving reasons why she was not in court at the time the suit was being dismissed. She annexed a cause list for the High Court and further submitted on the affidavit sworn by a pupil whom she had requested to approach any counsel who was available before the SPM to hold her brief.

In a ruling delivered on 8/12/2004, the learned magistrate dismissed the appellant's application seeking to set aside the orders of

6/10/2004. This is what prompted the appeal herein. The memorandum of appeal filed on 17/10/2005 sets out three grounds of appeal namely that;

(1) The learned magistrate erred in law and fact in allowing her discretion to be vitiated by the consideration of the previous history of the matter which was extraneous for the purposes of the application before her.

(2) The learned magistrate erred in law and fact in failing to find that there was sufficient explanation for the counsel's failure to be in court when the matter was called out.

(3) (3) The learned magistrate erred in law and in fact in failing to exercise her wide discretion and unlimited discretion judicially especially in view of the fact that the defendant's counsel himself had applied to have the suit adjourned and in view of the serious injuries sustained by the appellant as disclosed in the plaint on record.

The appellant prayed that the order of 8th December 2004 be set aside thereby reinstating Milimani CMCC No. 2319 of 2004 for hearing on its merits, together with costs of the appeal.

The appeal herein was filed pursuant to an order of leave by Hon. Justice Ransley on 22/9/2005 vide HC Misc. Civil Application No. 506 of 2005. The appeal was opposed and parties hereto did agree to dispose it of by way of written submissions when they appeared before Hon. Lady Justice Rose Ougo on 3/7/2014. The appellant had filed his written submissions on 3/12/2013 whereas the Respondent's submissions were filed on 12/2/2014.

In their submissions, the advocates for the appellant implored this court as an appellate court to set aside the order of dismissal by the trial magistrate while reiterating the three grounds of appeal as replicated herein. They urged the court to exercise its inherent powers to allow the appeal with costs, citing the case of **David Livingstone Oyieko vs. Simon Kiprono [2005] eKLR**.

They further submitted that the court should find that more often than not, advocates find themselves engaged in more than two courts and it is only reasonable that in such a case, the High Court matter was expected to take precedence. They cited the dicta that mistakes of counsel should never be visited upon innocent clients as long as the mistake was shown to be genuine and not meant to delay the cause. It was further submitted that no prejudice would be occasioned to the Respondent if the appeal herein was allowed.

Counsel further cited *Articles 159 (2) (d)* of the *Constitution* to the effect that justice should be administered without undue regard to technicalities. Further they relied on **Sections 1A** and **1B** of the *Civil Procedure Act*, the now well known oxygen principle. Counsel further submitted that the appellant stands to suffer an injustice if he is not accorded an opportunity to be heard as he sustained very serious injuries and suffered loss and damage as a result of the accident subject matter of the appeal.

The Respondent opposed the appeal and submitted that whereas they concede that where advocates make inadvertent mistakes, their clients should not be punished for such misdeeds, they submit that such inadvertent or excusable mistake was not shown. In their view, the record shows that the plaintiff had no serious interest in pursuing his claim before the court and that it appears the plaintiff did not follow up the matter with their advocates on record. They cited several authorities in support of their arguments, urging this court to dismiss the appeal with costs to the respondent. In their view, the court should strive to uphold the interests of justice and that the interests of justice will not be secured in this case if the appeal is allowed.

I have carefully considered the rival submissions by counsel for the appellant and respondent touching on the merits and demerits of this appeal. From the onset, my responsibility as an appellate court as stipulated in **section 78** of the *Civil Procedure Act* is to evaluate and consider the evidence and the law, and exercise as nearly as possible, the powers and duties of the court of original jurisdiction.

I am aware that this appeal arises from a ruling of the learned magistrate dismissing the appellants' suit for want of prosecution and non-attendance and the subsequent refusal to set aside that order of dismissal. Therefore, the material evidence that I will be evaluating on are the submissions by counsel in the subordinate court and their disposition in the affidavits filed in support of the application for setting aside, taking into account the fact that I did not see or hear the submissions being made hence, making an allowance for that; as espoused in the case of **SELLE VS. ASSOCIATED MOTOR BOAT CO. LTD [1968] EA. 123**, in my evaluation of the trial court's evidence and analysis to come to my own conclusion.

In my view, the issues for determination in this appeal are: (1) whether the trial magistrate erred in law and fact in failing to exercise her discretion to set aside the order of 6/10/2004 dismissing the appellant's suit for non appearance and want of prosecution.

Over the years, courts have been reluctant to dismiss a party's suit and thereby deny a claimant an opportunity to ventilate their grievances before the courts. My careful perusal of the record shows that

the suit as filed was very active both in the High Court as originally filed and as soon as it was transferred to the Milimani Commercial Courts, the plaintiff swiftly invited the Respondent/Defendant with a view of fixing a hearing date, which date was fixed by consent for 6/10/2004 when the suit was dismissed for non-appearance and want of prosecution. There is no evidence on record to show that the appellant/plaintiff failed to demonstrate seriousness in having the suit prosecuted. The record further shows that the plaintiff/appellant was seriously ill at one point, necessitating a second medical report to avail his current status before the matter could proceed to hearing.

I am therefore not persuaded by the submissions by counsel for the respondent that the appellant showed a lack of serious commitment to have his case out of the courts; and neither is there evidence on record to show that his advocates were indolent. They may have been negligent, giving rise to the dismissal of the appellant's suit on 6/10/2004 by giving instructions to a pupil who was not familiar with the advocates who were to hold brief for the appellant's advocates, yes, but they were not indolent. In dismissing the appellants' application to reinstate his suit for hearing and determination on merit, it is obvious that the learned magistrate was exercising judicial discretion; and as established in the well known case of **Mbogo & Another vs. Shah [1968] EA LR** page 13 that, an appellate court will not normally interfere with the exercise of the trial judges' discretion unless it is satisfied that the judge in exercising his discretion misdirected himself in some matters and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been an injustice.

Armed with an apology emanating from the appellants' counsel for failure to attend court, the other issue for determination is whether the learned magistrate was justified in dismissing the application seeking to reinstate the suit.

In my view, the court's discretion to set aside an order of dismissal of suit for non-attendance is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the cause of justice.

Over the years, a plethora of decisions from the courts reveal that courts have been reluctant to dismiss a party's suit and thereby deny a claimant the opportunity to ventilate their grievances.

I have carefully perused the record and considered the reasons that were offered in the submissions by the appellant regarding counsel's failure to attend court on 6/10/2004 when the suit was dismissed. I have also noted from the record that the original suit was as filed in the High Court and subsequently transferred to Milimani Commercial Court was an active suit. There was no moment, according to the record, when the plaintiff slumbered on his rights. Neither is there evidence on record that the Respondents even threatened to have the said suit dismissed for want of prosecution.

Even upon the transfer of the suit from the High Court to the subordinate court, the plaintiff/appellant moved with speed and invited the respondent to fix a hearing date for 6/10/2004 when the suit was dismissed. This was the first appearance by the parties before the learned magistrate's court upon the transfer.

I do not, therefore, find any evidence that the appellant failed to demonstrate seriousness in having the suit herein prosecuted, or that he was indolent. It however appears to me and I repeat that counsel for the appellant was careless in the manner in which she handled the appellant's brief. She simply gave the brief to a pupil who had no idea of the matter and who was not familiar with the advocates in court. The pupil helplessly watched as the appellant's suit was being dismissed. I am fortified in this conclusion by the fact that there is no indication as to whether the appellant was even aware that his case was due for hearing on 6/10/2004 or that he was in court or if he was not in court when the matter was called, the reasons why he was not in court. My assumption is that he was not present in court.

I have asked myself whether failure by counsel to attend court on 6/10/2004, and in the presence of an advocate holding brief for the Respondent/defendant's counsel, constituted an excusable mistake, or whether it was intended to deliberately delay the cause of justice.

As I have stated, in the absence of an affidavit by the Plaintiff on what transpired on 6/10/2004, I assume that he was not in court. Nonetheless, counsel for the appellant promptly moved the court to recall its order of 6/10/2004 in favour of the appellant and have continued to be vigilant in pursuing justice for their client by admitting their fault. They have cited what I call a dicta that is often quoted to persuade courts that, counsel's mistake should not be visited upon their clients. In my view, the appellant's advocate's have shown sufficient cause for failing to adequately represent their client when he most needed them. They cannot, therefore, be demonized forever.

In the case of **Belinda Murai & Another vs. Amoi Wainaina [1978] KLR 278 CA** per Madan JA, the court described what constitutes a mistake in the following terms:

> **"a mistake is a mistake. It is no less a mistake because it is an unfortunate slip though in case of senior counsel the court might fell compassionate more readily.**
>
> **A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule ……".**

In my view, the learned magistrate misapprehended the reasons given for non-attendance which arose as a result of a mistake of counsel for the appellant.

The record clearly shows that it was the Respondents' counsel who sought an adjournment citing engagements before the High Court. It was further recorded that counsel for the appellant and Respondent had consulted over the matter and their non availability. The learned magistrate, nonetheless rejected the Respondent's counsels' application for adjournment and dismissed the appellant's suit. It is not on record that the appellant's counsel applied for an adjournment which was rejected as having no merits. It was the Respondent's counsel who sought an adjournment.

In **Phillip Chemwolo & Another vs. August Kubende [1982 – 1988] KAR 103**, Apaloo J.A. posited that:

> **"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline".**

My careful perusal of the file folders in this appeal reveal that on one of the file covers, the citation for the suit subject matter is handwritten as:

> **"IN THE HIGH COURT OF KENYA AT NAIROBI**
>
> **CIVIL CASE NO. 1591 OF 1991".**

On the other folder which is pre-printed, it has a High Court citation but which is crossed out by hand and overwritten with the Chief Magistrate's (CMC) Court, Civil Case No. 2319 of 2004 as issued on 10/3/2004. In the latter folder, there are just 4 pieces of paper including the communication by the Deputy Registrar to the SPM forwarding the High Court file for appropriate action following the transfer order issued on 27/2/2004 by Hon. Lady Justice Mugo.

Those revelations support the appellant's counsel's submission that it is possible that there was a mix up in calling out files as it is not clear on the face of it which of the two file folders was read out to the gallery by the court clerk. I believe counsel for the appellant that the reported mix up may have confused the advocate who was called upon to hold brief by the pupil. In my view, the confusion created a procedural technicality that should not outweigh the overriding objective of dispensing substantive justice to the parties noting, especially, that the failure by the appellant's counsel to attend court on the hearing date has, on a balance of probabilities, been sufficiently explained. In my view, the reasons for refusal to set aside the orders of dismissal by the learned magistrate raised the standard of proof in civil cases to that of beyond reasonable doubt as opposed to on a balance of probability.

In conclusion, denying the appellant a forum to ventilate his grievances ousts him from the seat of justice. His timeous action to reinstate the suit is a clear indication that he has not been hell-bent to frustrate the course of justice. Furthermore, it has not been shown that any prejudice will be suffered by the Respondent if the dismissed suit is reinstated and heard on merit.

In the end, I hold that the appellant should not be denied a hearing. I have no option but to allow his appeal herein. Accordingly, I order that the ruling of C. W. Meoli (SPM) dated 6/10/2004 dismissing the appellant's application for setting aside the order dismissing his suit for want of prosecution and non-attendance is hereby set aside. I substitute thereof with an order allowing the application dated 12th October 2004 and reinstate the appellant's suit for hearing on merit.

The advocates for the appellant having admitted that it was their fault that the suit was dismissed, I order that they personally pay costs of this appeal to the Respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 4th day of November 2014.

R. E. ABURILI

JUDGE

In the present of:

…….. for Appellant.

……..……. for Respondent.

Virginia Kavata – court clerk.