



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELCA 21 OF 2018

ALICE NYAMBURA KINUTHIA (suing in her capacity as the administrator

Ad litem of the estate of Eunice Muthoni Kinuthia).....**APPELLANT**

VS

SAMUEL KARANJA MIUMI.....**RESPONDENT**

(Being an appeal from the ruling and order of SPM A M MAINA delivered on the 11/9/2018

RULING

1. This is an appeal arising from the ruling and order of Hon A M Maina, SPM delivered on the 11/9/18 in CMCC No 390 of 2011. The background of the case in this appeal is that the matter came up for hearing on the 26/8/14 when the Plaintiff and her advocate were absent in Court despite service having been made and an affidavit of service filed leading the Court to dismiss the suit with costs for want of prosecution. The matter seems to have rested until the 11/5/18 when the plaintiff filed a Notice of Motion seeking orders interalia to set aside/review the dismissal orders made on the 26/8/14 and the suit be reinstated. The Plaintiff attributed her non-attendance of Court to the mistake of her counsel and further that she was still keen in prosecuting the case to conclusion and that mistakes of her Counsel should not be visited on her. Further that no prejudice would be visited on the Defendant if the suit is reinstated.

2. The Notice of Motion was opposed by the Defendant who deponed interalia that the application has been brought 4 years after the dismissal orders and therefore the delay is inordinate and unexplained. Further that no reasons have been given to warrant any orders of review under Order 45 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act. That the Court has not been informed of any mistake or error on the face of the record, or any discovery of new evidence or any other sufficient reason. In addition, that the decree being sought to be reviewed has been substantially executed and hence spent. The Defendant in further resistance to the Notice of Motion deponed that even if the suit had not been dismissed it would have stood abated by operation of law and there would be nothing to reinstate after 4 years. In conclusion he averred that the application is an attempt to subvert the course of justice.

3. After hearing the application on its merits the learned Magistrate dismissed it in her considered ruling delivered on the 11/9/18.

4. Aggrieved by the decision of the Learned magistrate, the Appellant proffered an appeal on the following grounds;

- a. The magistrate failed to exercise discretion donated to her under Order 12 Rule 7 of the Civil Procedure Rules.
- b. The magistrate erred in finding that the Appellant had not explained the delay in filing the application to set aside the dismissal orders.
- c. That the magistrate failed to find that the orders sought would not prejudice the Respondent in any way.

5. The appeal was canvassed by way of written submissions. The Appellant filed written submissions but the Respondent filed none. The appeal is therefore undefended.

6. The Appellant admitted that the application was erroneously brought under Order 45 instead of Order 12 Rule 7 and urged the Court to consider order 50 Rule 10 of the Civil Procedure Rules which provides that every order rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated but no objection shall be made and no application be refused merely by reason of a failure to comply with this rule. Further the Appellant beseeched the Court to find that no application shall be defeated on a technicality or for want of form that does not affect the substance of the application.

7. The Appellant further submitted and admitted that she and her Advocate were absent on the date of hearing and it took some time for her to discover that the case had been dismissed. That she discovered this on the 3/5/18 when she visited the registry at Thika to inquire about the matter when she was advised that her case was dismissed on 26/8/14 after which she filed the application on the 11/5/18. On whether there was unreasonable delay, the Appellant submitted that there is no definition of what constitutes unreasonable delay as stated in the case of **Mwangi S Kimenyi Vs Attorney General & Anor (2014) EKL**R where the Court held that there is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case, the subject of the case, the nature of the case, explanation for the delay and so on and so forth.

8. The Appellant further submitted that dismissal is a draconian step which drives the Plaintiff away from the seat of judgment and it should be done sparingly and in cases where dismissal is the feasible and just thing to do. The Appellant further impressed upon this Court that Courts should strive to sustain rather than to dismiss cases especially where justice would still be done and fair trial had despite the delay. The Appellant submitted that the delay herein has not given rise to substantial risk to fair trial or resulted into grave injustice to the Defendant. That the Appellant stands to be prejudiced if the case is not reinstated for hearing and determination.

9. The Appellant has relied on a number of case law which I have read and considered.

a) **Gatu –vs- Muriuki (1986) eKLR.**

b) **Mwangi S. Kimenyi –vs- Attorney General & Another (2014) eKLR.**

c) **Hardware and General Stores –vs- Jihan Freighters Limited (2018) eKLR.**

d) **Ivita vs Kyumbu (1975) eKLR.**

e) **Paustina Auma Ojwang –vs- John Onyango Owangi & 2 Others (2017) eKLR.**

f) **Karatina Garments Ltd –vs- Nganarua (1976) eKLR.**

10. This being the first appellate Court my role will be to re-examine the evidence placed before the trial Court and see if I would have arrived at a different verdict, however I must take into account that the trial Court had the opportunity to examine and assess the witnesses appearing before it, which advantage I do not have.

11. The principles upon which this Court will interfere with the exercise of a magistrate's exercise of discretion in the lower Court are also well known and settled. This Court can only interfere with the exercise of a trial Court's judicial discretion if satisfied that the magistrate misdirected himself on the law; or that he misapprehended the facts; or that he took into account considerations of which he should not have; or that he failed to take into account considerations which he should have; or that his decision, albeit a discretionary one, was plainly wrong. (See **Mbogo & Another v Shah (1968) EA 93**; **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) eKLR**).

12. The sole issue for consideration in this appeal is whether or not the Magistrate judiciously exercised her discretion in refusing to set aside the dismissal orders. It is settled law that whenever a Court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by the Court to do real and substantial justice to the parties in a suit. Chief Justice, John Marshall, the 4th Chief Justice of the United States, delivered himself in **Osborn V. Bank of the United States, 22 U. S. 738 [1824]** on the issue as follows;

"Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."

13. The Supreme Court of India, Civil Appellate Jurisdiction in **Civil Appeal No.9047 of 2014; K. Praksh v B.R. Sampath Kumar**, quoting with approval the King's Bench in Rookey's Case, 77 ER 209, described exercise of discretion as follows;

"The King's Bench in **Rookey's Case [77 ER 209; (1597) 5 Co.Rep.99]** it is said: "Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with".

14. Back home the case of **Mbogo v Shah [1968] EA 93** settled the matter of exercise of discretion by a Court as follows;

"...the discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice".

15. It is not in contest that the application was brought under Order 45 Rules 1, 2 and 3 and Order 51 Rule 1 of the Civil Procedure Rules.

The prayers sought however were clearly for setting aside and or review. I have reviewed the record and I totally concur with the learned Magistrate that there are no grounds adduced by the Appellant to warrant granting orders of review. In that regard there is no ground to fault the learned magistrate in the decision that she arrived at.

16. On the alternative prayer for setting aside the dismissal orders, the correct order is Order 12 Rule 7 which provides as follows;

“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”.

17. Case law on setting aside orders is now settled. These principles include; whether there has been inordinate delay on the part of the Plaintiff in prosecuting the case; whether the delay has been explained; is delay inexcusable and or intentional; any prejudice to the parties.

18. I have reviewed the case and the record in its entirety and it is not in dispute that the Appellant has conceded that she and her advocate did not attend Court on the material date. There is no reason that has been adduced for this non-attendance. After the dismissal of the case the Appellant went into slumber for about 4 years before filing the application to set aside the dismissal orders. There is no dispute that it took the Appellant close to 4 years to realize that the case had been dismissed. Was this delay inordinate? The Appellant would want the Court to think otherwise. The Appellant has laid blame on her counsel for not informing her that the case had been dismissed. That may be so, but the case belongs to the Plaintiff and not the counsel. One would have thought that she should have been monitoring the progress of her case from her agent, the legal counsel from time to time.

19. In the case of **Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR** it was held that;

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

20. In the case of **Mwangi v Kariuki [1999] LLR 2632 (CAK) Shah, JA.** ruled that; -

“mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant’s careless attitude.” The import of this is that while the mistake of counsel is excusable, if it is accompanied by a litigant’s carelessness and inactivity, then the refusal by Court to exercise discretion in favour of such a party cannot be impugned”.

21. The overriding objectives found in Section 3A of the Civil Procedure Act calls upon the Court, the party in litigation together with the Counsel to facilitate the achievement of these objectives. The Appellant is not exempt in ensuring that her case is determined expeditiously. The Appellant failed to do so.

22. The Appellant has or ought to have a legitimate contract with her Counsel and if the Counsel has committed an injury, the Appellant has recourse to a legal remedy for professional misconduct by her lawyer. She therefore cannot have both the litigation proceedings as well as a claim in tort.

23. The learned Magistrate found as a matter of fact that if the Appellant was a vigilant litigant as she ought to have been she would have taken steps to visit her Counsels office or the Registry to inquire on the matter. From the record, she only woke up from her slumber 4 years later only to realize that the case had been dismissed. This period in my view is inordinate coupled with the fact that no good reason was given for the delay.

24. Having had judgment for 4 years the Respondent has legitimate expectation that the matter was settled. I also find that the decree has been executed and therefore the Respondent would stand to be prejudiced if the same is reversed after an inordinate period. The Court cannot aid the Appellant in her indolence. Public policy in such circumstances dictate that litigation must come to an end.

25. I find that the appeal has no merit. It is dismissed with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 30th DAY OF SEPTEMBER 2019

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Gachao HB for Saluny for the Appellant

Respondent – Absent

Irene and Njeri, Court Assistants