JKK v MWK (Civil Appeal E030 of 2020) [2023] KECA 470 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KECA 470 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E030 OF 2020

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

APRIL 28, 2023

BETWEEN

JKK ..... APPELLANT

AND

MWK ..... RESPONDENT

(Being an appeal from the ruling and orders of the Hon. Lady Justice M. Thande delivered on 20th September, 2019inthe Matrimonial Cause No. 5 of 2016 [OS] Mombasa)

JUDGMENT

1. The proceedings from which this appeal arises were commenced by way of Originating Summons as Matrimonial Cause No 5 of 2016 at the Family Division of Mombasa High Court. The said proceedings were commenced by the Respondent herein against the Appellant. It was a dispute surrounding the determination of ownership of a property acquired during the subsistence of the marriage between the Appellant and the Respondent which marriage was dissolved vide Divorce Cause No 3 of 2011.

2. According to the record of the High Court, the Respondent's Case was closed on July 16, 2018 and the hearing of the Appellant's case fixed for December 11, 2018 in the presence of counsel for both parties. On that day, however, as neither the Appellant nor his counsel attended court, his case was marked closed and the parties were directed to file submissions within 21 days. On February 12, 2019, the date when the matter was fixed for mention to confirm the filing of submissions, Mr Ondieki who seem to have been holding brief for Mr Shimaka, learned counsel for the Appellant, sought a further 14 days to file his submissions, a request which the court acceded to and the matter was then fixed for further mention on March 5, 2019.

3. However, on that date, Mr Ondieki once again held brief for Mr Shimaka and informed the Court that Mr Shimaka was yet to file his submissions. He however drew the Court's attention to a pending

application dated December 20, 2018 which application Mr Ondieki informed the court was not drawn to his attention at the time the directions on submissions were given.

4. The said application dated December 20, 2018 was by the Appellant and it sought the reopening of the suit and leave to the Appellant to prosecute his defence. The court noted that since the filing of the application, no step was taken by the Appellant to prosecute the same and proceeded to fix the matter for ruling on May 10, 2019. However, by an application dated April 30, 2019 filed on the same date, the Appellant sought an order for the setting aside the order made on March 5, 2019 purportedly dismissing the Appellant's Motion dated December 20, 2018 and for the reinstatement of the Motion dated December 20, 2018. The said application was prosecuted by way of written submissions and in her ruling delivered on September 20, 2019, the Learned Judge dismissed the said application with costs to the Respondent. It is that ruling that aggrieved the Appellant hence this appeal.

5. In her ruling, the Learned Judge noted that the application dated April 30, 2019 was brought two months after the application dated December 20, 2018 was dismissed. It was noted that the rule under which the application was brought was inappropriate as it was relevant to situations where a matter has been dismissed for non-attendance and that the correct provision would have been Order 45 Rule 1(1) of the *Civil Procedure Rules*. Even then, the Court was not satisfied that the conditions for the exercise of discretion under Order 45 Rule 1(1) of the *Civil Procedure Rules* had been satisfied. The court noted that the Appellant had given scant respect for rules and timelines and the conduct of the Appellant exhibited an intention to delay the delivery of the judgement. It was further noted that whereas the mistake of an advocate should not be visited on his client, the matter belongs to the client and not his counsel and the client is obligated to demonstrate due and reasonable diligence in pursuit of his case.

6. Aggrieved by the said decision, the Appellant has moved to this Court seeking to have that decision set aside based on the following grounds:

    1. That the Learned Judge erred in law and fact in failing to appreciate that the right to be heard is a Constitutional right and denying the Appellant an opportunity to be heard is a total violation of the *Constitution* as provided under Article 50(i).

    2. That the Learned Judge erred in Law and fact in failing to find that the mistake of an advocate should not be visited upon his client.

    3. That the Learned Judge erred in law and in fact in failing to find that there was sufficient reason given by counsel for the failure to attend Court.

    4. That the Learned Judge erred in law and in fact in not finding that and further there was sufficient reason given by counsel for the failure of taking directions of the application dated December 20, 2019.

    5. That the Learned Judge erred in law and in fact in failing to consider the reasons given and submissions made by the Appellant's Counsel.

    6. That the Learned Judge erred in law and in fact in failing to appreciate that the mistake of counsel (if any) should not be visited upon the Appellant.

7. This appeal was heard virtually and at the hearing, there was no appearance for the Appellant, who was served and is acting in person, while Learned Counsel Ms Ngigi, holding brief for Mr Apollo Muinde, appeared for the Respondent. Ms Ngigi wholly relied on the submissions she had filed.

8. In the Appellant's written submissions, it was contended that the High Court Judge erred in law and in fact in failing to find that the mistake of an advocate should not be visited upon the client. According to the Appellant, the failure in taking directions on the Application dated December 20, 2018 was purely a mistake by his advocate which mistake was admitted by the Advocate and explained. It was urged that it is trite that a case belongs to a litigant, it is also trite law that where a litigant is represented by counsel, counsel is to act at all times in the best interest of the litigant. In support of this contention the Appellant cited *Burhani Decorators & Contractors v Morning Foods Ltd & Another* [2014] eKLR, *Phillip Chemwolo & Another v Augustine Kubende* [1982-88] KAR 103 at 1040. In determining what constitutes a mistake, we were urged to consider *Belinda Murai & Others v Amos Wainaina* [1978] KLR 278.

9. It was therefore submitted that the Learned Judge erred in law and fact in failing to appreciate that the right of the Appellant to be heard is a constitutional right and there cannot be finality in the issues at trial where a party has not been heard through no fault of his own and reliance was placed on *Nguruman Limited v Shompole Group Ranch & Another* (2014) eKLR. The Appellant submitted that he will suffer more harm and stand to be prejudiced by being condemned unheard if this appeal is not allowed yet there is no prejudice that the respondent will suffer if this appeal is allowed as she will be given an opportunity to respond and the matter be decided on merit. In support of this limb of submission the Appellant cited the case of *Phillip Kitonga Mulei & Others v Justus Musyoki Mangui* [2018] eKLR.

10. We were urged to allow the appeal.

11. In response, the Respondents relied on the written submissions dated May 19, 2021, in which it was contended that in dismissing the Appellant's application for reinstatement of the application dated December 20, 2018, the Learned Judge was exercising her judicial discretion. Therefore, this court ought to only interfere with that discretion if it is satisfied that the learned judge misdirected herself on the law or misapprehended the facts; or took into account factors which she ought not to have taken; or that she failed to take into account factors which she should have; or that her decision, albeit a discretionary one, was plainly wrong. We were referred to the Supreme Court authority of *Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 Others* [2019] eKLR.

12. According to the Respondent, as there was no sufficient reason given by counsel and/or the Appellant for failing to attend the defence hearing on December 11, 2018, the Learned Judge's decision cannot be faulted and on that basis there is no justification for interfering with the exercise of her discretion. As regards the need to comply with the timelines, the Respondent relied on *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [20131 eKLR and it was submitted that in view of the above conduct of the Appellant and his advocate, the Learned Judge rightly dismissed the application dated December 20, 2018. It was contended that from the Appellant's conduct, leisurely and negligent approach of the Appellant and his advocates in handling the suit was thus apparent. The mischief intended was to have the judgement of this court arrested and to cause further delay in the conclusion of the suit. The Respondent cited in support of this submission *Moses Mwangi Kimari v Shammi Kanjirapparambil Thomas & 2 others* [20141 eKLR.

13. According to the Respondent, in this case blame cannot entirely lie on the mistake of his advocate when the Appellant also failed to attend the defence hearing which was scheduled on December 11, 2018 and no explanation whatsoever was given by himself. In this regard, reliance was placed on the case of *Savings and Loans Ltd v Susan Wanjiru Muritu* Nairobi HCC 397 of 2002. On the authority of *Anna Kamorinjithi v David Munene; Pauline Wangithi & 4 others (Interested Parties)* [2021] eKLR which cited the case of *Omwoyo Vs African Highlands & Produce Co Ltd* [2002] eKLR, it was contended that

what befell the Appellant is also the consequence of the negligent acts of his advocate which must be allowed to fall on the negligent counsel.

14. In the Respondent's submissions, the Appellant was granted an opportunity to be heard; he however failed to attend court for the defence hearing on December 11, 2018 and he gave no explanation whatsoever for failure to do so. The Appellant and his advocate then failed to expeditiously prosecute the application dated December 20, 2018 leading to its dismissal. Thereafter, the Appellant and his advocate delayed, without any explanation or reason, in the filing of the application dated April 30, 2019 causing the judgement to be arrested and further delay in the conclusion of the suit. According to the Respondent, the right to be heard as provided for under the *Constitution* is not absolute and that once the Appellant is given the opportunity to be heard and fails to utilize that chance diligently, he cannot be heard to claim that his right to be heard was breached.

15. It was therefore submitted that there was no demonstration that the Learned Judge's discretion was not properly and judiciously exercised. Further, the Appellant has not demonstrated that the Learned Judge misdirected herself on the law or misapprehended the facts; or took into account consideration which she ought not to have taken; or that she failed to take into account consideration which she should have; or that her decision was plainly wrong. We were urged to dismiss the appeal with costs.

Analysis and Determination

16. We have considered the written submissions by and on behalf of the parties herein.

17. Being a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions as authoritatively stated in *Selle v Associated Motor Boat Co* [1968] EA 123, where it was expressed thus:

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan [1955], 22 EACA 270)."

18. Similarly, in *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212 this Court held that:-

> " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

19. In determining this appeal, we shall be guided by the above principles.

20. The Learned Judge of the High Court as well as parties herein proceeded on the basis that the application dated December 20, 2018 was dismissed on March 5, 2019. On March 5, 2019, the matter was coming up for confirmation of the filing of the submissions and the fixing of a date for judgement. However, Learned Counsel for the Appellant drew the Learned Judge's attention to the pendency of the application dated December 20, 2018. Learned Counsel for the Respondent, on his part, stated

that at the previous appearance, the issue of the pending application was not raised. He however stated that he would be guided by the directions of the Court. Thereafter the Court narrated a brief history of the matter and concluded that since the Appellant filed the application dated December 20, 2018, no steps had been taken by the Appellant to prosecute the same, it was too late for the Respondent to seek directions for the said application. She proceeded to fix the matter for what she called a ruling though it ought to have been a judgement.

21. It is clear from the foregoing that the Learned Judge well aware that what the Learned Counsel for the Appellant was seeking were directions as regards the application dated December 20, 2018 and the directions that the Court gave, to our mind, was that it would proceed to deliver its decision, notwithstanding the pendency of that application. Accordingly, the application was not dealt with. This Court in *Godffrey Gatere Kamau v Peter Mwangi Njuguna* Civil Appeal No 139 of 2003 held that as is required by Order 20 rule 4 [now Order 21 rule 4] of the *Civil Procedure Rules* in respect of judgements, a ruling in an application which is opposed must be self-contained and should contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. The Learned Judge appreciated that what was sought before her by the Appellant's counsel were directions and not a determination of the application and hence the application dated December 20, 2018 was never determined. However, both the Court and the parties subsequently proceeded under a misapprehension that the said application was dismissed. However, there was no dismissed application on March 5, 2019 that could have been the subject of an application for reinstatement.

22. The appeal before us arises from the exercise of discretion by the Learned Judge. In deciding the appeal, we are guided by the decision of the Supreme Court authority of *Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 Others* (2019) eKLR in which it was held that:

> "We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of Kacem v Bashir [2010] NZSC 112; (2011) 2 IVZLR 1 (Kacem) where it was held:
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> 'In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter: (l) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong."

23. It was therefore held by this Court in *Price & Another v Hilder* [1986] KLR 95 that it would be wrong for the court to interfere with the exercise of the trial court's discretion merely because the Court's decision would have been different. The Supreme Court of Uganda, in *Kiriisa v Attorney-General and Another* [1990-1994] EA 258 held that it is settled law that the discretion must be exercised judiciously and an appellate Court would not normally interfere with the exercise of the discretion unless it has not been exercised judiciously. As to what the term "discretion" connote the Court stated that:

> "Discretion simply means the faculty of deciding or determining in accordance with circumstances and what seems just, fair, right, equitable and reasonable in those circumstances."

24. In this case the circumstances were that when the matter came up on July 16, 2018, both the Respondent and the Appellant were represented and though the Appellant was not in court. Notwithstanding that fact the Court, after the close of the Respondent's case fixed the matter to December 11, 2018 for the Appellant to appear and adduce evidence.

Neither the Appellant nor his advocate was in court on the adjourned date and the court was compelled to close the defence case and fixed the matter for mention on February 12, 2019. In the meantime, on December 20, 2018, the Appellant filed his application of that date. Instead of having that application served and fixed for hearing, no action was taken till February 12, 2019, the date when the matter was fixed for mention to confirm the filing of submissions and fix a date for judgement. Instead of bringing to the court's attention the fact of filing of the application dated December 20, 2018, at the request of the Appellant, the court indulged the Appellant and stood over the matter to March 5, 2019 for confirmation of filing of submissions by the Appellant. Once again nothing happened until the date of the mention when the pendency of the application dated December 20, 2018 was brought to fore. Not even the submissions were filed by the Appellant as directed. Even after the Court declined to indulge the Appellant further and proceeded to fix the matter for judgement on May 10, 2019, the Appellant did not show any diligence in the matter and it was not until April 30, 2019, nearly two months later that the misconceived application for setting aside was made.

25. In these circumstances, we are unable to see how the Learned Judge can be faulted in her decision in dismissing the said application. We are unable to see any error of law or principle that was committed by the Learned Judge. Nor are we satisfied that the Learned Judge took account of irrelevant considerations or failed to take account of a relevant consideration. In the circumstances there is no basis upon which we can find that the decision arrived at by the Learned Trial Judge was plainly wrong. We find that the factors that were taken into account in arriving at the decision were all relevant factors and that the Learned Judge arrived at the correct decision in the circumstances.

26. We reiterate the well-articulated position that public policy demands that the business of the courts should be conducted with expedition and that it is of the greatest importance in the interest of justice that actions should be brought to trial with reasonable expedition.

27. We have said enough to show that we find no merit in this appeal which we hereby dismiss with costs.

28. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF APRIL 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR