Oginga v Moko (Civil Appeal (Application) 33 of 2019)
[2024] KECA 1830 (KLR) (20 December 2024) (Ruling)

Neutral citation: [2024] KECA 1830 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL (APPLICATION) 33 OF 2019

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

DECEMBER 20, 2024

BETWEEN

RISPER AKEYO OGINGA ..... APPELLANT

AND

TITUS KAHUNYORO MOKO ..... RESPONDENT

(An application for restoration of the Applicant's appeal by the Order of the Court of Appeal at Kisumu (Ouko (P), Koome & Makhandia, JJA.) dated 23rd February, 2021 in CIVIL APPEAL NO. 33 OF 2019)

RULING

1. The application before the Court is dated 3rd March, 2021. Though inelegantly drafted, it is readily obvious that its main prayer is for the restoration of the appellant's appeal which was dismissed by this Court on 23rd February, 2021 for non- attendance. When the matter was called, neither the appellant nor the appellant's advocate was present. The Court, then, dismissed the appeal under Rule 102(1) of the Court of Appeal Rules, 2010 (which were applicable at the time).

2. The brief background to the application is that the applicant was a defendant to a suit at the Environment and Land Court, to wit, Migori ELC No. 192 of 2017. The plaintiff in the suit was the respondent herein. He sought vacant possession to a parcel of land known as LR Kamagambo/ Kabuoro/1251 and a permanent injunction restraining the applicant from interfering with the suit property. On the other hand, the applicant, in a counterclaim, sought specific performance of a sale agreement entered into between the respondent and the applicant's deceased's husband over the sale of the suit property. The judgment of the ELC dated 12th April, 2018 was in favour of the respondent: it granted the prayers for vacant possession while dismissing the applicant's counterclaim in its entirety.

3. The applicant was dissatisfied with the judgment of the trial court. She timeously filed and perfected her appeal before this Court. A hearing was scheduled on 23rd February, 2021. On that day, neither

the applicant nor her advocate appeared for the hearing hence prompting the Court to dismiss the appeal for non-attendance under Rule 102(1) of the then-applicable Court of Appeal Rules, 2010. As aforesaid, the present application is an attempt to restore the dismissed appeal.

4. The application is supported by the supporting affidavit of the applicant deponed on 3rd March, 2021. In short, the applicant craves for the Court's discretion to restore the appeal on the ground that both she and her lawyer were unwell when the appeal was listed for hearing on 23rd February, 2021. She, therefore, argues that she has sufficient cause to warrant the restoration of her appeal.

5. To demonstrate the veracity of her claim that both she and her lawyer were indisposed on 23rd February, 2021, the applicant has exhibited the following documents:

    a. An outpatient medical card from Riosiri Medical Centre for the applicant, Risper Akeyo Oginga. It shows that she attended the clinic there on 27th January, 2021 and again on 13th February, 2021 with elevated temperatures; severe headache and other symptoms. She was treated and discharged on both occasions.

    b. A medical card for the advocate, Samuel Mauti, from Tabaka Mission Hospital.

    c. A prescription note from Galaxy Medicare Clinic for Samuel Mauti dated 6th January, 2021.

    d. A receipt of payment from Dr. Ongeri Angwenyi, a Consultant Physician, for the advocate dated 31st January, 2020.

    e. An assorted number of mostly illegible payment receipts to various medical institutions with respect to the advocate.

    f. Two graphic (full body) photographs of the advocate with a focus on his left leg. Visible on the photographs is a highly swollen leg from the below the knee all the way to the foot. There are indications of scarring, bruising and wounding on the injured part of the foot.

6. In both the supporting affidavit aforementioned and in the written submissions dated 27th February, 2023 filed by her advocate, the applicant strongly argues that she has shown sufficient cause under our Rules to be granted the relief of restoration of her appeal; especially considering that the subject matter of the appeal is land which forms her livelihood.

7. The application is opposed by the respondent through a replying affidavit deponed on 29th June, 2023. Perhaps as an indication of how vexed he feels by this torturous litigation, the respondent reserves plenty of ink in his replying affidavit to give a comprehensive procedural history of the case. His intention is to show that perhaps it is time to pull the plug on this litigation. In the rest of the replying affidavit, as well as in the written submissions filed by his advocates dated 29th June, 2023, the respondent urges the Court not to grant the prayer for restoration of the appeal on three grounds:

    a. First, that the grounds upon which the prayer for restoration is sought are not, objectively speaking, and by our jurisprudence, sufficient;

    b. Second, that key paragraphs in the supporting affidavit which allege the applicant's lawyer was unwell should be struck out because they offend the provisions of *Oaths and Statutory Declarations Act* because they are deposed to by the client and not the advocate; and

    c. Third, that all the annextures in the applicant's affidavit offend Rule 9 of the Oaths and Statutory Declarations Rules and should be struck out because they are not appropriately marked and stamped by a Commissioner for Oaths.

8. We have carefully considered the application before us – including the affidavits filed in support and opposition to it as well as the submissions filed by the parties. The application is governed by Rule 102 of the Court of Appeal Rules, 2010 (now repealed). That Rule permits the Court to dismiss an appeal for non-attendance if on the day scheduled for hearing the appellant does not appear. However, we note that the proviso to Rule 102(1) of the Court of Appeal Rules, 2010, provided that:

> "Where an appeal has been so dismissed or any cross appeal so heard has been allowed, the appellant may apply to the court to restore the appeal for rehearing or to rehear the cross appeal, if he can show that he was prevented by any sufficient cause from appearing when the appeal was called out for hearing."

9. Rule 102(3) of the Court of Appeal Rules, 2010, provided that:

> "An application for restoration under the proviso to sub rule 1 or the proviso to sub rule 2 shall be made within 30 days of the decision of the court, or in the case of a party who should have been served with notice of the hearing but was not so served, within 30 days of his first hearing of the decision."

10. In the present case, the application before us was timeously brought under Rule 102(3) and, therefore, merits consideration on its substantive terms. As both parties acknowledge the only normative standard upon which the Court determines an application for restoration of an appeal otherwise dismissed for non-attendance is a showing of sufficient cause that prevented the applicant from appearing when the appeal was called out for hearing.

11. In the instant application, the applicant has pivoted her "sufficient cause" on physical indisposition of both herself and counsel. She has attached documents in a bid to demonstrate that her stated cause is truthful. On the other hand, the respondent attacks the purported "sufficient cause" by, first, arguing that it fails the test of internal logic and truthfulness. The respondent says that the documents adduced, even if taken as authentic, do not logically demonstrate that the applicant and her lawyer were indisposed on 23rd February, 2021 when the appeal came up for hearing. On the part of the applicant, the respondent argues that the medical card shows she went to the hospital on 27th January, 2021 and again on 19th February, 2021. There is no showing, the respondent contends, that she was unwell on 23rd February, 2021.

12. Turning to the applicant's lawyer's reason for his absence when the appeal came up for hearing, the respondent argues that, first, the allegations that the lawyer was sick must be struck out because they were made by his client who could not possibly have that knowledge. He relies on Kamlesh Masunkhlal Damji Pattni v Nasir Ibrarhim Ali & 2 Others [2005] eKLR. Second, the respondent argues that the allegation that the lawyer was unwell is untruthful for two reasons. One, he has used the same reason in another case, to wit, Rongo PMCC ELC No. 61 of 2018, to argue for similar relief which was in 2019 – hence indicating a possible inauthenticity of the claim. Two, the documents presented do not show that the advocate was, in fact, hospitalized on the actual date of the hearing.

13. Finally, the respondent urges that we strike out all the annextures to the applicant's supporting affidavit for offending Rule 9 of the Oaths and Statutory Declarations Rules. This is because, the respondent insists, they are not marked, and each annexture does not bear a stamp of the Commissioner of Oaths. The respondent cites Solomon Omwega Omache & Another v Zachary Ayieko & 2 Others [2016] eKLR in support of this proposed course of action.

14. It is prudent to begin with the last two technical objections raised by the respondent – that we should strike out some paragraphs in the supporting affidavit and expunge all the annextures for their technical deficiencies. We appreciate the respondent counsel's deft legal arguments in this regard but we are unmotivated to determine the issue on this talismanic formalistic basis in the specific circumstances of this case. We already pointed out that the application is inelegantly drafted. It is true that the supporting affidavit is as well. We do not excuse the slovenliness of the legal counsel – but we are unpersuaded that these technical deficiencies – though speaking to the woeful level of technocratic expertise of the advocate on record – are sufficient to substantively determine the issue at hand.

15. It is true that, ideally, the depositions about the appellant's advocate's indisposition should have come straight from the advocate himself. Putting them in the mouth of the client is, to be polite, lily-livered. At best, the advocate could have sworn an affidavit to be annexed to the affidavit of the client. Yet, the client has a leg on which to stand in deposing to her advocate's illness: she heard about it from the advocate; and believed it. On that basis, she subjectively believes she has a good cause to obtain the relief of restoration of her appeal.

16. Similarly, it is true, as the Solomon Omwega Omache Case held, that the proper procedure in which annextures become part of an affidavit is for them to be identified in the affidavit; intituled; attached with the correct intitulement; and have each annexture separately stamped by a Commissioner of Oaths. However, it is not true that the venial failure to studiously follow each of this formalistic failures would automatically render the annextures inadmissible in evidence. The test is substantive: can it be said that the failure in process was prejudicial to the other side? Was it otherwise so bad that it would make a mockery of procedural due process? And, finally, does the failure betray a lack of good faith or an animus to steal a match on the other side? We think on consideration of each of these factors, the technical deficiencies of the supporting affidavit are to be forgiven under Article 159(1)(d) of *the Constitution*.

17. This brings us to the substantive question: has the applicant shown sufficient cause to restore her appeal? This turns on the question whether her stated position that both she and her advocate were indisposed when the appeal was called out for hearing on 23rd February, 2021 is borne out by the facts. It is true, as the respondent points out, the Court of Appeal in The Hon. Attorney General v The Law Society of Kenya &

    Another – Civil Appeal (Application) No. 133 of 2011 observed as follows as to the meaning of sufficient cause:

    > " Sufficient cause or good cause in law means:-
    >
    > 'The burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused.' See Black's Law Dictionary, 9th Edition, page 251.
    >
    > Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

18. The question is whether the applicant meets this threshold in the present case. We are forced to subject the duelling accounts of the applicant and the respondent to a test of credibility – and in doing so, bear in mind the following principles:

    a. As a general matter, the Judiciary has a policy for determining matters on substance and merit rather than procedural technicalities where possible and where the procedural due process of the opposing party is not compromised;

b. What constitutes "sufficient reason" for not attending is, in each case, very fact-sensitive, and the Court should examine the facts contextually;

c. In considering contentious factual narratives, the Court utilizes the balances of probabilities standard;

d. Where it is demonstrated that there is no malicious or malign reason for failing to attend, that would be a factor in favour of restoring the appeal.

19. Looking at the present case, even while decrying the standard of lawyering on behalf of the applicant, we have not doubt that the objects of substantive justice call for the restoration of the appeal; and to allow the case to substantive determination. We have looked at the respondent's rival submissions aimed at impugning the appellant's narrative. On a balance of probabilities, we have resolved the case in favour of the applicant. This is, in part, because we disagree with the respondent's stated view that the medical documents exhibited needed to show that the applicant and her advocate were, physically in hospital on 23rd February, 2021. There is no such requirement. The aim was to show, using documents to draw deductive logic, that they were, in fact, unwell on that date. In our opinion, the documents demonstrated that a person whose medical condition is demonstrably fragile shortly before a hearing date was probably still unwell during the hearing date. There is no requirement to show, with specificity, that on the actual hearing date, the party or the lawyer was actually in hospital.

20. Based on this reasoning, we are inclined, in part due to deference to a lawyer's oath (as the applicant's lawyer appeared before us and stated, as an officer of the Court, that he was, indeed, unwell on the date the appeal was called out for hearing), to allow the application and restore the appeal. In doing so, we note that the underlying appeal is about land ownership. As much as the practicalities and due process allow, we would err on the side of having such disputes receive resolution based on substantive consideration of the merits rather than procedural determinations.

21. The upshot is that we hereby allow the application dated 3rd March, 2021. The appeal herein is reinstated. The costs of this application will be in the cause.

22. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER, 2024.

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR