Chabari v Tharaka Nithi County Government & another (Civil Appeal 293 of 2019) [2025] KECA 558 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KECA 558 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 293 OF 2019

W KARANJA, J MOHAMMED & AO MUCHELULE, JJA

MARCH 28, 2025

BETWEEN

FRANKLINE JB CHABARI ..... APPELLANT

AND

THARAKA NITHI COUNTY GOVERNMENT ..... 1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD THARAKA NITHI COUNTY ..... 2ND RESPONDENT

(Being an appeal from the ruling of the Employment and Labour Relations Court in Meru (Nzioki Wa Makau, J.) dated 4th October 2019 in Meru ELRC No. 36 of 2019 (formerly Nyeri ELRC No. 323 of 2017)

JUDGMENT

Background

1. This is an appeal against the ruling and order of the ELRC (Nzioki Wa Makau, J.) dated and delivered on 4th October 2019. Frankline J.B. Chabari (the appellant) is aggrieved by the fact that the Employment and Labour Relations Court (ELRC) failed to consider the reasons why his counsel failed to attend court on the hearing date, leading to the dismissal of his claim as filed before the ELRC. Tharaka Nithi County Government and the County Public Service Board, Tharaka Nithi County are the 1st and 2nd respondents respectively.

2. The brief synopsis of the dispute is that the appellant filed a Memorandum of Claim dated 31st August 2017 contending that the revocation of his appointment on the basis of the letter dated 30th August 2017 as Director – Urban Development, Tharaka Nithi County was in violation of Article 236 (b) of *the Constitution* of Kenya 2010, irregular, unprocedural, null and void. The appellant sought injunctive orders against the 1st and 2nd respondents by themselves their servants or any other persons working

under their direction to be restrained from demoting the appellant or interfering with his current salary, general damages for wrongful termination of employment, any other relief and costs of the claim.

3. The 1st and 2nd respondents entered appearance and filed a response to the appellant's claim. They denied the averments in the appellant's Memorandum of Claim. They contended that much as they agree that they issued the appellant with a letter dated 30th August 2017 revoking the appointment, the same was withdrawn on 12th September 2017. The respondents further contended that the claim was overtaken by events by virtue of the withdrawal and cancellation letter dated 30th August, 2017.

4. As can be gleaned from the trial court record, the parties all being well represented by their respective counsel appeared before the Deputy Registrar, Hon. T. Madowo on 11th December 2018. A hearing date for the claim was slated for 6th February 2019. On the material date learned counsel, Mr. Muriuki holding brief for Mr. Mutuma appeared for the appellant while Mr. Munyori appeared for the respondents. Mr. Muriuki confirmed that Mr. Mutuma was ready to proceed. The trial court allocated time for the hearing at 9.30 a.m. When the matter was called out, there was no appearance by counsel for the appellant and the claim was therefore dismissed with costs to the respondents.

5. Undeterred to have his claim stand reinstated, the appellant entreated the ELRC by filing an application on even date, when his suit was dismissed seeking the following orders:-

    a. That the court be pleased to reinstate this matter for hearing and determination on merit.

    b. Costs of the application be provided for.

6. In support of the application, Gregory Mutuma Muthuri, learned counsel acting on the instructions of the appellant deposed in a supporting affidavit of even date that counsel whom he sent to hold his brief, Mr. Muriuki erroneously informed him that the matter was scheduled for hearing at 11.30 a.m. as opposed to 9.30 a.m. Counsel stated that he was in court at 11.30 a.m. only to learn that the claim had been dismissed. Counsel urged that his absence and that of the appellant was not intentional and urged the ELRC to reinstate the claim.

7. Opposing the application, the respondents filed grounds of opposition.

    We have perused the record of appeal with a fine-tooth comb but we are unable to trace the grounds of opposition on record. Nevertheless, we rely on the impugned ruling since the ELRC had the advantage of perusing the physical documents as filed. The respondents stated that the appellant and his counsel did not explain where they were at 9.30 a.m. when the matter was called out for hearing. Counsel holding brief, Mr. Muriuki, did not swear an affidavit confirming that he erroneously advised the appellant's counsel on the time allocated for hearing.

8. Counsel further submitted that the court should not exercise its judicial discretion in favour of a party who fails to attend the hearing and fails to give a satisfactory explanation for the failure to attend. Further, that reinstatement of the suit will not affect the appellant's promotion to the office of the Director in charge of Urban Development since it was revoked on 10th May, 2018 and he reverted to his previous position and the suit is therefore not meritorious.

9. In the ruling dated 4th October 2019, the ELRC held that there was no reason preferred by the appellant's counsel on his absence in court at

9. 00 a.m. when the matter was first called out and at 9.30 a.m. when the hearing of the case was scheduled. The ELRC agreed that failure to have the affidavit of Mr. Muriuki Advocate, to prove that he indeed advised otherwise on the time of the hearing being at 11.30 a.m. was fatal. On those grounds, the

learned Judge found the appellant underserving of the court exercising its discretion in his favour and dismissed the application with costs.

10. Aggrieved by the ruling, the appellant invoked this Court's jurisdiction by filing a notice of appeal dated 14th October, 2019. The appellant preferred 5 grounds of appeal in a Memorandum of Claim dated 5th November, 2019 which we hereby reproduce verbatim as follows: -

    i. That the learned Judge erred in fact and in law in holding that the advocate's failure to attend court on the said date had not been adequately explained;

    ii. That the learned Judge erred in fact and in law in holding that the appellant's advocate's failure to inform the appellant of the time allocation of the hearing and the appellant's failure to attend court on the said date had not been adequately explained;

    iii. That the learned Judge erred in fact and in law in holding that the Advocate who was holding brief for the Claimant's Advocate did not avail his affidavit to prove that indeed he advised that the case was scheduled for hearing at 11.30 a.m.;

    iv. That the learned Judge erred in fact and in law in holding that the claimant's reasons are not factual but a connivance now that he is faced with the demise of his suit;

    v. That the learned Judge erred in law in failing to give effect to the overriding objective in Sections 1A, 1B of the *Civil Procedure Act* and Article 159 of *the Constitution* of Kenya 2010 in denying the appellant the opportunity of a just determination and in dismissing the notice of motion on account of mistake on the appellant's advocates."

11. The appellant prayed that we find merit in his appeal, the application filed in the ELRC dated 6th February 2019 be allowed and that he be awarded costs of the appeal.

Submissions by Counsel

12. Learned counsel, Mr. Kiplagat was on record for the appellant while learned Senior Counsel, Dr. Kamau Kuria was on record for the respondents. Mr. Kiplagat submitted that the appellant's suit was dismissed for non-attendance. Counsel submitted that the crux of the appeal is that the appellant and his counsel inadvertently failed to attend court at the scheduled time. Counsel submitted that the ELRC did not judiciously exercise its discretion and dismissed the application on the basis of a technicality. Further, that the matter was coming up for hearing for the first time and had not previously been adjourned. Counsel relied on the decision of Belinda Murai & Others vs Amos Wainaina [1979] eKLR for the proposition that the mistakes of counsel should not be visited on the client. Counsel urged this Court to correct the injustice and uphold Articles 10 and 159 of *the Constitution* and allow the appeal as prayed.

13. Senior Counsel, Dr. Kamau Kuria opposed the appeal and submitted that the respondents oppose the appeal on various grounds. On the ground whether this Court should interfere with the discretion of the ELRC, Senior Counsel submitted that the appellant has not brought himself within the laid down principles as the ELRC did not misdirect itself in law or take into account factors that it should not have taken into account. Counsel asserted that the appellant's suit was dismissed as neither he nor his advocate was in court.

14. Counsel further submitted that when the matter was scheduled for hearing, neither the appellant nor his counsel were in court. Further, that the court has power to regulate its own procedures. Counsel urged this Court to dismiss the appeal with costs and thereby send a message to all litigants.

15. Mr. Kiplagat in his brief rejoinder urged this Court to reinstate the suit as there was some confusion regarding the time allocation for the hearing of the matter before the ELRC.

Determination

16. As the first appellate court, we have the duty to re-evaluate and reconsider the evidence adduced before the trial court so as to draw our own independent conclusions as it was held in the case of Selle vs Associated Motorboat Company (1968) E.A. This being an appeal which is challenging the exercise of the court's discretion, this Court is cognizant that it will only interfere with the judicial discretion of the ELRC if satisfied that it misapprehended the facts; or misdirected itself in law; or that it took into account matters of which it should not have; or failed to take into account considerations which it should have; or that its decision was plainly wrong. See Shah vs Mbogo & Another (1967) EA 1116.

17. We have carefully considered the record of appeal, the written submissions by both counsel, the cited authorities and the law. We are of the view that the pertinent question we must address ourselves to is whether the failure to attend court by the appellant's counsel on 6th February, 2019 constituted an excusable mistake and whether the same was intended to derail the hearing of the claim.

18. It is now a long-standing principle that the mistake of counsel should not be visited upon an innocent litigant. In Philip Keipto Chemwolo & Another vs Augustine Kubende [1986] eKLR Apoolo JA rendered himself as follows: -

> "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."

19. Moreover, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that it is not a blanket application and exercise of such discretion is by no means automatic as was held by this Court in Tana and Athi Rivers Development Authority vs Jeremiah Kimigho Mwakio, Patrick K. Mulisho, Mohamed Godhana & Amos Amitai [2015] KECA 674 (KLR). The court must strive to look at the conduct of the party pleading no fault on its part in order to make a just decision.

20. While we acknowledge that counsel's mistake should not be visited upon an innocent litigant, counsel has a corresponding duty to act in the best interests of administration of justice and to that end, with candour and not aid a litigant in the subversion of justice.

21. Article 50 (1) of *the Constitution* preserves the right of hearing and a party should not be locked out of the seat of justice. To further re - affirm on the right to be heard, Sections 1A and 1B of the *Civil Procedure Act* Cap 21 commonly referred to as the 'Oxygen Principles' encourage substantive justice to be realized as opposed to technicalities. In Richard Ncharpi Leiyagu vs Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR this Court held:-

> " The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court

process from abuse that would amount to injustice and at the end of the day there should be proportionality."

22. Further, this Court in Belinda Murai & Others vs Amos Wainaina (supra) stated as follows:

> "A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of Junior counsel the court might feel 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."

23. From the facts of this case, it would appear that the appellant's counsel was intent on prosecuting the claim. Had he not had the intention to do so, he would not have strived to send another counsel to hold his brief and take time allocation. Furthermore, counsel for the appellant filed an application for reinstatement of the claim on the same date that he learnt of the dismissal. This goes on to further prove that he indeed followed up with the court to find out the time when the claim was listed to be called out. The actions of counsel do not correspond to a person who was not vigilant in pursuing the claim on behalf of his client and this is an instance where equity will come to the aid of the vigilant.

24. It is our respectful finding that the ELRC misdirected itself in the exercise of its unfettered discretion by declining to reinstate the claim and thereby denying the appellant the right to be heard. Accordingly, we are persuaded that the appeal has merit and it is for allowing.

25. In the circumstances, we set aside the ruling and orders emanating from the ruling of the ELRC of 4th October 2019 and allow the application dated 6th February 2019.

26. The upshot is that the appellant's memorandum of claim is hereby reinstated. The order that commends itself in the circumstances of this matter is that costs of this appeal shall be borne by the appellant.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF MARCH, 2025.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR