Mukherjee v Karachiwalla Nairobi Limited (Civil Appeal (Application) 304 of 2015) [2024] KECA 1676 (KLR) (22 November 2024) (Ruling)

Neutral citation: [2024] KECA 1676 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 304 OF 2015

F TUIYOTT, JW LESSIT & GWN MACHARIA, JJA

NOVEMBER 22, 2024

BETWEEN

SANJIVAN MUKHERJEE ..... APPLICANT

AND

KARACHIWALLA NAIROBI LIMITED ..... RESPONDENT

(Being an application for reinstatement of the appeal against the Judgment and Decree of the High Court of Kenya at Nairobi (Havelock, J) dated 7th August 2014 in H.C.C.C. 133 OF 2013)

RULING

1. This appeal was dismissed on 26th April 2021 for non- appearance of the appellant, Sanjivan Mukherjee (now the applicant). The application before us dated 15th February 2024 brought in the main under Rule 105(3) of the Court of Appeal Rules seeks that it be reinstated.

2. In an affidavit sworn on 15th February 2024, the applicant explains that: the appeal was filed after leave to do so out of time was granted by Warsame, JA. on 4th November 2015; dissatisfied with that order, the respondent filed a reference which has never been disposed of; on 25th October 2022 his erstwhile advocate Mr. Georgiadis Khaseke learnt that the appeal had been dismissed for non-attendance on 26th April 2021; that Mr. Khaseke informed him that the notice for hearing was sent to the general email address of his firm info@mohammedmuigai.com and which inadvertently was not brought to his attention for action.

3. As the applicant was in breach of Rule 105(3) of the Rules of this Court which requires an application for restoration to be made within 30 days after the decision of the court or within 30 days after the party who should have been served with a notice for hearing but was not served first learns of the decision, the applicant sought and was granted extension of time by Ngenye- Macharia, JA on 9th February 2024 to bring the application now before us.

4. Karachiwalla Nairobi Limited (the respondent) opposes the motion. Mr. John Odere Were, learned counsel seized of the matter on behalf of the respondent, gives the reasons for the resistance that: the applicant has admitted that the email used by the Deputy Registrar to communicate to the parties belonged to his advocates and no reason has been given as to why his advocates did not attend court; the applicant has left gaps by not giving any reason at all or mentioning the email sending the link for the virtual hearing and one notifying the parties of the dismissal of the appeal; no plausible reason has been given by the applicant for the failure to attend court or to make an application for restoration within 30 days; the applicant learnt of the dismissal on 25th October 2022 and has not explained the long delay in bringing the application which can only be taken to mean that he has no interest in prosecuting the appeal; and that keeping a party away from fruits of its judgment is prejudicial as the money cannot be enjoyed or be invested by the respondent.

5. We have considered the above material and the written submissions filed on behalf of the parties which were relied upon without highlights.

6. The power to reinstate an appeal or application that has been dismissed for non-appearance is discretionary and is exercised on certain consideration. The proviso to Rule 105(1) requires an applicant seeking reinstatement of an appeal dismissed for non-attendance to "show that he was prevented by any sufficient cause from appearing when the appeal was called for hearing." In considering an application for reinstatement of an application dismissed for non-attendance, Nambuye, JA. in *Ngugi v Thogo* (Civil Application *372 of 2018*) [2021] KECA 88 (KLR) stated;

> " ix. In an application for reinstatement of a court process, there is need to balance the requirement as to whether reasonable grounds have been proferred for reinstatement and the prejudice to be suffered by the opposite party if such an order for reinstatement were to issue bearing in mind at the same time that dismissal is a draconian order that drives parties away from the seat of justice and should therefore be employed sparingly."

7. Even before pondering over whether the non-attendance was sufficiently explained, there is an issue raised by the respondent which we must first dispose of. The appeal was dismissed for non-attendance on 26th April 2021 and the information of the dismissal came to the knowledge of the applicant's counsel on 26th October 2022. The respondent takes issue with the delay in bringing this application and proposes that the delay should be construed against the applicant. We think, however, that this issue need not detain us at all because on the occasion when our sister Ngenye-Macharia, JA. considered and allowed the motion of leave to bring this application out of time, the learned judge deliberated on whether there was sufficient reason to excuse the delay.

8. Turning to the reasons for the non-attendance, it is blamed on an inadvertent oversight on the part of the counsel representing the applicant. Although the hearing notice was sent to the correct address of the firm representing the applicant, the email used was the general email address of the firm and the specific advocate, Mr Khaseke, having conduct of the matter did not see it. The respondent's counsel asks us not to be swayed by this argument because the application is not supported by an affidavit of the previous advocate owning up to the mistake. (See *Chege Muraya vs Rehema Noor & another* [2017] eKLR.)

9. While the respondent's argument is no doubt forceful, there is some evidence before us which corroborates the disposition by the applicant. First, both in the applicant's affidavit and the replying affidavit filed on behalf of the respondent is the hearing notice for 26th April 2021 when the appeal was dismissed for non-attendance. In respect to the applicant, the notice is addressed to

info@mohammedmuigai.com. This again is the address used to send the link for the court session. This is the general email address of the firm of Mohammed Muigai LLP.

10. The other evidence is that the personal email address of the advocate who was in conduct of the matter, Mr Khaseke, was gkhaseke@mohammedmuigai.com. It is therefore believable, that as alleged by the applicant, the information of the hearing date went unnoticed by the advocate dealing with the matter. A human failing!

11. Case law teaches us that there will be occasion when a party will be left to suffer the mistake of his or her counsel, and the respondent's counsel has cited past decisions which discuss this. They include when it is plain that the party is indolent and has therefore contributed to his or her circumstances (Rajesh *Rughani vs Fifty Investments Limited & Kembi & Muhia Advocates (Civil Appeal 80 of 2007)* [2016] KECA 829 (KLR)) or where although not of the client's making, to excuse the mistake would be to cause immeasurable prejudice to the other side (see *Rhoda Ndululu Sengete & Daniel Kasimu Gibson vs Tabitha Kavenge Matolo* [2019] KECA 640 (KLR)). In which event, justice is better served by the party pursuing counsel for professional negligence.

12. There is then the other end of the pendulum where mistake of counsel can be excused. See in *Belinda Murai & 9 others v Amos Wainaina* [1979] KECA 25 (KLR) where this Court held:

> "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 a 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 person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of the years since the decision was delivered so requires. It is all done in the interests of justice. A static system of justice cannot be efficient."

Similarly, in *Tana and Athi Rivers Development Authority vs Jeremiah Kimigho Mwakio, Patrick K. Mulisho, Mohamed Godhana & Amos Amitai* [2015] KECA 674 (KLR), this Court held:

> "From past decisions of this court, 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 the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side. (See. *Halsbury's Laws of England*, 4th Edn, Vol 44 at p 100-101) and also Re Jones [1870], 6 Ch. App 497 in which Lord Hatherley communicated the court's expectations this way:
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> '....I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned...'
>
> Under this duty, counsel is unequivocally obliged to exercise candour and not aid a litigant in subversion of justice. Even though the determination of whether or not counsel has failed in this obligation is dependent on the circumstances of a case, as a custodian of justice, the court

must always stay alive to the interests of both parties. This is of paramount importance. Thus, there is a corollary to the hallowed maxim that mistakes of counsel should not be visited on a client."

13. There is no evidence that the applicant here is an indolent litigant and the delay in bringing the application was considered and found to the excusable by the single judge extending time for filing of the current motion. As to whether reinstatement of the appeal will cause the respondent undue prejudice, the respondent simply deposed that "keeping a party away from the fruits of its judgment is prejudicial as the money cannot be enjoyed or be invested by the respondent." This is not elaborated at all. Is it because there is a stay of the judgment? We do not know. In the end, in so far as we are not told that the prejudice suffered cannot be compensated by an order of costs, then we have to find that it is not as dire as to dissuade us from exercising our discretion in favour of allowing the application. We think, and so hold, that justice is better served in the circumstances of this case in allowing the parties to have their day in a merit resolved appeal.

14. We allow the notice of motion dated 15th February 2024 in terms of prayers (2) and (3). Costs shall, in any event, be to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2024.

F. **TUIYOTT**

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.