



**Nature Pharmacy Ltd & another v Gichuhi (Civil Appeal
245 of 2016) [2022] KECA 827 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KECA 827 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 245 OF 2016
DK MUSINGA, P, MSA MAKHANDIA & K M'INOTI, JJA
MAY 27, 2022**

BETWEEN

NATURE PHARMACY LTD 1ST APPELLANT

NDUBAI NGEERA 2ND APPELLANT

AND

SAMUEL MAINA GICHUHI RESPONDENT

(An appeal from the Ruling and Order of the Employment and Labour Relations Court of Kenya at Nairobi (M. Nduma Nderi, J.) dated 9th September, 2016 in ELRC Cause No. 2007 of 2013)

JUDGMENT

1. The 1st appellant employed the services of the respondent in the year 1995 as a Pharmacy Assistant, whose duties included prescription, dispensing, stock taking, stock ordering as well as occasionally acting as a cashier. The 2nd appellant on the other hand was a director of the first appellant. The 1st appellant conducted its pharmaceutical business on the ground floor of the 20th Century Plaza building in Nairobi. On the 15th of October 2011 the respondent's services were terminated by the 1st appellant. His monthly salary then was Kshs.22,000. According to the respondent, the termination of his services was unfair as the reasons given were spurious, no notice had been served on him nor was he accorded a hearing before the termination.
2. On that basis the respondent filed a claim for unfair and unlawful termination seeking the following prayers:
 - a. Three-months' salary in lieu of notice: Kshs.66,000
 - b. Salary for October 2011..... Kshs.22,000
 - c. One month salary in lieu of leave Kshs.22,000



- d. Salary for 12 months being compensation for wrongful and unfair termination in terms of section 49 of the Employment Act... Kshs.264,000
- e. Severance pay at the rate of 15 days' pay for each complete year of service in this case 16 years (11,000 x 16)Kshs.176,000
- Total.....Kshs.550,000

3. The appellants failed to enter appearance and file defence. Accordingly, judgment was entered in default of appearance and subsequently the matter proceeded by way of formal proof. In its judgment, the trial court found that the respondent's employment was terminated without notice and that the appellants did not follow the procedure for redundancy set out under Section 40 of the Employment Act, 2007 and therefore the termination was ipso facto unlawful for want of procedural fairness.
4. The trial court then proceeded to award the respondent, as against the appellants jointly and severally;
 - i. One month salary in lieu of notice in the sum of Kshs.22,000;
 - ii. Fifteen (15) days' salary for the month of October 2011 in the sum of Kshs.11,000
 - iii. Severance pay at the rate of fifteen (15) days salary for sixteen (16) years completed service in the sum of Kshs.176,000.00;
 - iv. Ten (10) months' salary as compensation for the unlawful and unfair termination of employment in the sum of Kshs.220,000.00;
 - v. Total award is in the sum of Kshs.429,000.00;
5. The appellants subsequently presented an application seeking leave to act in person; setting aside the ex parte judgment and readmission of the cause for hearing inter parties; leave to file defence and the striking out 2nd appellant as party in the cause.
6. The application was premised on the grounds that: judgment had been delivered and it was a mandatory- requirement of law that leave of court be sought by any party who wished to come on record; the appellants had previously engaged the services of Messrs. Mutua Muthuva & Co. Advocates to act for them but did not act on their instructions which omission should not be visited upon them; the suit had been determined without hearing the appellants, which act contravened the rules of natural justice and that they came to know the position of the suit on 21st June 2016 when the 2nd appellant perused the court file and was shocked to learn that the matter had been finalized.
7. The application was opposed. In its grounds of opposition, the respondent stated, inter alia, that the application lacked merit, and or was a clear attempt at obfuscation of issues; that there were laches in bringing the application and the maxim that delay defeats equity was applicable in the circumstances obtaining in the case; that the application was merely meant to delay the respondent from enjoying the fruits of his judgment; that the second appellant had not shown any authority under seal to act for the 1st appellant as he did not disclose his relationship with the said appellant; that it was incumbent upon a litigant to appraise himself of matters that are in court and not merely wait to be informed by an advocate,; that equity aids the vigilant and not the indolent; and that this was a case where the mistake is not of counsel alone but one of both the counsel and the appellants as the appellants too had the duty to find out what had transpired in their matter.



The trial court, after considering the rival positions of the parties, delivered a ruling and held thus:

“It is the court’s considered view that this application has not been brought timeously, the same has not been brought in good faith and it has not been demonstrated by the applicant that he has an arguable defence against the suit. It is equitable and in the interest of justice to let- the claimant enjoy the fruits of his Judgment. Consequently, the application lacks merit and is dismissed with costs to the claimant.”

8. Aggrieved by the ruling and order aforesaid, the appellant approached this Court with thirteen grounds of appeal which may be clustered into six, to wit: whether mistake or error of counsel should be visited upon the appellants; whether failure to file a defence within the stipulated time amounts to procedural technicality curable under Article 159(2)(d) of *the Constitution* of Kenya; whether failure to attach a draft defence by a litigant appearing in person amounts to procedural technicality; whether the 2nd appellant was properly joined as a party in the suit; which the right to be heard and the right of expeditious disposal of cases, carries more weight; and finally, whether the respondent stood to suffer any prejudice if the orders sought were granted?

9. When the appeal came up for hearing, Mr. Njeru, learned counsel for the appellants was present. However, there was no appearance by the respondent, though served with the hearing notice.

On the first issue, the appellant submitted that mistakes of counsel should not be visited on an innocent litigant; that the appellants had instructed counsel to act for them but for reasons best known to counsel he failed to act on the instructions; that in the circumstances of this case, these were excusable mistakes and blunders by the appellants’ advocates, and the appellants should not suffer injustice as a result of those mistakes.

10. Counsel invited the Court to adopt the dicta in the case of *Hosea Kiplagat Vs. John Allan Okwema* [2018] eKLR in buttressing the point that the mistake of counsel is excusable, especially if the wrong can be righted by an award of costs.

With respect to the second issue, the appellant submitted that the requirement that defence be filed within 14 days of entry of appearance is a mere procedural requirement and failure to strictly adhere to the requirement amounts to procedural technicality which does not go to the root of the substance of the matter and as such, the omission is curable under Article 159(2)(d) of *the Constitution* of Kenya.

11. As to the third issue of failing to annex a draft defence to the application, the appellants submitted that the court ought to have taken notice of the fact that the appellants were lay people and thus ought to have been excused from the normal procedures where an advocate is involved. They added that the trial court erred in law in failing to administer justice without undue regard to procedural technicalities contrary to Article 159 of *the Constitution* and that Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law.

12. Turning to the fourth issue, it was submitted that the trial court erred in entertaining the claim against the second appellant and failing to find that the 2nd appellant was non-suited and should not have been joined in the suit by the respondent.

13. With regard to the fifth issue, the appellants submitted that though they admitted that mistakes were indeed made by their counsel, nonetheless the court is obliged by the rules of natural justice and more specifically Article 50 of *the Constitution* of Kenya, to hear and determine each case on merits. They invited us to adopt the dicta in the case of *Martha Wangari Karua Vs. Independent and Electoral Boundaries Commission & Others* [2018] eKLR where the Court stated that no litigant should be driven from the seat of justice without being heard, however weak his or her case. It was submitted that



the Court must weigh the rights of the respondent who has judgment in his favour against the rights of the appellants to have their case heard and determined on merit.

14. On the sixth and last issue, the appellant submitted that, the respondent shall not suffer any prejudice if the default judgment is set aside but rather a slight delay in the conclusion of his case. In any event, it was contended, even if the respondent suffered any prejudice, such prejudice can be adequately compensated by an award of costs as was stated in the case of *Sebei District Administration Vs. Gasyali & Others* (1968) EA 300. The respondent did not file written submissions and neither was he present when the appeal came up for hearing despite being served.
15. We have considered the appeal, submissions by counsel for the appellants and the authorities relied on. To us the issues for determination are whether the trial court's discretion was properly exercised when declining the application; whether the mistake of an advocate should be visited on an innocent client; whether the 2nd appellant was wrongly joined in the suit; and whether the appellants' rights to fair hearing were violated.
16. Whether or not to set aside an *ex parte* judgment is discretionary. This being an exercise of judicial discretion, like any other judicial discretion it must be based on sound principles and not on sentiments, sympathy, arbitrarily, whimsically or capriciously. See *Murtaza Hussein Bandali T/A Shimoni Enterprises Vs. P. A. Wills* [1991] KLR 469.
17. The principles upon which this Court will interfere with the exercise of discretion by the lower court are well known and settled. The Court of Appeal can only interfere with the exercise of a trial court's judicial discretion if satisfied that the trial court misdirected itself on law; or that it misapprehended the facts; or that it took into account considerations which it should not have; or that it failed to take into account consideration which it should have; or that its decision, albeit a discretionary one, was plainly wrong. The predecessor of this Court in *Mbogo Vs. Shah* [1968] EA 93 held that:

“...the discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

From our reading of the ruling, we discern no misdirections. If anything the ruling was well thought out and legally sound. Therefore, the discretion was properly exercised.

18. With regard to mistakes and or omissions of counsel, the approach and guidance given by this Court is clear from the case of [*Tana and Athi Rivers Development Authority Vs. Jeremiah Kimigbo Mwakio & 3 Others*](#) [2015] eKLR. In dismissing the appeal on similar grounds as the present appeal, the court stated:

“...From past decisions of this Court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side. (See. Halsbury's Laws of England, 4th Edn, Vol 44 at p 100-101) and also *Re Jones* [1870], 6 Ch. App 497 in which Lord Hatherley communicated the court's expectations this way:

Under this duty, counsel is unequivocally obliged to exercise condor and not aid a litigant in subversion of justice. Even though the determination of whether or not counsel has failed in



this obligation is dependent on the circumstances of a case, as a custodian of justice, the court must always stay alive to the interests of both parties. This is of paramount importance. Thus, there is a corollary to the hallowed maxim that mistakes of counsel should not be visited on a client...Hence, the mistakes of Mr. Mouko's clerk became the mistakes of Mr. Mouko. This takes us back to the question, was the same excusable enough to warrant court's favour?

It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."

From the record, it is clear that the appellants had advocates on record. There is no explanation as to why they did not file a defence. We therefore find no plausible reason to move our hand in their favour. This plea that the mistakes of counsel ought not be visited upon the client is a common one and any party who fails to perform a duty will invariably seek relief on the basis that mistakes or errors of counsel ought not to be visited upon the client. The appellants too have not demonstrated that after instructing counsel they made any follow up to find out the progress of the case. Having failed to do so, they cannot really hide behind the mantra that mistakes of their counsel should not be visited on them. In *Omwoyo Vs. African Highlands & Produce Co. Ltd* [2002]1 KLR, this Court held:

"Time has come for legal practitioners to shoulder the consequences of their negligent act or omissions like other professionals do in their fields of endeavour. The plaintiff should not be made to shoulder the consequences of the negligence of the defendant's advocates. This is a proper case where the defendant's remedy is against its erstwhile advocates for professional negligence and not setting aside the judgment."

We wholesomely agree and adopt the above reasoning in the circumstances of this case. The continued pardoning of a party on the above basis will make it the norm that in any case which falls in the ambit, responsibility will be avoided by mere reason that the mistake was by the counsel

19. The appellants have also contended that the judgment was in breach, not only of the law, but also of *the Constitution* in so far as it condemned them without being accorded an opportunity to be heard and therefore in breach of the right to a fair hearing guaranteed by Article 50(1). There is no need to restate the importance of a fair trial as guaranteed by *the Constitution*. The right to a fair trial remains at the heart of any judicial determination and courts should endeavour to protect and uphold the same. It is a cardinal rule and it emanates from the principle of natural justice. In *M K Vs. M W M & Another* [2015] eKLR, it was reiterated thus:-

"The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. In *Onyango Vs. Attorney General* (1986-1989) EA 456, Nyarangi, JA asserted at page 459:

'I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly.'"



At page 460 the learned judge added:

“ A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.”

However, in the circumstances of this case, the record is clear that the appellants were served with the pleadings and had counsel on record representing them on 22nd October 2015 when the matter was before the trial court for hearing. It was then that the court after examining the record found that the appellant had not filed a defence, hence made the correct finding that the claim was undefended and thus ordered the same to proceed by way of formal proof. The appellants did nothing from there until after the judgment had been delivered and the respondent had filed and served a bill of costs that they sought to find out what was happened in court. We agree that the right to a fair hearing is guaranteed by our Constitution. However, that fairness must apply to both parties. The appellants’ counsel was in court on the day of formal proof and the appellants cannot claim in all fairness that they were not accorded an opportunity to be heard. From the analysis above, it is clear that Article 50 of the Constitution does not aid the appellant as the due process required was followed.

20. The appellant equally asked this Court to consider Article 159 of the Constitution and allow the appeal. The essence of Article 159(2) (d) is that a court should not allow the prescriptions of procedure and form to overshadow the primary object of dispensing substantive justice to the parties. In the instant case we agree that the rules of procedure must be complied with and cannot be sacrificed at the alter of Article 159 of the Constitution. In so saying we are guided by the case of *Raila Odinga Vs. I.E.B.C & Others* [2013] eKLR, where the Supreme Court observed thus:

“ Article 159(2) (d) of the Constitution simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.”

In the light of the foregoing we hold that the appellant cannot hide behind Article 159 by stating that the failure to file a defence and/or even follow up the matter was essentially an omission or error or technically that can be taken care of by the said Article.

21. Should the appellants have annexed a draft defence in their application to set aside the ex parte judgment? The answer is pretty obvious. We say so bearing in mind the holding of this Court in the case of *Nairobi City Council Vs. Thabiti Enterprises Limited Civil Appeal No. 264 of 1996 (UR)* thus:

“ The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the twofold purpose of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial court and which the court will have to determine at the trial.”

22. To say that the trial court should have allowed an application where no intended defence had been annexed is far from the desired truth as the court would not be in a position to tell whether a party had an arguable defence or one that was not frivolous. As the old adage holds, ignorance of the law is no defence. The excuse proffered by the 2nd appellant for the failure being that he was a layman does not



arise. The law in any event has no different provisions for laymen, educated people, those represented by advocates and those representing themselves. The choice having been made by the appellants to act in person and file the application, they were bound by rules of procedure encapsulated in the *Civil Procedure Act* and the rules made thereunder. The requirement to annex a draft defence to an application to set aside a judgment is to enable the trial court to exercise its discretion properly.

23. It was the 2nd appellant's case that he was wrongly added as a party in the suit as there was no nexus between him and the employment of the respondent. To this we reiterate the provisions of Order 1, rule 3 of the Civil Procedure Rules which provides that:

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.” Emphasis supplied.

24. In essence, any party can be joined in a suit as long as he is in a way involved and or linked to the act or transaction giving rise to the suit. In this case the respondent decided to join the second appellant as it was his case that the 2nd appellant was at all times the owner and/or director of the 1st appellant. This was the only person who was known to the respondent at the time of his employment. Further, if at all he disputed liability, he would have taken steps to properly exonerate himself. In any event, we do not think that such prayer was available to the second appellant at that stage.

25. In view of the above, we are not convinced that the second appellant had been improperly enjoined to this suit. In any case, Order 1 rule 9 of the Civil Procedure Rules provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and that the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. To our mind, no prejudice was occasioned to the second appellant by a being made a party to this suit.

26. We agree that the right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and that at the end of the day there should be proportionality. This right was extended to the appellants as they were served properly and there was an advocate on record to represent them. The reasons why the advocate did not adhere to set timelines in prosecution of cases is a question which as we have said before can only be answered by the appellants and or their counsel and which has not been answered in our view.

27. It is trite law that rules of procedure and timelines fixed by the courts must be honoured for certainty and proper case management. In this regard, we reiterate what Kiage, J.A. said in the case of *Nicholas Kiptoo Arap Korir Salat Vs. Independent Electoral and Boundaries Commission and 6 Others* [2013] eKLR in which the learned Judge stated that:

“I am not the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, which it may seem to aid one side, it unfairly harms the innocent party



who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”

28. We are of the view that the right to be heard and disposal of cases in an expeditious manner is a right which must go in line with set procedures and the law and the right to be heard cannot be lauded alone at the expense of the right of a party to have his case determined expeditiously. For doing so would render that right to be heard otiose when a suit remains in the corridors of justice for twenty years without an end, especially where parties are aware of the existence of the suit but their laxity leads to the delay.
29. The matter having been in court for some time and the respondent’s employment having been terminated in the manner it was, weighing that against the laxity of the appellants, the respondent would ideally suffer prejudice were the orders sought in the trial court to be granted.

The upshot then is that the appeal is dismissed in its entirety. The respondent shall have the costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K. M’INOTI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

