Mugambi & another v Wangai (Civil Appeal 219 of 2019) [2025] KECA 508 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KECA 508 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 219 OF 2019

J MOHAMMED, M NGUGI & FA OCHIENG, JJA

MARCH 21, 2025

BETWEEN

JOHN MUGAMBI .... 1ST APPELLANT

MUGAMBI & COMPANY ADVOCATES .... 2ND APPELLANT

AND

KIAMA WANGAI .... RESPONDENT

(Being an appeal against the ruling of the High Court of Kenya at Nairobi, (Sergon, J.) dated 16th February 2018 in HCCA No. 597 of 2012)

JUDGMENT

1. The appellants herein were sued by the respondent before the Magistrates Court in Civil Suit No. 5137 of 2010. In the suit, the respondent sought payment from the appellants, whom he claimed were tenants on his premises, as they had occupied rooms 715 and 716 from 12th February 2000. The respondent claimed that the appellants paid rent of Kshs.10,000 per month. When the appellants left in mid-January 2010, they had a balance of Kshs.56,670.

2. The appellants denied that they were tenants of the respondent. The 1st appellant stated that he only had an arrangement with the respondent to use his letterhead. He stated that the payments he made to the firm were for medical reports, and not rent payment.

3. The trial court held that on a balance of probability, it had been proved that the appellants were using the respondent's office. The trial court referred to the schedule of payments made by the appellants from February 2009 to April 2009, which indicated that for three months, part rent was paid. The trial court found that the only amount due was for September 2009 to mid-January 2010.

4. The trial court then calculated unpaid rent for four months to be Kshs.40,000, and the unpaid half rent for three months to be Kshs.15,000. The trial court therefore entered judgment for the respondent for Kshs.55,000, costs of the suit, and interest.

5. Being dissatisfied with the judgment of the trial court, the appellants appealed to the High Court. On 5th September 2017, the court issued a Notice to Show Cause why the appeal should not be dismissed for want of prosecution. The notice was fixed for hearing on 6th October 2017.

6. On the hearing date, neither the appellants nor their advocates appeared before the court. The respondent sought to have the appeal dismissed for want of prosecution, which order was granted by the court.

7. Following the dismissal, the appellants filed the notice of motion dated 11th October 2017 seeking to set aside the order dismissing the appeal.

8. The appellants stated that the reason why they were not present in court was because their counsel was busy in another court. They prayed that the mistakes of counsel should not be visited upon the client. The appellants informed the court that after the dismissal order, respondent had approached the trial court and had the amount deposited as security, released to him.

9. Opposing the application, the respondent stated that there was considerable delay in prosecuting the appeal, which prompted the court to issue a show cause notice. The respondent pointed out that no evidence was adduced to show that the appellants' counsel was engaged in another court.

10. Upon examining and analyzing the application and the submissions thereon, the learned Judge held that the reason advanced by the appellants was not plausible, as the pupil who was allegedly sent to give instructions to counsel to hold brief, did not swear an affidavit to that effect.

11. The learned Judge further held that the appellants had failed to give reasons why the appeal should not have been dismissed.

12. Consequently, the application was dismissed with costs to the respondent.

13. Being dissatisfied with the ruling, the appellants lodged the present appeal in which they raised four grounds of appeal.

    a. The learned Judge erred by disregarding the appellants' case given that the decretal sum had been deposited in the trial court as security, and the respondent would not have lost any interest.

    b. The learned Judge erred by placing much reliance on the mistake of counsel, yet the court called out the matter without following the cause list, and the matter which was listed as No. 55 was called out as No. 10.

    c. The learned Judge erred by finding that the appellants had not shown cause why the appeal should not have been dismissed, as the reasons could only have been valid upon reinstatement.

    d. The learned Judge was biased in favour of the respondent, and he ignored critical issues raised before the court.

14. When the appeal came up for hearing before us on 12th November 2024, Mr. Gachie Mwanzia, learned counsel, appeared for the appellants, while the respondent appeared in person. Parties relied on their written submissions, which they orally highlighted.

15. Mr. Mwanzia submitted that the appeal concerned the High Court's decision to dismiss an earlier appeal for want of prosecution. He argued that the appellants had demonstrated interest in pursuing the case by depositing the required security in the Chief Magistrate's Court.

16. Counsel submitted that although he was in another court, at the time the matter was called out much earlier than expected, given its position on the cause list. The matter was then dismissed for non-attendance. He submitted a formal application for reinstatement, which was also dismissed. Counsel further submitted that he had representatives in court to alert him when the case was approaching, but it was called much earlier than expected. He was of the view that the learned judge may have been unsympathetic because his explanation implied a complaint against the court's procedure, of not following the cause list in a chronological sequence.

17. Counsel submitted that the appellants were denied an opportunity to articulate their appeal on its merits. He was of the view that procedural rules should not prevent a litigant from being heard, especially when they express a desire to be heard.

18. In their written submissions, the appellants submitted that they met the conditions for reinstatement under rule 102 (1) of the Court of Appeal Rules, 2010. They submitted that their application was within a reasonable time (10 days) and that they had sufficient explanation for non-attendance. The appellants attributed their absence to the case being called out earlier than it was listed on the cause list.

19. The appellants claimed that the dismissal infringed on their constitutional rights under Article 50 of the *Constitution*, which guarantees the right to a fair hearing. They also invoked Article 48, asserting their right of access to justice. In support of their submissions, the appellants relied on the cases of: Wilson Cheboi Yego v Samuel Kipsang Cheboi [2019] eKLR; and J.M.K v M.W.M & Another [2015] eKLR.

20. In his submissions in response, Dr. Kiama stated that the core issue of the initial suit in the lower court has been resolved through compensation. While not explicitly opposing the appeal, Dr. Kiama indicated that he was compelled to appear in court and would be satisfied if the appellants dropped the appeal without costs to him. He also pointed out that the appeal was filed in 2012, and the court had, on two occasions, considered applications to dismiss the appeal for want of prosecution. He claimed that the appellants never responded to the notice to show cause.

21. Counsel submitted that the appellants' application to review the order of dismissal was rejected, and this possibly negated their right to appeal. He submitted that the current appeal seeks to set aside the dismissal order so the case can revert to the notice to show cause stage, even though the core dispute had been resolved.

22. In his written submissions, the respondent submitted that the appeal should be dismissed because the appellant had not prosecuted the appeal for a period of five years. The respondent pointed out that, in any event, the decretal amount in the primary suit had been paid fully by the appellants, and the matter was fully settled.

23. When the court raised concern over the prolonged nature of the legal battle between the two learned colleagues, and suggested the possibility of an amicable resolution. Mr. Mwanzia explained that there were multiple related matters and clarified his earlier remarks, affirming that the appellants wished to challenge the Magistrate's Court's decision.

24. We have carefully considered the record, submissions by counsel, the authorities cited, and the law. The main issue for determination is whether the High Court erred in dismissing the application seeking to set aside the orders dismissing the appellants' appeal.

25. This being a first appeal, we are reminded of our primary role as a first appellate Court to re-evaluate, re-assess and reanalyze the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not, and to give reasons either way. In the case of Kenya Ports Authority versus Kuston (Kenya) Limited [2009] 2 EA 212, this Court held inter alia that:

> On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

26. It is common ground that the appellants' advocate failed to attend the Court when the matter came up for the hearing of the notice to show cause why the appeal should not be dismissed, for want of prosecution on 6th October 2017. Upon the dismissal, the appellants sought reinstatement of the orders dismissing the suit. The appellants' application was dismissed, leading to the present appeal. The appellants contend that they showed sufficient cause for their non-appearance.

27. The appellants sought to set aside the orders of 6th October 2017. These were discretionary orders, and this Court would be reluctant to interfere with the discretion of the trial court. The circumstances in which this Court can interfere with the exercise of discretion by the trial Court are circumscribed. This Court may only interfere with the exercise of such discretion when, as was stated in Mbogo & Another v Shah [1968] EA 93, it is satisfied that the decision of the lower Court was clearly wrong:

> ...because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

28. To succeed in this appeal therefore the appellants must demonstrate that the learned Judge took into account matters that he should not have, or that he failed to take into account matters that he should have, or that his decision was clearly wrong. The appellants submitted that the learned Judge called out the matter earlier than anticipated, given the position at which it was listed on the cause list. This interfered with their counsel as he was appearing before another court in which the matter was listed earlier than this case. The appellants' counsel submitted that he sought to have the matter revisited by the court on the same day, but he was denied audience. The respondent submitted that no evidence was adduced to show that the appellants' counsel was engaged in another court at the time. The learned Judge held that the appellants ought to have produced evidence to show why they were not in court.

29. It is evident that when the matter in dispute was called out, neither the appellants nor their counsel were present in court. These facts were undisputed by the respondent. In a nutshell, the matter was called out earlier than it would have been, if the court followed the cause list strictly. It is our considered view that the learned Judge therefore ought to have taken into consideration the fact that the appellants' appeal was called out earlier than it was listed on the cause list when exercising his discretion. This was an important issue as counsel might have acted on the presumption that since the appeal was listed way down on the cause list, he would be able to attend to the other matter before he appeared, to attend to this specific appeal. We find that the court denied counsel this opportunity by calling out the matter earlier.

30. In the circumstances, we find that the learned Judge failed to take into account the fact that the matter was called way earlier than it was listed on the cause list.

31. In the result, we find that this gives us the mandate to interfere with the exercise of discretion by the trial Judge. It follows, therefore, that we find the appeal to be meritorious, and we allow it, with costs to the appellants.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH, 2025.

JAMILA MOHAMMED

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. OCHIENG

....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR