Director General, National Employment Authority v Al Hujra Agencies Limited (Civil Application E185 of 2020) [2022] KECA 379 (KLR) (4 March 2022) (Ruling)

Neutral citation: [2022] KECA 379 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E185 OF 2020

RN NAMBUYE, HM OKWENGU & A MBOGHOLI-MSAGHA, JJA

MARCH 4, 2022

BETWEEN

DIRECTOR GENERAL, NATIONAL EMPLOYMENT AUTHORITY ..... APPLICANT

AND

AL HUJRA AGENCIES LIMITED ..... RESPONDENT

(An application for reinstatement of the applicant's application dismissed by this Court (Asike-Makhandia, J. Mohammed & Kantai, JJ.A.) dated 29th November, 2021 in Nairobi Civil Application No. E185 of 2021)

RULING

1. Before us is a Notice of Motion dated 6th December, 2021. It is brought under Articles 50(1), 159(2)(a), (e) of *the Constitution* of Kenya, 2010, sections 3A and 3B of the *Appellate Jurisdiction Act*, Rules 4, 47, 56(3), (4) and 57(2) of the *Court of Appeal Rules, 2010*. It seeks orders as follows:

> " 1. Spent.
>
> 2. That this Honourable Court be pleased to vary or rescind the orders issued on 29th November, 2021 by this Honourable Court (Hon. Asike-Makhandia, Hon. J. Mohammed & Hon. Kantai, JJ.A.)
>
> 3. That this Honourable Court be pleased to reinstate/restore for hearing the applicant's Notice of Motion application dated 7th June, 2021.
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> 4. That upon the grant of prayers 2 and 3 above, this Honourable court be pleased to order that the applicant's Notice of Motion application dated 7th June, 2021 be re-heard urgently and appropriate orders be issued in respect thereof before the 17th December, 2021.

5. That the costs of this application be provided for."

2. It is supported by grounds on its body, a supporting affidavit sworn by Michael Maurice Ogosso, Senior State Counsel with the Office of the Attorney General together with annexures thereto. It has been opposed by the respondent's replying affidavit sworn on 15th December, 2021 by Susan Wanjohi, a Director of the respondent, together with annexures thereto and written submissions dated the same date of 15th December, 2021.

3. A brief background to the application is that the applicant herein filed a Notice of Motion dated 7th June, 2021 against the respondent seeking various reliefs. It came before this Court (Asike-Makhandia, J. Mohammed & Kantai, JJ.A.) on 29th November, 2021. After the court was satisfied that both counsel for the respective parties had due notice of the hearing date both having been served electronically by the Deputy Registrar of the Court on 12th November, 2021 at 2.27pm, dismissed the application for non-attendance with no order as to costs.

4. The applicant is now before this Court seeking the reliefs set out above asserting cumulatively that its email address for service upon it of all court processes was inadvertently misquoted in the hearing notice issued on 12th November, 2021 at 2.27pm. Non-attendance on their part was therefore not deliberate. The mistake lay with the court's registry. They plead with the court to exercise its discretion in their favour, set aside the dismissal order, reopen the matter, and restore their application erroneously dismissed for want of non-attendance, for merit disposal.

5. On the law, the applicant relies on the case of *Rachel Mukami Ngugi vs. Mercy Wanjiru Thogo [2021] KECA 88 (KLR)* on the parameters for theexercise of the court's discretion in an application of this nature.

6. In opposing the application, the respondent invites this Court not to exercise its discretion in favour of the applicant because according to them, the court cannot be faulted for dismissing the applicant's application for non-attendance as the dismissed application had been listed twice before, that is on 19th October, 2021 and 29th November, 2021, On both occasions, there was no appearance by the applicant to prosecute it.

7. Our invitation to intervene on behalf of the applicant has been invoked under the provisions of law set out in the heading of the application. Article 50(1) applied in conjunction with Article 159(2)(a), (e) of *the Constitution* of Kenya, 2010 underpin the right to fair hearing and the need for a court of law to frown upon subservience to procedural technicalities in the dispensation of justice.

8. In *Richard Nchapi Leiyagu vs. IEBC & 2 Others [2013] eKLR*; *Mbaki & Others vs. Macharia & Another [2005] 2EA 206* it was held, *inter alia*, that: the right to a hearing is a valued right. It is not only constitutionally entrenched but it is also the corner stone of the Rule of law and can only be withheld in exceptional circumstances.

9. In *Jaldesa Tuke Dabelo vs. IEBC & Another [2015] eKLR* among numerous others, it was stated, inter alia, that: the exercise of the jurisdiction under Article 159 of *the Constitution* is unfettered especially where procedural technicalities pose an impediment to the administration of justice.

10. Turning to sections 3A and 3B of the *appellate Jurisdiction Act*, Cap 9 Laws of Kenya, it is sufficient for us to state that it is now trite that these provisions enshrine the overriding objective principle of the court. The parameters for the invocation and application of this principle have now also been crystallized by numerous enunciations emanating from this Court itself. See *City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs. Orient Commercial Bank Limited Civil Appeal No. Nai 302 of 2008 (UR No. 199 of 2008).* In summary, the

crystalized parameters for the application of the overriding objective principle of the court and which we fully adopt may be rephrased as follows: the overriding objective principle mandates the court to act justly and fairly with greater latitude for ends of justice to be met to all the parties involved in the litigation before it or stand to be affected by the outcome of the litigation.

11. Turning to Rules 42 and 47 of the Court of Appeal Rules, our position is that these merely provide for the mode of presentation of an application of this nature. The substantive provisions are Rules 56(3) and (4) and 57(2) of the Court of Appeal Rules.

12. Rule 56(3) and (4) of the Court of Appeal Rules donate power to the court to intervene and grant reprieve to a party affected by an order of dismissal of an application for non-attendance. These provide as follows:

> (3) Where an application has been dismissed under sub-rule
>
> (1) or allowed under subrule (2), the party in whose absence the application was determined may apply to the Court to restore the application for hearing or to re-hear it, as the case may be, if he can show that he was prevented by any sufficient cause from appearing when the application was called on for hearing.
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> (4) An application made under sub-rule (3) shall be made within thirty days of the decision of the Court, or in the case of a party who would have been served with notice of the hearing but was not so served, within thirty days of his first hearing of that decision.

13. Rule 57(2) on the other hand donates power to the court to hear the application for reinstatement either by the Judge(s) who issued the order sought to be set aside or any other Judge(s) of competent jurisdiction. It provides as follows:

> (2) An order made on an application to the Court may similarly be varied or rescinded by the Court.

14. In order to succeed in this application, the applicant is obligated to satisfy two prerequisites, namely, that the application was presented within the timeline set out in Rule 56(4) of the Court of Appeal Rules and which timeline is mandatory by the use of the word "shall" in sub-rule (4) of Rule 56 of this Court's Rules. It is mandatory for the application to be filed within thirty (30) days of the impugned order. Secondly, that on the law, the application meets the threshold for granting the reliefs prayed for.

15. On satisfaction of the timeline set in Rule 56(4), it is evident from the record that the application sought to be resuscitated was dismissed on 29th November, 2021 while the application under consideration is dated 6th December, 2021, which in our view satisfies the prerequisite in Rule 56(4) of this Court's Rules.

16. On satisfaction of the law, we adopt the position taken by the court in the following cases among numerous others: *Kasturi Limited vs. Nyeri Wholesalers Limited [2014] eKLR*; *Wilson Cheboi Yego vs. Samuel Kipsang Cheboi [2019] eKLR* and *Joseph Kinyua vs. G. O. Ombachi [2019] eKLR* all which underscored the need for litigation to be brought to an end after all parties have been heard on merit and substantive justice met to all parties before the court. Secondly, when seeking the court's intervention upon default and or non-compliance with a procedural step in litigation before the court, demonstration of existence of a reasonable explanation for the default would suffice as basis for the exercise of the court's discretion in favour of the party seeking relief. Thirdly, consideration of the nature of the substratum of the litigation is also a primary consideration. Fourthly, that in an

application of this nature there is need to balance the requirement as to whether reasonable grounds have been proffered for reinstatement and the prejudice to be suffered by the opposite party if such an order for reinstatement were to issue. Fifthly, dismissal is a draconian order which should only be employed sparingly.

17. We have applied the above threshold to the rival position herein. It is evident from the record that the applicant has exhibited a copy of the hearing notice allegedly served on them electronically by the Deputy Registrar of this Court on 12th November, 2021 at 2.27pm bearing an email address attributed to them. The notice was notifying them of the hearing date for 29th November, 2021. They assert the email address provided in the said notice was a wrong email. They have gone further to provide an email address they say is the correct email. It is this same email through which they received the hearing notice for the hearing of the application under consideration hence their attendance in court to prosecute the same. This assertion has not been controverted either by the Deputy Registrar of this Court or the respondent.

18. The above being the uncontroverted position herein, we are satisfied the applicant has given both a reasonable and a plausible reason for non-attendance when their application sought to be reinstated, came before this Court for hearing, was called out and dismissed for nonattendance. We therefore, find basis for acceding to the applicant's request as the same in our view has been sufficiently demonstrated. We also find no prejudice will be suffered by the respondent if the applicant was granted the relief sought as none has been pointed out to us both in their replying affidavit and written submissions.

19. We therefore, proceed to make orders as follows:

    1. Prayers 2, 3 and 4 of the application are granted as prayed.

    2. Costs of the application will abide the outcome of the reinstated application.

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

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR