Muchoki & 2 others v Gichira (Civil Appeal (Application) 183 of 2015) [2022] KECA 41 (KLR) (4 February 2022) (Ruling)

Neutral citation: [2022] KECA 41 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 183 OF 2015

DK MUSINGA, SG KAIRU & AK MURGOR, JJA

FEBRUARY 4, 2022

BETWEEN

MARGARET NYOKABI MUCHOKI ..... 1ST APPLICANT

ANTHONY MUCHOKI ..... 2ND APPLICANT

SHARON MUCHIRI ..... 3RD APPLICANT

AND

CATHERINE WAIRIMU GICHIRA ..... RESPONDENT

(An application from the Judgment and Order of the High Court (L. Kimaru, J.) to re-hear the appeal herein afresh and to set aside the ex-parte proceedings of the 2nd February 2017 together with the Judgment delivered on 23rd June 2017 in Succession Cause No. 1684 of 1995)

RULING

1. The applicants have moved this Court under sections 3A (1), (2), (3) and 3B (1) of the *Appellate Jurisdiction Act*, rules 102 (2), (3) of the Rules of the Court seeking orders to "set aside the ex-parte proceedings of 2nd February 2017 together with the judgment of the court made on the 23rd June 2017 and re-hear the substantive appeal herein."

2. The application is premised on twelve grounds supported by an affidavit sworn by Mr. Charles Njenga, the applicants' advocate on record explaining that he assumed the conduct of this matter when he received instructions to apply for a revocation of the certificate of grant and mode of distribution issued by the High Court in favour of the appellant/respondent herein. The respondent filed an appeal against the decision of the High Court which came up for directions on 4th October 2016. He stated that he sent one of his associates, Maureen Wakahia, to attend the same and take directions.

3. Consequently, the court issued directions to the effect that the parties do file written submissions to be highlighted on 2nd February 2017. The said advocate having taken the directions and date

inadvertently failed to diarize or bring it to the attention of Mr. Njenga, even though the hearing notice and all subsequent correspondence were directed to her since she had custody of the file at the time.

4. Counsel admitted that as a result, no submissions were filed on the appeal and further no attendance was made at the hearing. The appeal was heard ex-parte and allowed thereby restoring the initial status with regard to the distribution of the estate of the deceased, which substantially excluded the applicants, who are bonafide beneficiaries of the estate of the deceased, counsel stated.

5. The application was opposed, and the respondent, filed a replying affidavit stating that no sufficient cause had been shown by the applicants for the court to re-hear the appeal. It was reiterated that despite directions from the Court, no submissions were filed and neither did the said law firm attend court for hearing.

6. In her view, the applicant's counsel contradicted himself when he deponed that he had been in personal conduct of the matter, yet he failed to follow up on the directions given.

7. Mr. Njenga, in urging us to allow the application, argued that the core substance of the appeal is whether the applicants are beneficiaries of the estate. He faulted the appellate court for finding that the 1st applicant was not the deceased's wife, and her two children were not dependants. She maintained that she did not participate in making of the grant issued on 23rd October 2010.

8. Mr. Njeru, learned counsel for the appellant/respondent, in opposing the application, was of the view that the judgment was delivered on merit and not because the applicant was absent. The court considered that the applicant consented to the making of the grant and distribution of property and was given some properties initially. He urged that the application be dismissed.

9. The appeal sought to be reinstated was allowed in favour of the appellant. Rule 102 (1) of this Court's Rules states: -

> " (1) If on any day fixed for the hearing of an appeal the appellant does not appear, the appeal may be dismissed and any cross appeal may proceed, unless the court sees fit to adjourn the hearing: 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 hearing 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."

10. Rule 102 (3) sets out the time within which such application for restoration of the dismissed appeal may be made. It states: -

> " An application for restoration under the proviso to Sub-rule (1) or the proviso to Sub-rule (2) shall be made within thirty 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 thirty days of his first hearing of that decision."

11. That the applicant filed this application within the statutory timelines is not disputed. The main issue to be determined is whether the applicant demonstrated sufficient cause that prevented him from appearing when the appeal was called out for hearing.

12. Musinga, J.A, in The *Hon. Attorney General-vs-The Law Society of Kenya & Another* Civil Appeal (Application) No. 133 of 2011, considered the meaning of sufficient cause as follows:

> " 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, 9thEdition,* page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a Judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

13. In considering this aspect, the Court must consider whether the applicant has adduced sufficient evidence as to why he could not appear on the hearing date. The Court exercises unfettered discretionary powers in determining such an issue. In *Philip Keipto Chemwolo & Another v Augustine Kubende* [1982] 1 KAR, this Court held as follows:

> " The Court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties." (Emphasis supplied)

14. In the matter before us, the undisputed facts are that the hearing date was agreed upon by consent of both parties in court; no submissions were filed by the applicants and neither did they appear in court for the hearing. It is also noted that a subsequent hearing notice was served upon the firm of the applicant's advocates on 21st October 2016.

15. It is true as was submitted by Mr. Njenga that mistakes of counsel may be excusable and should not be visited upon litigants.

In *Bains Construction Co. Ltd. V. John Mzare Ogowe* [2011] eKLR, the Court had this to say:

> " It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party, but it is equally true when Counsel as agent is vested with authority to perform some duties and does not perform as principal and does not perform it, surely such principal should bear the consequences."

16. In this instant, the applicant's advocates are accused of inaction for not filing submissions and for failing to attend court for the hearing of the matter. It was also submitted that they had not given sufficient cause for their inaction.

In *Rajesh Rughani v. Fifty Investment Ltd. & Another* [2005] eKLR, this Court held:

> " It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy."

17. Having analyzed and evaluated the record of appeal and the facts of the case, we agree with the respondent that this appeal was determined on its merits, the absence of the applicants' advocate notwithstanding. Further, the applicant had consented to the mode of distribution of the estate and had already benefited from the agreed distribution.

18. What is now in contention is the estate of Thomas Kabii (now deceased) and not the whole estate of his deceased father, James Muchiri Kabii. We think, with respect, that the applicant has not shown sufficient cause why the agreed mode of distribution should be varied. We think that even if it were to be heard afresh the Court would most likely arrive at the same decision as the impugned one.

19. We find and hold that no sufficient cause was given for non-attendance, and even if the application were to be allowed the appeal would still succeed in favour of the respondent. The application is devoid of merit, and we hereby dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR