Ngilimani & 21 others v Rift Valley Textile Limited (Civil Appeal 44 of 2019) [2023] KECA 988 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KECA 988 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 44 OF 2019

F SICHALE, FA OCHIENG & WK KORIR, JJA

JULY 28, 2023

BETWEEN

ABSOLOM JAYUGA NGILIMANI ..... 1ST APPELLANT

SAMSON MECHA BOTA ..... 2ND APPELLANT

SIMON NDIRANGU KIRUKWA ..... 3RD APPELLANT

JORAM NZOYWA LAVATE ..... 4TH APPELLANT

GEORGE MURIMI GATHIMA ..... 5TH APPELLANT

WELLINGTONE WACHIYE ..... 6TH APPELLANT

GEOFFREY KIPTANUII CHEPTOCH ..... 7TH APPELLANT

EZEKIEL MULONGA ODELLE ..... 8TH APPELLANT

TAMINA WAMBOI KIHARA ..... 9TH APPELLANT

ELIUD KHOMBE MULINGA ..... 10TH APPELLANT

JOHNSTONE OTHIENO OTHIENO ..... 11TH APPELLANT

PATRICK MUCHIRI MUNGAI ..... 12TH APPELLANT

CHARLES BENJAMIN MUE ..... 13TH APPELLANT

WILLY NJAU KAMAU ..... 14TH APPELLANT

HUDSON MUNGOLE INDIAVO ..... 15TH APPELLANT

JAMES NGURE KAMAU ..... 16TH APPELLANT

PETER PANKRAS EKESA ..... 17TH APPELLANT

SABASTIAN DESTERIO WAKHAYA ..... 18TH APPELLANT

SAMUEL NGERESA ..... 19TH APPELLANT

BEN KIPKEMBOI AIYABEO ..... 20TH APPELLANT

MATHEW SAINA ..... 21ST APPELLANT

DAVID MUTINGU YAYUGA ..... 22ND APPELLANT

AND

RIFT VALLEY TEXTILE LIMITED ..... RESPONDENT

((Being an appeal from the Ruling and Orders of the Employment and Labour Relations Court (Mbaru,J), dated 22nd November 2018 IN (ELRC Cause No. 191of 2016 (formerly Eldoret HCCC No. 124 of 2006)

JUDGMENT

1. The appellants have filled this appeal against the ruling and orders of Mbaru, J, dated November 22, 2018, in which the learned judge dismissed an application by the appellants dated August 21, 2017, seeking to set aside the orders given on June 22, 2017, in which the appellants claim was dismissed for non-attendance.

2. The brief facts in this appeal are that the appellants had instituted a claim at Eldoret being Eldoret HCCC No 124 of 2006, which suit was later transferred to Nakuru *vide* a letter dated May 12, 2006. It was the appellants case that they did not receive any communication of such receipt of the file at the High Court in Nakuru, prompting them to write to the court regarding the same and that after having failed to receive any response from the court, they undertook to physically follow up on the same at the court registry in Nakuru. It is then that they learnt that the file had been received by the court at Nakuru and allocated a new case number namely, Nakuru ELRC No 191 of 2016.

3. That, the appellants thereafter undertook to have the matter set down for mention and subsequent hearing, but when the matter was slated for mention on March 9, 2017, they were informed that the matter was to be transferred back to Eldoret since an ELRC court had since been stablished at Eldoret and that for these reasons, they did not attend court as they understood the transfer of a file from one station to another to be a purely an administrative function. That contrary to the intimation of the file having been transferred to Eldoret, the court proceeded to make directions in the matter, whereupon it set down the matter for dismissal on April 27, 2017, barely a month after directions had been taken which was contrary to the statutory limitation of a file being inactive for a period of more than one year and that there was no communication of the said date to either the appellants personally, nor their advocates on record.

4. The matter was eventually set down for mention on April 28, 2017, and the court again found that the notice to showcause had not been served and ordered that a fresh notice to show cause be issued and served and directed that the same be heard on June 22, 2017. It was the appellants' contention that on April 28, 2017, when the matter was in court, the appellants' advocates were not in court whereupon Mr Magatta held their brief and unfortunately misinformed them that the matter had been slated for hearing on July 26, 2017 instead of June 22, 2017.

5. The matter was subsequently dismissed on June 22, 2017, on account of non-attendance by either the appellants or their advocates and when the appellants advocates attended court for hearing of the notice to show cause on July 26, 2017 as had been intimated to them by Mr Magatta on April 28, 2017, they discovered that the matter had already been dismissed on June 22, 2017, on account of non-

attendance and that in essence they learnt of the dismissal orders on July 26, 2017 and not June 22, 2017 when they were made.

6. It was these actions that precipitated the filing of the notice of motion dated August 21, 2017, in which the appellants sought to have the dismissal orders set aside, which motion was dismissed by Mbaru, J on November 22, 2018, thus provoking the instant appeal *vide* a notice of appeal dated November 28, 2018 and a memorandum of appeal dated June 21, 2019, in which the appellants raise 3 grounds of appeal as follows:

   i. "That the learned trial judge erred in law and fact in failing to hold that the appellants were prevented from attending court on June 22, 2017 on account of an error of communication of the court date.

   ii. That the learned trial judge erred in law and fact in holding that the appellants took no steps to seek to set aside the dismissal orders for over 30 days when it is clear the lawyers for the appellants learned of the miscommunication of the date when they attended court on July 26, 2017 and that they required time to inform and seek instructions from the appellants and that the time between July 21, 2017 when they learned of the dismissal order and August 21, 2017, when the application to review the dismissal order was made did not amount to undue delay.

   iii. That the learned trial judge erred in law and fact in failing to exercise her discretion in favour of reinstating the suit thereby denying the appellants substantive justice in the cause at the altar of a technical error."

7. When the appeal came up before us for plenary hearing on May 29, 2023, Miss Jeruto learned counsel appeared for the appellants. There was no appearance for the respondent despite having been served with a hearing notice on April 26, 2023. The appellants sought to rely on their written submissions, list of authorities and a case digest dated December 4, 2022, which they did not orally highlight in court.

8. It was submitted for the appellants that in considering an application for setting aside a judgement, all that the applicant needs to demonstrate is that he/she has a good and sufficient cause as to why they failed to attend court and that the court in exercising its discretionary powers has to consider reasons proffered by the applicant, the applicants prior conduct, the facts of the case and that such discretion should be exercised such that the ends of justice are met.

9. It was further submitted that in the instant case, the appellants had sufficiently explained to court the reasons as to why they failed to appear before court on June 22, 2017, the reason being that prior to that date when the matter was before court on April 28, 2017, Mr Magatta advocate who appeared before the court holding brief for Mr Manani who was on record for the appellants informed the advocates for the appellants of the directions that were given namely, that the matter was to come up next on July 26, 2017 and that when the appellants attended the court on that day, they were informed that their claim had been dismissed by the court on June 22, 2017, yet the information that they had was that the matter was coming up for hearing on July 26, 2017 and that this amounted to sufficient and good reason to warrant the setting aside of a dismissal order for non-attendance made under order 12 rule 1 of the *Civil Procedure Rules*.

10. We have carefully considered the record, the grounds of appeal, the appellants' submissions, the cited authorities and the law. We are required as a first appellate court by rule 31 of the *Court of Appeal Rules 2022*, to re-appraise the evidence and to draw inferences before coming to our own independent conclusion. See *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123 and *Kenya Anti- Corruption Commission v Republic & 4 others* [2013] eKLR.

11. Having carefully perused the record and the rival pleadings by the parties it is evident that the issues in this appeal are rather straightforward and undisputed and as a consequence, we have framed the following one main issue for our determination:

    i. Whether the appellants have satisfied the grounds for setting aside the dismissal order made by the trial court on November 22, 2018?

12. It is indeed not in dispute that the appellants claim was dismissed on June 22, 2017 on account of non-attendance. It is also not in dispute that on April 27, 2017, the matter had been listed for dismissal whereupon the court discovered that no notice had been issued to the parties and subsequently slated the matter for mention on April 28, 2017.

13. On April 28, 2017, the court again found that the notice to show cause had not been served and ordered that a fresh notice to show cause be served and subsequently slated the matter for hearing of the notice to show cause on June 22, 2017. It is instructive to note that on April 28, 2017, when these directions were issued, Mr Magatta who was holding brief for the appellants' advocates advised them that the matter had been slated for hearing on July 26, 2017 and when the appellants' advocates attended court on July 26, 2017, as intimated to them by Mr Magatta, they found out that the matter had already been called out and dismissed on June 22, 2017 on account of non-attendance by both parties.

14. It is therefore evident that failure by the appellants advocates to attend court on June 22, 2017, when the matter was slated for hearing of the notice to show cause was on account of the misleading information that they were given by Mr Magatta, the advocate who was holding their brief on April 28, 2017, a fact that has not been disputed by the respondent.

15. In an application for setting aside an ex parte judgment or ruling, the court exercises its discretion in allowing or rejecting the same. That discretion must however be exercised judiciously. See the locus classicuss case of *Shah v Mbogo and Another* [1967] EA 116 where the predecessor to this court stated:

> " This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

16. This position was recently restated by this court in the case of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR, where the court stated:

> " We agree with those noble principles which go further to establish that the court's discretion to set aside an exparte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend court on the June 10, 2013 with anxious minds. We have asked ourselves whether failure to attend court on June 10, 2013, constituted an excusable mistake, an error of judgment regarding counsel's failure to diarize the date properly or was it meant to deliberately delay the cause of justice."

17. As we had alluded to earlier, failure by the appellants advocates to attend court on June 22, 2017, when the matter was slated for hearing was on account misleading information that they were given by Mr Magatta, (the advocate who was holding their brief on April 28, 2017, when these directions were issued), who informed them that the matter was slated for hearing on July 26, 2017 as opposed

to June 22, 2017. In our view, the learned judge misapprehended the reasons given by the appellants for failure to attend court on June 22, 2017 when she held *inter alia* in her ruling that "the absence of the claimants and their advocate in court as directed has not been addressed". Additionally, the learned judge clearly fell into error when she held that no action was taken for a period of over 30 days by the appellants to file the application for reinstatement of the dismissed suit as the appellants had clearly stated they only learnt of the dismissal of the suit on July 26, 2017, when they attended court for hearing of the same as had been intimated to them by Mr Magatta and subsequently filed the application for reinstatement on August 21, 2017.

18. For the aforesaid reasons and with respect, we think the learned judge was wrong in the exercise of her discretion which effectively resulted in an injustice as the appellants were denied a hearing. It is our view that the orders issued on November 22, 2018, cannot be allowed to stand.

19. Accordingly, we find merit in the appellants' appeal and allow the same and set aside the ruling and orders dated November 22, 2018 and substitute the same with an order allowing the notice of motion dated August 21, 2017 in terms of prayer II thereof, and further direct that the appellants claim be heard on merit before another judge other than Mbaru, J.

20. The appellants shall also have the costs of this appeal.

It is so ordered

Dated and Delivered at Nakuru this 28th day of July, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR