**Kidada & another v Mutua (Civil Appeal 19 of 2020)**
**[2022] KECA 639 (KLR) (24 June 2022) (Judgment)**

Neutral citation: [2022] KECA 639 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT MOMBASA**

**CIVIL APPEAL 19 OF 2020**

**SG KAIRU, P NYAMWEYA & JW LESSIT, JJA**

**JUNE 24, 2022**

**BETWEEN**

**THEOPHILUS KADIDA KIDADA ..... 1ST APPELLANT**

**ROSITA NAKISU ABAWATA ..... 2ND APPELLANT**

**AND**

**MATHIAS MULELO MUTUA ..... RESPONDENT**

***(An appeal against the judgement of the High Court at Mombasa (D. O. Chepwony J.) delivered on 25th June 2019inMombasa High Court Appeal No 34 of 2017)***

## JUDGMENT

1. Theophilus Kadida Kidada and Rose Nakisu Abawata, (the 1st and 2nd Appellants) have brought this appeal against the judgment of the High Court delivered on 25th June 2019 (D. Chepkwony J.) dismissing their appeal against a judgment delivered by the Senior Principal Magistrate Court (hereinafter the trial Court) in Mombasa CMCC No 2490 of 2011. The Appellants were initially sued by Mathias Mulelo Mutua (the Respondent herein) in Mombasa CMCC No 2490 of 2011, wherein the trial Magistrate found that there was a sale agreement between the Appellants and Respondent in respect of the house in land parcel MN I/3015 (the suit property), and that the Appellants terminated the same in breach of the agreement after they had been paid 10% of the purchase price amounting to Kshs. 800,000/= by the Respondent. The trial Magistrate accordingly entered judgment for the Respondent against the Appellants jointly and severally for a refund of Kshs. 800,000/= with interest at Court rates with effect from 8th April 2011; general damages for breach of contract of Kshs 50,000/=; and costs of this suit.

2. Aggrieved by the judgment of the trial Court, the Appellants lodged a first appeal in the High Court, in which they raised five grounds of appeal in a memorandum of appeal dated February 20, 2017. The Appellants sought to set aside the trial Court's judgment and faulted the trial Magistrate for finding

that the Respondent had proven his case on a balance of probabilities; denying the Appellants an opportunity to be heard; failing to find that the subject sale agreement was tainted with fraud and misrepresentation; failing to find that there was no breach of contract by the Appellants as alleged and finally, failing to find that the Appellants had made out a case of breach of contract on the part of the Respondent.

3. The main arguments by the Appellants in the High Court were that their advocate erroneously diarized the hearing in the trial Court for 9th January 2017 instead of December 19, 2016, hence the matter proceeded ex parte. According to the Appellant they were notified of the mention for submissions and only came to know of the position of the matter when they were served with a Respondent's letter demanding settlement for the decretal sum Further, that the non-attendance on the hearing day of December 19, 2016 and non-communication of the trial Court's conditions for setting aside the judgment were mistakes by their advocate, which should not be visited upon them.

4. The Respondent on the other hand detailed the proceedings in the trial Court and noted that after judgement was delivered therein, the same was set aside upon an application by the Appellants, on condition that they deposited the sum of Kshs. 850,000/= in an interest earning account in the joint names of their advocates, which the Appellants did not comply with, and execution proceedings commenced resulting in the arrest of the Appellants.

5. The High Court, in dismissing the appeal, found that the hearing date at the trial Court was taken by consent with both parties being represented by their advocate, and that the overriding objective captured in Section 1A of the *Civil Procedure Act* of just, expeditious and proportionate justice does not cover situations aimed at subverting the expeditious disposal of cases and appeals or mistakes, lapses and negligent acts of counsel.

6. The Appellants being dissatisfied with the High Court judgment, filed a memorandum of appeal in this Court dated February 21, 2020 wherein they challenged the High Court's findings on seven grounds, which they collapsed into two limbs during the hearing namely, on the constitutional right of the Appellants to be heard and that the mistake of an advocate should not be visited upon his client. The matter came up for hearing before this Court on March 14, 2022, Mr. Shimaka, learned Counsel for the Appellants and Mr. Mutisya, learned counsel for the Respondent were present and highlighted their respective written submissions.

7. This is a second appeal, and this Court's mandate in this regard is limited to issues of law, as was stated in the case of *Stanley N Muriithi & Another v Bernard Munene Ithiga* [2016] eKLR (Waki, Karanja & Kiage JJ.A) as follows:

> " We are conscious of our limited jurisdiction when dealing with a second appeal. Our reading of Section 72(1) of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, which provides for the circumstances when a second appeal shall lie from the appellate decrees of the High Court, indicates that the appeal must be on matters of law.
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> In Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR (Civil Appeal No. 127 of 2007) Onyango Otieno, J.A. put it succinctly in the following words:
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> " In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

We hasten to observe, however, that failure on the part of the first appellate court to re-evaluate the evidence tendered before the trial court and as a result, arriving at the wrong conclusion is a point of law..."

8. The Respondent's counsel raised a preliminary issue and referred to a preliminary objection dated 31st May 2021 which sought to have the Notice of Appeal and/ or the Appeal be struck out with costs because an essential step was not taken within the prescribed time, for reasons that the Appellant's memorandum and record were not filed within the mandatory sixty (60) days of lodging the Notice of Appeal as required by Rule 80 (1) (a) and (b) of the *Court of Appeal Rules*. He noted that the Notice of Appeal was filed on 4th July 2019 while the memorandum of appeal was filed on February 21, 2020 after more than 7 months. Further, that Certificate of delay showed certified copies of the proceedings were applied for on July 8, 2019 and supplied on December 17, 2019. We however note that since the Respondent never applied to strike out the Notice of Appeal and appeal within the timelines specified in Rule 84 of the Court of Appeal Rules of 2010, the same remain on record.

9. On the constitutional right of the Appellants to be heard, their counsel submitted that the Appellants' case in the primary suit was closed without being given an opportunity to be heard, and that the High Court denied them a chance for their defence case to be heard which was meritorious and raised triable issues. Further, that the Appellants had also filed their list of documents and witness statements in support. The Appellants relied on the decisions in *Peter Macharia Kariuki vs James Kibara & Anor* [2020] eKLR and *Esther Chege v James Kiyagi Amaingu* [2019] eKLR for the proposition that Courts must consider the overriding objective of just determinations when they make rulings, give directions and interpreting the civil procedure rules.

10. The Respondent's counsel on his part submitted that the High Court correctly found that the Appellants had been indulged and given a chance for hearing, because the trial judgment was set aside on condition that they deposited the decretal sum in a joint interest earning account in the names of the parties which they never did, even after a Notice to Show Cause. Further the hearing date was set by consent in Court but neither the Appellants nor their advocates appeared for hearing.

11. On the mistake of an advocate not being visited upon his client, the Appellants' counsel submitted that the failure to attend Court was not deliberate but occasioned by honest mistake on the part of the counsel then on record for the Appellants and who swore an affidavit. Further, failure of the Appellants not depositing the decretal amount in a joint account was also not deliberate on the Appellants' part because the advocate failed to inform them of the Court's conditions and only knew of it at execution. The counsel submitted that the Appellants had since sent Kshs 500,000/- to the Respondent through their advocate therefore, they had played their part.

12. Reliance was placed on the decision by this Court of *Philip Chemwolo & Another v Augustine Kubende* [1982-88] KAR 103 at 1040 (Apallo JA) that blunders will be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. The counsel urged this Court to exercise its discretion in allowing the appeal and having the Appellants' suit reinstated for hearing on merit for the interest of justice of all parties.

13. The Respondent's counsel reiterated that the hearing date in the trial Court was set by consent with both parties being represented by their advocates. The counsel also confirmed that upon the filing of this appeal, the Appellants unconditionally paid Kshs 500,000/-, which was part payment of the decree, but were yet to pay the balance, costs and interest.

14. The circumstances in this appeal also arose in *Pithon Waweru Maina vs Thuka Mugiria* [1983] eKLR, and this Court (Potter, Kneller JJ. A & Chesoni Ag. JA), while emphasizing that only matters of law

may be Page 7 of 11 taken on a second appeal, held that if the High Court upholds a resident magistrate on a question of whether or not he exercised his discretion judicially, whether he was right or wrong to do so is a question of law. The Court held as follows on the principles governing the exercise of the judicial discretion to set aside an ex parte judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing:

> " Firstly, as was stated by Duffus P in Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E:
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> " There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules."
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> Secondly, as Harris J said in Shah v Mbogo [1967] EA 116 at 123B:
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> " This discretion 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 the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice." That judgment was approved by the Court of Appeal in Mbogo v Shah [1968] EA 93. And in Shabir Din v Ram Parkash Anand (1955) 22 EACA 48 Briggs JA said at 51: "I consider that under order IX rule 20, the discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the QUOTE appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised."
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> Thirdly:
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> " ... a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."
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> See per Newbold P in Mbogo v Shah [1968] EA 93}} at 96 G

15. It is notable in this regard that the suit in the trial Court was brought by a plaint dated 1st November 2011, and was first mentioned for directions on November 23, 2011. After several adjournments, it proceeded to hearing on September 14, 2016, nearly five years later, when the Respondent gave his evidence as PW1 and was cross-examined by the Appellants' advocate who was present. The matter was scheduled for further hearing on October 5, 2016, on which date the Appellants' advocate made an application to cease acting. The hearing was adjourned and the said advocates were granted 7 days to file an application to cease acting, and a mention date was set for October 14, 2016 to confirm filing of the application, which application was thereupon scheduled for hearing on October 24, 2016. On October 24, 2016, the Appellants' advocates sought to withdraw the application to cease acting, which was allowed, and the matter was fixed for hearing on December 19, 2016 in the presence of the advocates for the Appellants and Respondents. On December 19, 2016, there was no appearance for the Appellants, whereupon the advocates for the Respondent prayed that the defence case be closed.

The Court noted that the hearing date was taken by consent, closed the Defence case and reserved the matter for judgment on January 20, 2017.

16. The High Court considered these facts in its judgment, and also noted that the trial court still indulged the Appellants and gave them another opportunity to be heard on condition that they deposit the decretal sum in a joint interest earning account of both counsel for the parties, as provided for under Order 42 Rule 6 of the *Civil Procedure Rules*. However, that the Appellants failed to deposit the said money as had been ordered, and even after a notice to show cause was issued against the Appellant.

17. We are of the view that the High Court exercised its discretion judiciously and properly, and took into account relevant facts in reaching its decision not to set aside the trial Court's judgment and reopen the Appellant's case, and therefore did not err in law. In addition, the rights to a hearing and to be shielded from the mistakes of an advocate are not absolute, especially where it is evident that a party has slept on its rights and injustice will be caused to the other party, as was the case in the circumstances of this appeal. Lastly, we also note that a substantial amount of the decretal sum has since been paid to the Respondent, and this appeal is to this extent also overtaken by events.

18. We therefore find no merit in this appeal, and accordingly dismiss it with costs to the Respondent.

19. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 24*TH* DAY OF JUNE, 2022**

**S. GATEMBU KAIRU, FCIArb**

**.....**

**JUDGE OF APPEAL**

**P. NYAMWEYA**

**.....**

**JUDGE OF APPEAL**

**J. LESIIT**

**.....**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**