Khan v Wines & Spirit Kenya Limited (Civil Appeal 35 of 2020) [2022] KECA 668 (KLR) (8 July 2022) (Judgment)

Neutral citation: [2022] KECA 668 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL 35 OF 2020

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

JULY 8, 2022

BETWEEN

HANIF IQBAL KHAN ..... APPELLANT

AND

WINES & SPIRIT KENYA LIMITED ..... RESPONDENT

(An appeal from the judgment of the High Court ofKenya at Malindi (Korir, J.) dated and signed at Nairobi on the 24th April 2019 and delivered by (Nyakundi, J.) on 20th June 2019 in High Court Civil Appeal No. 14 of 2017)

JUDGMENT

1. This is a second appeal by Hanif Igbal Khan, the appellant, challenging the judgment of the High Court at Malindi (W. Korir, J.) dated April 24, 2019 and delivered on June 20, 2019 by Nyakundi J. dismissing his first appeal from a ruling of the Magistrate's Court at Kilifi delivered on 7th March 2017 in Kilifi SPMCC No. 46 of 2013 dismissing his suit for want of prosecution.

2. The record shows that the appellant and the respondent, Wines & Spirits Kenya Limited, were in a tenant and landlord relationship in respect of premises known as LR No. 562/III/MN Mtwapa Creek (the premises). On February 13, 2013, the appellant filed suit against the respondent before the Magistrate's Court at Kilifi in PMCC No. 46 of 2013 and at the same time filed an application in that suit seeking orders to restrain the respondent from evicting him from the premises. On May 23, 2013 (though the appellant makes reference to December 27, 2013) that court issued an order restraining the respondent from evicting the appellant from the premises pending the hearing and determination of the suit.

3. Having obtained that temporary restraining order, the appellant appears to have sat back without taking further steps to prosecute the suit whereupon the respondent applied to the court to dismiss

the suit for want of prosecution. Based on that application, which was opposed by the appellant, the court dismissed the suit in a ruling delivered on March 7, 2017.

4. Aggrieved by the ruling of March 7, 2017, the appellant appealed to the High Court complaining that the magistrate erred in dismissing the suit and: for holding that the delay in prosecuting it was inexcusable; in failing to appreciate that the delay was attributable to mistake of the appellant's advocate; considering extraneous matters; and in not giving the appellant an opportunity to be heard.

5. Having considered the appeal, the learned Judge of the High Court dismissed it in the impugned judgment dated April 24, 2019. The Judge expressed that to succeed in his appeal, the appellant was required to demonstrate that the trial magistrate's exercise of discretion in dismissing the suit was unreasonable and capricious and that the appellant had failed to do so. The Judge concluded, "that trial magistrate correctly exercised her discretion, and this court has no reason for interfering with the exercise of that discretion."

6. The appellant has, in the present appeal, challenged that decision. During the hearing of the appeal on March 17, 2022, learned counsel Miss. Achieng held brief for Mr. Lughanje, learned counsel for the appellant. Despite service of notice of hearing of the appeal, there was no appearance for the respondent. Miss Achieng briefly orally highlighted the appellant's written submissions dated June 10, 2021.

7. Counsel urged that the delay in prosecuting the appellant's case before the trial magistrate was not inordinate and inexcusable; that as a layperson who did not know the time lines, the appellant was let down by his advocate; that had he known the time frames for the case, the appellant would have acted diligently as he did when he learnt of the dismissal of the suit by changing his advocates; and that the appellant should not suffer a penalty because mistake of advocate. In that regard, reference was made to the case of *Philip Chemowolo & another v Augustine Kubebe* [1988] KAR 103. It was submitted that the learned Judge of the High Court was unduly technical rather than considering the merits and failed to head Sections 3A and 3B of the *Appellate Jurisdiction Act* and Article 159 (2)(d) of *the Constitution* of Kenya.

8. It was submitted further that the subsistence of the suit was not at all prejudicial to the respondent as the court, in delivering a ruling for stay of execution ordered the appellant to deposit Kshs. 500,000 as security and to continue paying rent which the appellant complied with. It was submitted that the learned Judge should, in the circumstances, have interfered with the ruling of the trial magistrate and should have allowed the re-opening of the suit for hearing and determination on merits. In that regard counsel referred to Madan, JA's statement in *Belinda Murai & others v Amos Wainaina* [1978] LLR 2782 that the door of justice should not be closed because of a mistake made a lawyer.

9. As stated, there was no appearance for the respondent and neither were written submissions tendered for the respondent. We have considered the appeal and the submissions. This being a second appeal, we must confine ourselves to matters of law. See *John Mbuta v Bosky Industries* [2019] eKLR. As this Court stated in *Charles Kipkoeng Leting vs. Express (K) Limited and another* [2018] eKLR:

> "Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina versus Mugiria [1983] KLR 78, Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & Another versus Bernard Munene Ithiga [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the 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."

10. Onyango Otieno, JA, in the case of *Kenya Breweries Ltd v Odongo* Civil Appeal No. 127 of 2007; [2010] eKLR, expressed the principle as follows:

> "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."

11. With that in mind, the issue for consideration in this appeal is whether the learned Judge erred in refusing to interfere with the decision of the trial magistrate in the exercise of her discretion dismissing the appellant's suit for want of prosecution. It was incumbent upon the appellant to satisfy the High Court that the trial magistrate failed to judiciously exercise her discretion in dismissing the suit. The appellant was under a duty to demonstrate that the magistrate misdirected herself in law; or that she misapprehended the facts; or that she took into account considerations of which she should not have; or that she failed to take into account considerations which she should have; or that her decision, albeit a discretionary one, was plainly wrong. See *Mbogo & another v Shah* [1968] EA 93; *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR; and *Patriotic Guards Limited v James Kipchirchir Sambu* [2018] eKLR.

12. There is no dispute that after obtaining temporary injunctive orders before the trial magistrate restraining the respondent from evicting him from the premises, the appellant did not take steps to prosecute the suit for over one year prompting the respondent to apply to have the suit dismissed for want of prosecution. The appellant blamed it all on his advocate who, according to the appellant, did not do what he was supposed to do, and the appellant was ignorant of the time frames. Both lower courts took contentions into consideration. In his judgment, the learned Judge of the High Court noted that the appellant's case was that the failure by his advocate ought not to have been visited on him and that in her ruling, the trial magistrate had expressed that the appellant was bound by the actions of the advocate he had picked to represent him. In agreeing with the trial court, the learned Judge expressed that:

> "A case belongs to the party and not the advocate. A party is under an obligation to follow the case with his advocate. You do not go to sleep once you instruct an advocate."

13. We can discern no error in the approach taken by both courts below in that regard. It is an approach consistent with pronouncements of this Court. For instance, in *Charles Maina Muriuki v Jamleck Muchira Wanjau*, [2014] eKLR, Odek, JA stated:

> "Whereas it is a general principle that mistake by counsel should not always be visited upon a client, I do find that in the present case, the indolence on part of the applicant is inexcusable."

14. In *Christopher Muriithi Ngugu v Eliud Ngugu Evans* [2016] eKLR this Court stated:

> "The appellant blamed his previous advocate on record for failing to file the intended appeal on time; he did not provide any documentation or evidence to show that he had actively pursued his advocates to file the appeal. Whereas it is a general principle that a mistake by learned counsel should not always be visited upon a client, the learned Judge found the indolence on the part of the appellant, to be inexcusable."

15. In the case of *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".

16. Similarly in *Bains Construction Co. Ltd v John Mzare Ogowe* [2011] eKLR the court observed:

> " 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 it, surely such principal should bear the consequences".

17. In *Habo Agencies Limited vs Wilfred Odhiambo Musingo* [2015] eKLR, thus:

> " 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".

18. In the case of *Bi-Mach Engineers Limited v James Kahoro Mwangi* [2011] eKLR the Court of Appeal held:

> " The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. 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 an excusable mistake which the court may consider with some sympathy."

19. In the present case, the appellant did not demonstrate that he made any effort at all to contact his advocates after obtaining the temporary restraining order against the respondent. The appellant has not, in our view, demonstrated 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 so as to warrant this Court to interfere with the same.

20. The appeal fails and is hereby dismissed. We make no orders as to the costs of the appeal as the respondent did not participate.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF JULY 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR