



Ng'ang'a (aka General Bahati) & 3 others v Kahengeri & 3 others (Civil Appeal 436 of 2018) [2024] KECA 77 (KLR) (9 February 2024) (Judgment)

Neutral citation: [2024] KECA 77 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 436 OF 2018
MSA MAKHANDIA, S OLE KANTAI & PM GACHOKA, JJA
FEBRUARY 9, 2024**

BETWEEN

**ELIJAH KINYUA NG'ANG'A (AKA GENERAL BAHATI) 1ST APPELLANT
MWAI WA MUTHIGI 2ND APPELLANT
WAWERU MUGO 3RD APPELLANT
MUIRURI NJUGUNA (AKA GENERAL MUIRURI NJUGUNA) 4TH
APPELLANT**

AND

**JACOB NYAGA 1ST RESPONDENT
GITU WA KAHENGERI 2ND RESPONDENT
MAU MAU VETERANS ASSOCIATION 3RD RESPONDENT
THE REGISTRAR OF SOCIETIES 4TH RESPONDENT**

(Being an appeal from the Ruling of the High Court of Kenya at Nairobi (J. K. Sergon, J.) dated 7th December, 2017 in H.C. Civil Case No. 64 of 2014)

JUDGMENT

1. In an amended plaint filed in the High Court of Kenya at Nairobi the appellants Elijah Kinyua Nganga a.k.a. General Bahati, Mwai wa Muthigi, Waweru Mugo and Muiruri Njuguna prayed for orders of injunction and declaration against the respondents Gitu wa Kahengeri, Jacob Nyaga, Mau Mau War Veterans Association and the Registrar of Societies. The respondents filed respective defences denying the claims made in the suit. The record shows that the suit came up for hearing before Sergon. J. on 17th October, 2017 when counsel appearing for the appellants applied for adjournment on the grounds that the lawyer seized of the matter had travelled out of the country. That application was opposed



by counsel for the respondents and the Judge ruled that no plausible explanation had been advanced for the application for adjournment. The Judge observed that the appellants (plaintiffs) were not in court and in those circumstances declined the application for adjournment. He ordered that the suit proceeds for hearing that day at 11 a.m. When the suit was called out for hearing at 11 a.m. the lawyer appearing for the appellants stated that she had no instructions to proceed with the case and prayed to be discharged from the proceedings and confirmed to the Judge that the appellants were not in court. Counsel for the respondents informed the Judge that he had one witness present and was ready to proceed. He however applied that the suit be dismissed for want of evidence. The Judge ruled that the lawyer in court for the appellants had indicated that she had no further instructions; the names of the appellants had been called by the court assistant but they were not in court and in those circumstances the suit was dismissed for want of evidence and or of attendance on the part of the appellants.

2. The appellants then moved the Court on a motion brought under Order 17 rule 2(2); Order 12 rule 7 of the *Civil Procedure Rules* and Sections 1A, 1B and 3A of the *Civil Procedure Act* for orders that the orders issued on 17th October, 2017 dismissing the suit be set aside and the court be pleased to review its orders and reinstate the suit. The application was opposed by the respondents who argued that the suit had been in court for a long time and the appellants had not prosecuted it and that there was no reasonable explanation advanced why the appellants had not attended court when it was their lawyer who had taken a hearing date and served a hearing notice upon the respondents.
3. In a ruling dated 7th December, 2017 the Judge (Sergon, J.) considered the application, found no merit in it and dismissed it.
4. That is the sequence of events that have provoked this appeal through Memorandum of Appeal drawn by counsel for the appellants M/s E.K. Mutua & Company Advocates where four grounds of appeal are set out. The appellants fault the Judge and say that he erred in law and fact in denying him an opportunity to be heard; that the Judge erred in law and fact in exercise of his discretion by failure to take into account a relevant fact in that the grounds for an adjournment were valid; that the Judge erred in law and fact in holding that it was not a relevant fact that parties had not complied with order 11 of the *Civil Procedure Rules*, and, finally, that the Judge erred in considering extraneous material in the exercise of his discretion. We are asked to allow the appeal with costs and set aside the “judgment” of the High Court and substitute it with an order allowing the appeal.
5. When the appeal came up for hearing before us on 16th October, 2023 learned counsel Mr. Kalii who held brief for Mr. Mutua appeared for the appellants but there was no appearance for the respondents. We were satisfied that the respondents’ lawyer had been served with a hearing notice on 3rd October, 2023 at 12.37p.m. and we allowed counsel for the appellants to proceed. In submissions before us counsel stated that Mr. Mutua, who was counsel on record had traveled to Tanzania when the suit had come up for hearing before the Judge; that the Judge had dismissed the suit and also dismissed an application to reinstate the suit and according to counsel that was a denial of the appellants right to be heard. Counsel confirmed that the lawyer who appeared before the Judge on the hearing date was an associate in the law firm on record (E.K. Mutua & Co. Advocates) and that it was that law firm that had fixed the suit for hearing and had served a hearing notice upon the respondents.
6. We have considered the whole record and submissions made.
7. In the ruling appealed from the Judge considered that it was the appellants who had fixed the suit for hearing; the lawyer who appeared before the judge was an associate of the firm of E.K. Mutua & Co. Advocates and that the appellants were not in court when the suit was called out for hearing. On whether the parties had agreed on issues for trial, the Judge held that both parties could file their own



issues or the court could draw up issues if parties were unable to agree on what issues arose for trial from the other pleadings.

8. The record shows that the law firm of E.K. Mutua & Co. Advocates on record for the appellants invited the other parties through a letter dated 7th March, 2017 to attend the Court Registry on 14th March, 2017 for purposes of fixing a hearing date for the suit. Those lawyers then served a hearing notice on the respondents indicating that the suit would be heard on 17th October, 2017. When the suit was called for hearing on that day a lawyer from the law firm applied for adjournment on the grounds that Mr. Mutua was the one seized of the matter but had traveled out of the country. The Judge held, and we agree, that there was no proper explanation advanced for the application for adjournment when a lawyer in that firm was in court.
9. The appellants were not in court to testify at the hearing and there was no explanation given for their absence. We also agree with the Judge that issues for trial could be agreed at the trial or be drawn by the Judge hearing the case. It cannot be the case in those circumstances that the appellants were denied a right to be heard. That right was availed to them as the court was ready to hear them and the respondents were present in court ready to proceed with hearing of the case.
10. The Judge exercised his discretion in the matter and as was held in the oft-cited case of *Mbogo & another v Shab* [1968] EA 93 an appellate court will not interfere with the exercise of discretion by a lower court unless it is shown that the court misdirected itself in some matters and as a result arrived at a decision that was erroneous or manifestly wrong. Such discretion is not designed to assist the person who has deliberately sought to obstruct or delay the course of justice. The appellants in the appeal took a hearing date but when the case came up for hearing before the Judge they were absent and there was no reasonable explanation proffered for their absence. They were accorded an opportunity to present their case but they were absent and did not prosecute the case. The Judge was right in those circumstances to reject the application for adjournment.
11. We find that the Judge did not misdirect himself in the matter at all.
12. This appeal has no merit and is dismissed.
13. We make no order on costs as the respondents did not attend when this appeal came up for hearing.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

