Ndegwa v 2NK Sacco Limited (Civil Appeal 11 of 2018)
[2024] KECA 732 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KECA 732 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 11 OF 2018

W KARANJA, J MOHAMMED & LK KIMARU, JJA

JUNE 21, 2024

BETWEEN

FRANCIS JAMES NDEGWA ..... APPELLANT

AND

2NK SACCO LIMITED ..... RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Nyeri (A. Mshila, J.) dated 13th July, 2017 in H.C.C. Application No. 17 of 2015)

JUDGMENT

Background

1. Before this Court is an appeal against the ruling of the High Court (A.Mshila, J.) dated 13th July, 2017 where the learned Judge dismissed the application dated 13th February, 2017 filed by Francis James Ndegwa (the appellant) seeking to review or set aside the order of 15thNovember, 2016.2NK Sacco Limited is the respondent herein.

2. The High Court found the application was res judicata. The High Court further found that the appellant had not satisfied the salient requirements for an order of review to enable the court to grant the order sought.

3. The brief background of the matter is that the appellant filed an application before the trial court under Orde 51 Rule 1 seeking an order for leave to file the record of appeal out of time against the award of the Co-operative Tribunal (the Tribunal) in Case No. 252 of 2009 delivered on 31st July, 2014. By a ruling delivered on 10th March, 2016, by the High Court, (A. Mshila, J.), the appellant's application was allowed. The High Court directed the appellant to file the record of appeal within 30 days in default of which the leave granted would stand vacated.

4. The appellant failed to comply with the orders issued by the trial court on 10th March, 2016 and approached the High Court for extension of the orders made. That application was made 142 days after the said order. The trial court declined to issue an order for extension on 15thNovember, 2016.

5. Dissatisfied with the trial court's ruling of 15th November, 2016, the appellant filed an application dated 13th February, 2017 for review or to vary the orders of 15th November, 2016. The application was dismissed on 13th July, 2017 for being res judicata.

6. Aggrieved by the trial court's ruling of 13th July, 2017, the appellant preferred an appeal to this Court raising grounds, inter alia, that the learned Judge erred in law and fact: by failing to consider that the appellant required proceedings and ruling to file the appeal; that the appellant applied for the proceedings and ruling on 11th March, 2016 a day after the court made the impugned ruling; that the appellant also filed a notice of appeal dated 22nd March, 2016; that the court failed to issue to the applicant proceedings and ruling within 30 days making it impossible for him to file the appeal within the time ordered by the same court; that it is the same court which issued proceedings and ruling 142 days out of time; and that the same court issued the appellant a Certificate of Delay dated 4th August, 2016.

7. The appellant further claimed that after delivery of the impugned ruling he applied for the proceedings and ruling on 20th July, 2017 and filed in court on 21st July, 2017; that proceedings and ruling wereissued after 139 days; that a Certificate of Delay was issued on 21stDecember, 2017; that the impugned ruling denying the appellant an opportunity to file an appeal in the High Court is in violation of Articles 25 (c) and 50 (1) of the *Constitution*; that failure to file the appeal within the 30 days ordered by the High Court due to unavailability ofproceedings and ruling is a procedural technicality which is curable by Article 22(3) (d) and Article 159 (2) (d) of the *Constitution*, that the *Civil Procedure Act* and Order 51 Rule 10 sub-Rule (2) clearly stipulate that:

> "No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."

8. The appellant seeks orders in the main that the appeal be allowed; that the appellant be allowed to file the intended appeal in the High Court; that the respondent be ordered to pay costs in the Tribunal, the High Court and in this Court.

Submissions

9. The appeal was canvassed by way of written submissions. At the hearing, the appellant appeared in person. He submitted that under the *Constitution* he has a right to file a suit as provided under Article 22(1) and the same be heard in accordance with the *Constitution*. The appellant submitted that he is 79 years old, a senior citizen and as such this Court should indulge and grant the orders sought in his appeal.

10. The appellant further submitted that the High Court denied him the right to be heard and dismissed the appeal at the Tribunal in which he was given 30 days to formally file an appeal. That the same court did not provide him with a certified copy of the proceedings and ruling/judgment in time for him to prepare for the main hearing. The appellant submitted that he seeks that this Court grants the prayersought and make an order for re-hearing/retrial of his appeal at the High Court for a fair and just conclusion of the same.

11. Learned counsel, Mr. Nderi appeared for the respondent and opposed the appeal. Counsel relied on his written submissions and submitted that apart from the substantive competence of the appeal, the

record does not contain primary documents as required by Rule 87 of this Court's Rules. Counsel submitted that the appeal lacks merit and should be dismissed.

12. Counsel further submitted that from the record it is discernible that the proceedings before the Tribunal have been ready and were availed to the appellant on 2nd April, 2015. Further, that as argued before the High Court, under Order 42, Rule 1, an appeal from the Tribunal or a subordinate court a party only requires the filing of a memorandum of appeal and that the issue of proceedings, judgment and decree only come at the point when directions are being taken and that a party can easily comply within the time by filing a memorandum of appeal.

13. Counsel further submitted that there was nothing new that warranted the review of the orders made on 10th March, 2016 and that there is no ground that can be advanced for finding error on the part of the learned Judge in disallowing the application. Counsel concluded that all the grounds that have been advanced in the memorandum ofappeal lack in substance and that this appeal is incompetent and unmeritorious.

Determination

14. We have considered the record of appeal, the submissions, the authorities cited and the law. The substantive issue for determination in this appeal is whether the learned Judge exercised her discretion judiciously in declining to allow the appellant's application dated 13th February, 2017.

15. In *Mbogo & Another vs Shah* [1968] E. A. 93, this Court held that an appellate court will interfere with the exercise of discretion by a lower court if:

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

16. The appellant filed an application dated 13th May, 2015 seeking leave to file the record of appeal out of time against the judgment of the Tribunal award dated 31st July, 2014. On 10th March, 2016, the appellant was granted leave to file the record of appeal within 30 days failure to which the leave granted stood vacated. Since then no diligence was demonstrated towards filing the record of appeal within the said time frame as granted by the trial court, the leave as such lapsed and stood vacated. Another application was filed after 142 days for extension of the orders earlier issued and which application made by the appellant was rejected by the trial court on 15th November,2016.

17. Subsequently, the appellant moved the trial court once again on 13thFebruary, 2017 seeking an order of review of the orders made by thecourt on 15th November, 2016. The only reason advanced by the appellant is that the Tribunal had refused to avail to him the typed proceedings necessary for him to file the record of appeal. The delay of the 142 days that the appellant had been granted to lodge the record of appeal within 30 days was not explained as per the Certificate of Delay, the typing of the proceedings was completed on 2nd April, 2015. As submitted by counsel for the respondent. An appeal to the High Court from a Tribunal or subordinate court only requires the filing of a memorandum of appeal pursuant to Order 42, Rule 1 of the *Civil Procedure Rules*. The inordinate delay was, therefore, not satisfactorily explained.

18. As this Court stated in the case of *Benjoh Amalgamated Ltdvs. Kenya Commercial Bank Limited* [2014] eKLR, the residual jurisdiction of the court to review its own decisions "should be invoked

with circumspection". In that case, this Court, after reviewing decisions from different jurisdictions on the question of review had this to say:

> " The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court)."

19. As we have endeavoured to demonstrate above, the issues that were before the High Court were conclusively and finally determined in the ruling of the High Court dated 15th November, 2016. As stated by the Supreme Court in *Menginya Salim Murgani vs. Kenya Revenue Authority* [2014] eKLR:

> " It is a general principle of law that a Court after passing judgment, becomes functus officio and cannot revisit the judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law." See also the decision of this Court in of *Peterson Ndung'u, Stephen Gichanga Gituro, N. Ojwang, Peter Kariuki, Joseph M. Kyavi & James Kimani vs. Kenya Power & Lighting Company Ltd* [2018]eKLR.

20. Accordingly, we find that the High Court correctly exercised its discretion judiciously in declining to review its decision in the circumstances. The upshot is that this appeal is bereft of merit and is dismissed. The appellant shall bear the costs of the application in the High Court as well as the costs of this appeal.

DATED AND DELIVERED AT NYERI THIS 21ST DAY OF JUNE, 2024

W. KARANJA

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JUDGE OF APPEAL JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR