Kigira v Kigira (Civil Appeal E337 of 2023)
[2025] KECA 146 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 146 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E337 OF 2023

PO KIAGE, K M'INOTI & WK KORIR, JJA

FEBRUARY 7, 2025

BETWEEN

FREDRICK NG'ANG'A KIGIRA ..... APPELLANT

AND

PETER NGIGI KIGIRA ..... RESPONDENT

(An appeal against the Ruling of the Environment and Land Court at Thika (J.G. Kemei, J.) dated 10th February 2022inELC Cause No. 88 of 2020)

JUDGMENT

1. The appellant, Fredrick Ng'ang'a Kigira, was the defendant in the suit before the trial court, which was determined in favour of the respondent, Peter Ngigi Kigira, on 24th June 2021. On 13th October 2021, the applicant moved the trial court seeking to set aside the judgment dated 24th June 2021 and permit him to prosecute his defence. The reasons adduced by counsel for the appellant were that the directions concerning the hearing of the matter were issued at the height of the COVID-19 pandemic, and counsel, having been working from home, failed to diarize the hearing date. In a ruling dated 10th February 2022, J. G. Kemei, J. dismissed the application to set aside the judgment. It is that ruling which has resulted in the present appeal.

2. In the memorandum of appeal lodged in this Court, the appellant is challenging the decision of the trial court on the grounds that his right to be heard was violated; that the mistake of his counsel should not have been visited upon him; that extraneous issues not relevant to the application were taken into consideration; and that the decision was not supported by the evidence on record.

3. This appeal came up for hearing on 24th September 2024 when learned counsel Mr. Kamau appeared before us representing the appellant. There was no representation for the respondent and neither had he filed any submissions. Counsel for the appellant had filed submissions which he sought to rely on while also briefly highlighting them.

4. In the submissions dated 8th May 2024, Mr. Kamau first reiterated the reasons advanced for non-attendance on the hearing date and submitted that those reasons were valid and that the learned Judge ought to have accorded due consideration to the fact that there was a meriting defence on record and that any prejudice to be suffered by the respondent could be compensated by an award of costs. Counsel referred to Shanzu Investment Ltd vs. Commissioner of Lands [1993] eKLR and submitted that among the grounds for setting aside a judgment is where there is a defence on merits. Counsel cited Belinda Murai & Others vs. Amos Wainaina [1979] eKLR to urge that the mistake of counsel should not be visited upon the litigant. Counsel maintained that he filed an affidavit acknowledging the error and the mistake should not prejudice his client. Finally, counsel submitted that the learned Judge should have exercised her discretion by promoting the appellant's inalienable right to be heard. Counsel termed the conclusion of the learned Judge as drastic and that it led to the appellant being greatly prejudiced. Consequently, counsel urged us to interfere with the decision of the learned Judge and allow his client to pursue his case to a just conclusion.

5. We have given due consideration to all that has been placed before us. The appellant calls upon us to interfere with the exercise of discretion by the learned Judge. As was rightly appreciated by counsel for the appellant, the case of Mbogo & Another vs. Shah [1968] EA 93 delineated the parameters within which an appellate court can interfere with the exercise of discretion by the court appealed from. In order for us to accede to the appeal, we must be satisfied that the learned Judge misdirected herself in some matter and as a result, arrived at a wrong decision or it is manifest from the case as a whole that the learned Judge was clearly wrong in the exercise of her discretion and that as a result there has been injustice.

6. The application before the learned Judge was brought pursuant to Order 12, rule 7 of the Civil Procedure Rules. As held by the Court in Daqare Transporters Limited vs. Chevron Kenya Limited [2020] KECA 309 (KLR), the discretion under the said rule is exercised to avoid injustice arising out of inadvertent or excusable mistakes and that a court must satisfy itself as to whether the reason given by the applying party was excusable.

7. The record shows that it was not the first time that counsel for the appellant was making a similar application. On 12th February 2019, the trial court set a hearing date for 11th July 2019. On the hearing date, neither the appellant nor his counsel showed up in court. The matter proceeded in their absence. On 29th September 2020, the proceedings of 11th July 2019 were set aside by consent, and the court directed that the matter starts afresh. This was done notwithstanding the fact that before the delivery of the judgment the applicant's counsel had been given a chance by the trial court to apply to set aside the ex-parte proceedings but had failed to do so. On 15th October 2020, the matter was once again scheduled for hearing on 8th December 2020 in the presence of counsel for both parties. When that day came, neither the appellant nor counsel were present, and the court proceeded with the plaintiff's case. The judgment was later delivered on 24th June 2021.

8. We find on record an application by the appellant dated 22nd October 2019, where he sought to set aside the proceedings of 11th July 2019. The reason adduced was that counsel wrongly diarized the hearing date as 11th June 2019 instead of 11th July 2019. Fast forward to the application dated 13th October 2021, counsel averred that the mistake this time round was failure to diarize on the firm's main diary because counsel was working from home pursuant to the Government's directives to curb the spread of COVID-19.

9. In dismissing the application, the learned Judge noted that despite the appellant having a triable defence, there was a delay of 4 months in bringing the impugned application, and the reasons were not an excusable accident. We do not think that the learned Judge considered extraneous matters in

reaching that conclusion. The reason why counsel did not appear in the two occasions was attributed to failure to diarize the dates. As to the circumstances under which mistake by counsel can be excused, the Court in Daqare Transporters Limited vs. Chevron Kenya Limited (supra) held that:

> "The adage rule that the mistake of counsel should not be visited upon an innocent litigant does not have a blanket application. Nor do we think that it has doctrinal status. The court must always look into the conduct of the party pointing the finger of blame in order to make a just decision. The appellant felt that the learned judge erred in looking into its past conduct, in reaching her decision. That cannot be right as the conduct of the appellant was key in the determination of whether or not it deserved to be granted the reinstatement. In exercising discretion, the Court must be satisfied that justice will be done to all parties to a suit."

10. We agree with the above pronouncement. In the circumstances of this appeal, we can only note that by taking 4 months to bring the application that was dismissed through the ruling that has led to this appeal, the appellant affirmed that he was indeed indolent. We say so, because as we have already stated, the applicant had indicated that he would be seeking to set aside the ex-parte proceedings that resulted in the second judgment but did nothing and only approached the court four months after that judgment had been delivered. Despite the judgment being delivered on 24th June 2021, there is no evidence that the appellant followed up on his matter with his advocates. The unexplained delay of four months can only be attributed to the appellant's indolence and was thus inexcusable.

11. Concerning the plea that the appellant's right to be heard was trampled upon, we note that the learned Judge considered the issue and properly ruled that the right was not to be enjoyed at whim of the parties. The record shows that the respondent was 82 years old in 2019, and the suit was instituted in 2016. The ensuing circumstances would lead to the respondent being prejudiced on account of his advanced age and considering the period that the litigation had taken. One of the constitutional tenets of judicial authority found in Article 159 of *the Constitution* is that justice shall not be delayed. That tenet not only speaks to the providers of justice, (the courts and tribunals) but also to the consumers of justice (the litigants).

12. Ultimately, we find no fault in how the learned Judge exercised her discretionary jurisdiction. Consequently, this appeal is devoid of merit and is hereby dismissed. The respondent having not defended this appeal, we make no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2025.

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.