Gachumi & another v Dedan & another (Civil Application 276 of 2016) [2023] KECA 236 (KLR) (3 March 2023) (Ruling)

Neutral citation: [2023] KECA 236 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 276 OF 2016

HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA

MARCH 3, 2023

BETWEEN

JOSEPH MBUGUA DEDAN GACHUMI ..... 1ST APPLICANT

JAMES MBUGUA DEDAN ..... 2ND APPLICANT

AND

GEOFFREY MBUGUA DEDAN & ANOTHER ..... RESPONDENT

(Being an application for review, and setting aside of the ruling of the Court of Appeal at Nairobi made by Musinga, Ouko & M'Inoti on September 29, 2017 with respect to the respondent's Notice of Motion dated December 16, 2016 in Civil Application no 276 of 2016)

RULING

1. The Notice of Motion dated March 12, 2019, supported by the affidavit of even date sworn by Njeri Gathu, is made pursuant to section 1A, 1B and 3A of the *Civil Procedure Act*, order 12 rule 7 of the *Civil Procedure Rules* and article 159 (2) of the *Constitution*, and seeks that:

    i. The order of the court made on November 1, 2018 dismissing the application filed on June 5, 2018 for want of prosecution be varied and/or set aside together with all the consequential orders.

    ii. the application filed on June 5, 2019 be reinstated for hearing on merit.

    iii. Costs of the application be provided for.

2. There is a replying affidavit on record dated June 26, 2019.

3. The background to this matter is that the applicant had filed an application seeking orders for review and setting aside this court's ruling made on September 29, 2017. That application was scheduled for

hearing on November 1, 2018, and the court sent out a hearing notice. However, on the set date, the applicant failed to attend court, in consequence of which the court made the following order:

> " The applicant is not in court despite having been served with the hearing notice for today. Mr Shem Odeck, learned counsel for the respondent, has urged us to dismiss the application dated June 4, 2018. Pursuant to rule 56 of this court's rules, we accordingly dismiss the application with no orders as to costs."

4. The applicants explain that the non-attendance was on account of a genuine mistake on the part of their advocate who had to attend a criminal matter in SPMCC 371 of 2014, in which he was the accused person, and a warrant of arrest had been issued against him; that the advocate on record was not aware that the criminal matter was coming up for hearing on November 1, 2018; that the order of dismissal was made through no fault of the applicants; and that the mistake of the advocate ought not to be visited upon the client.

5. The application is opposed through a replying affidavit dated June 26, 2019, sworn by Geoffrey Mbugua Dedan, on the grounds that the applicants have always been guilty of laches and have always conveniently blamed the former advocates on record; that the applicants are vexatious litigants without sufficient material to support their prayers, but are nonetheless bent on keeping the respondent in court for long; that litigation must come to an end; and that there is no plausible reason advanced to warrant the orders sought.

6. In her oral submissions, Miss Gathua, who appears for the applicants, has explained that, although the applicants who are elderly citizens, were in court, they were not given a chance to speak; that they usually appoint advocates, and pay them, yet the advocates routinely fail to attend court and they end up not knowing what to do. Mar Mokaya on behalf of the respondent, urged us to consider the long delay of over 100 days, before this application was filed.

7. This court has been invited to find that the applicants are not at fault, and exercise its discretion and grant the orders as sought by the applicants. The principles that guide the court in the exercise of jurisdiction under article 159 of the *Constitution* is unfettered especially where procedural technicalities pose an impediment to the administration of justice, save that article 159 (2) (d) of the *Constitution* is not a panacea for all procedural ills. (See *Jaldesa Tuke Dabelo vs IEBC and Another* [2015] eKLR; and *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others*).

8. Under the *Court of Appeal rules*, which this court notes have not been relied on by the applicants, rule 56(4) by use of the word shall state it is mandatory that such an application for reinstatement shall be filed within 30 days of making the impugned order. The mandatory nature of the wording of rule 56(4) was considered by Nambuye JA, in the case of *Ngugi vs Thogo* (Civil Application 372 of 2018[2021] KECA 88(KLR) (22 October 2021) (ruling).

   The uncontroverted position in this case, is that the application for review was dismissed on November 1, 2018, while the application under consideration was filed on March 12, 2019 – a whopping 130 days!! This is outside the 30 days window under the aforementioned rule, thus rendering the application improper before the court. On that ground alone, the application ought to fail as this court need not pronounce itself on the merits or lack thereof.

9. However, we, are keenly aware of the applicant's lament that that they are perpetually subjected to the 'brush aside treatment', so we confirm that in exercise of the vast discretion bestowed on us, we have read the supporting affidavit and submissions but are unable to detect any plausible reason why the application ought to be allowed. The main ground put forth by the applicants to explain why there was no appearance in court on November 1, 2018, and to justify the reinstatement of the application

for review, is that it was all because of the mistake of counsel. This court has readily accepted in *Belinda Murai & 9 Others vs Amos Wainaina* [1978] eKLR, that it may excuse a genuine mistake on part of the counsel where it is satisfied that such mistake exists.

10. In this case, the court is hard pressed to fathom the alleged mistake of counsel. This court notes that despite the allegation that there was a warrant of arrest out for the then advocate on record, causing him to attend the criminal case in the lower court; no such warrant has been attached to the application. It is our considered view that what the applicants seek to rely on is not a mistake but, a technicolored sob story borne out of plain indolence which cannot be excused. Indeed, sheer inaction by counsel does not constitute an excusable mistake. see *Rajesh Rughani vs Fifty Investment Ltd & Another* (2005) eKLR.

11. We are persuaded that article 159 of the *Constitution* is only available to deserving cases. The 'sufficient cause' being touted in this application is mistake of counsel. However, the evidence on record does not support the defence of the mistake of counsel. This court is therefore satisfied that, in the circumstances of this application, there is no basis for restoring the application that was dismissed on November 1, 2018.

    We therefore find that the Notice of Motion dated March 12, 2019 is without merit and the same is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MARCH, 2023.

H A OMONDI

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JUDGE OF APPEAL

DR K I LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA – CI Arb, FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR