Ngugi v Thogo (Civil Application 372 of 2018)
[2021] KECA 88 (KLR) (22 October 2021) (Ruling)

Neutral citation: [2021] KECA 88 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 372 OF 2018

RN NAMBUYE, JA

OCTOBER 22, 2021

BETWEEN

RACHEL MUKAMI NGUGI ..... APPLICANT

AND

MERCY WANJIRU THOGO ..... RESPONDENT

(An application to reinstate appellant's/applicant's Notice of Motion/ Civil Application No. 372 of 2018 (M. Koome, J.) dated 23rd July, 2019 in Nairobi Civil Application No. 372 of 2018)

RULING

1. Before me is a notice of motion dated 25th July, 2019 substantively brought under Article 159(2)(c), (e) of the *Constitution of Kenya, 2010* and Rules 56(3) and (4) and 57(1) and (2) of the *Court of Appeal Rules*, and all other enabling provisions of the law.

2. The application substantively seeks orders as follows:

> " 1. Spent.
>
> 2. That the Hon. Court be pleased to vary or set aside its orders dismissing the appellant's/applicant's notice of motion application dated 13th December, 2018 for non-attendance.
>
> 3. That the notice of motion application dated 13th December, 2018 be and is hereby ordered reinstated for hearing and determination on merit.
>
> 4. That costs of this application be in the cause."

3. It is supported by grounds on its body, supporting affidavits of Mose Nyambega and Rachel Mukami Ngugi with annexures thereto and written submissions dated 10th October, 2021. It is not opposed.

At least I have not traced on record either a replying affidavit or written submissions filed by the respondent in opposition to the application in response to the Deputy Registrar's hearing notice served electronically to the respective parties herein on Friday, October 8, 2021 at 3.50pm.

4. The background to the application albeit in a summary form is that the applicant initially filed a notice of motion under certificate of urgency dated 13th December, 2018 premised on various provisions of law cited in its heading. It substantively sought leave of the court to extend time within which to lodge and serve both the notice and record of appeal out of time. That application was supported by grounds on its body and a supporting affidavit of the applicant Rachel Mukami Ngugi together with annexures thereto. Apparently, it was not opposed.

5. It was placed before a single Judge on 17th December, 2018 who declined to certify it as urgent. It was processed in the normal manner and placed before M. K. Koome J.A. (as she then was) as a single Judge on 23rd July, 2019 and dismissed for want of attendance of the applicant to prosecute the application.

6. It is the above dismissal order that prompted the applicant to file the uncontested application under consideration.

7. In summary, the applicant contends cumulatively that she was aggrieved by the judgment delivered by L. M. Gacheru, J. at the Environment and Land Court Thika and desired to appeal against the said judgment. The applicant duly instructed her advocate then on record for her to initiate appellate process on her behalf. A certified copy of the proceedings to capacitate them to progress the intended appellate process was supplied to her advocate after the expiry of timelines stipulated in the Court of Appeal Rules for lodging of a notice and a record of appeal, hence the filing of the notice of motion dated 13th December, 2018 seeking validation of the intended appellate process dismissed on 23rd July, 2019 by the single Judge.

8. It is the applicant's position that the mentioned application for validation of the intended appellate process was fixed for hearing severally but could not be reached for one reason or the other. Events leading to that application being dismissed for non-attendance were not occasioned either by herself or her advocate but by the court's registry. The applicant asserts that a hearing notice dated 2nd July, 2019 was served on her advocates firm on 4th July, 2019 indicating that the dismissed motion was scheduled for hearing on 25th July, 2019 at 9.30am. Another hearing notice dated 10th July, 2019 was served on her advocate's office on 15th July, 2019 indicating that the application was scheduled for hearing on 22nd July, 2019 at 2.30am. The following day of 16th July, 2019, another hearing notice was served on her advocates firm indicating that the matter was scheduled for hearing on 23rd July, 2019 at 2.30am.

9. It is the above confusion that prompted her firm of advocates to seek clarification from the court's registry as to which of the above indicated conflicting dates was the correct date for the hearing of the dismissed application. The registry allegedly replied that the correct hearing date was 25th July, 2019. The registry went further and displayed that information on the notice board outside the court's registry. Pursuant to the above assurance, the applicant's advocate filed a list of authorities on 22nd July, 2019 in readiness for the hearing of the application on 25th July, 2019. On the morning of 25th July, 2019 the applicant's advocate presented himself to the court ready to proceed with the hearing of the application only for him to be confronted with the rude shock that the application had in fact been dismissed on 23rd July, 2019 for non-attendance.

10. It is in light of the totality of the above outlined sequence of events leading to the dismissal of the application dated 13th December, 2018 sought to be reinstated that the applicant asserts that her application is well founded and invites the court to exercise its discretion in her favour and allow the same as according to her the failure to attend court on 23rd July, 2019 to prosecute the application was not occasioned by any default on her part or that of her advocate but the same is attributable wholly

to the convoluted imprecise and misleading communication from the Court of Appeal registry with regard to the correct date on which the application was scheduled for hearing over which neither the applicant nor her advocate had control. Interests of justice therefore demands that the order sought be granted especially when no prejudice is demonstrated to be likely suffered by the respondent if the relief sought was granted.

11. To buttress the above uncontroverted submissions, the applicant relies on the case of *Kasturi Limited vs. Nyeri Wholesalers Limited [2014] eKLR*; *Wilson Cheboi Yego vs. Samuel Kipsang Cheboi [2019] eKLR*; and lastly, *Joseph Kinyua vs. GO Ombachi [2019] eKLR*, which upon perusal, I find dealt with reinstatement of an appeal dismissed for want of prosecution. It is however my view that the underlying principles would apply for an application also dismissed for nonattendance. I therefore find it prudent to distill and rephrase these as follows:

    i. It is more just if litigation is brought to an end after all parties have been heard on merit and substantive justice administered.

    ii. The very Rules of the court that provide for timelines for the performance of an act under the said Rules are the same Rules of the court that allow the court to exercise its discretion and extend time within which to comply in the event of any noncompliance with any of those Rules.

    iii. Article 159 of the Constitution of Kenya, 2010 enjoins the court to administer substantive justice.

    iv. Sections 3A and 3B of the Appellate Jurisdiction Act through the overriding objective principle mandate the court to act justly and fairly.

    v. The overriding objective principle is not aimed at giving justice to one party at the expense of another but for ends of justice to be met to all the parties involved or stand to be affected by the matter.

    vi. In seeking the court's intervention upon default and or noncompliance with a procedural step in litigation before the court, demonstration of existence of a reasonable explanation for delay in the supporting documents is sufficient basis for the exercise of the court's discretion in favour of a deserving party.

    vii. Consideration of the nature of the substratum of the litigation is also of paramount consideration in an application for extension of time within which to comply with the Rules.

    viii. Article 50 coupled with Article 159 of the Constitution on the right to be heard and the need for a court of law to frown upon procedural technicalities in favour of substantive justice are meant to ensure substantive justice to all parties.

    ix. In an application for reinstatement of a court process, there is need to balance the requirement as to whether reasonable grounds have been proferred for reinstatement and the prejudice to be suffered by the opposite party if such an order for reinstatement were to issue bearing in mind at the same time that dismissal is a draconian order that drives parties away from the seat of justice and should therefore be employed sparingly.

12. My invitation to intervene on behalf of the applicant has been sought under the substantive provisions of law indicated in its heading. The first to be addressed is Article 159 (2)(d) of the Constitution of Kenya, 2010 enshrining the non-technicality principle of the court. It provides:

> " In exercising judicial authority, the courts and tribunals shall be guided by the following principles -
>
> d. Justice shall be administered without undue regard to procedural technicalities;

13. The principles that guide the court on the invocation and application of the above provision as crystallized by case law are 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 save that Article 159(2)(d) of the Constitution is not a panacea for all procedural ills. See the cases of *Jaldesa Tuke Dabelo vs. IEBC & Another [2015] eKLR*; *Raila Odinga and 5 Others vs. IEBC & 3 Others [2013] eKLR*; *Lemanken Arata vs. Harum Meita Mei Lempaka & 2 Others [2014] eKLR*; *Patricia Cherotich Sawe vs. IEBC & 4 Others [2015] eKLR.*

14. The next in order of primacy is Rule 56(3) and (4) of the Court of Appeal Rules. These donate the power of the court to intervene and grant reprieve to a party affected by an order of dismissal of an application for non-attendance. They provide:

> 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 NRB Civil Application No. 372 of 2018 Ruling 6 hearing but was not so served, within thirty days of his first hearing of that decision.

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

> 1. An order made on an application heard by a single judge may be varied or rescinded by that judge or in the absence of that judge by any other judge or by the Court on the application of any person affected thereby, if –
>
> a. the order was one extending the time for doing any act, otherwise than to a specific date; or
>
> b. the order was one permitting the doing of some act, without specifying the date by which the act was to be done, and the person on whose application the order was made has failed to show reasonable diligence in the matter.
>
> 2. An order made on an application to the Court may similarly be varied or rescinded by the Court.

16. By the use of the word "shall" in sub-rule (4) of Rule 56 of the Court of Appeal Rules, it is mandatory that such an application should be filed within thirty (30) days of the making of the impugned order. Herein the uncontroverted position is that the application was dismissed on 23rd July, 2019 while the application under consideration was filed on 25th July, 2019 thus within the timelines set by Rule 56(4) of the Court's Rules. The application is therefore properly before me. I will therefore proceed to pronounce myself thereon on its merits.

17. On the merits, all that the applicant in an application of this nature is obligated to demonstrate as basis for granting the relief sought is demonstration that "he/she was prevented by any sufficient cause from appearing when the application was called for hearing."

18. The applicant has exhibited contradictory hearing notices issued by the Deputy Registrar of the court and served on her firm of advocates which bore conflicting dates for hearing already highlighted above and which I find no need to rehash but adopt as set out above for purposes of reasoning.

19. It is the applicant's position that upon being served with the above highlighted court processes bearing conflicting dates for the hearing of the dismissed application, her firm of advocates sought clarification from the court's registry and they were assured that the matter would be heard on 25th July, 2019. They were therefore shocked when her advocate called at the court premises on 25th July, 2019 intending to prosecute the application only for him to be told that the same had been dismissed for nonattendance on 23rd July, 2019. It is in light of the totality of the above uncontroverted position that the applicant contends that she has satisfied the prerequisite for granting relief under Rule 56(3) and (4) of the Court's Rules and invites the court to exercise its discretion in her favour and grant her the relief sought. Second, that no prejudice will be suffered by the opposite party if the relief were to be granted as prayed.

20. I have given due consideration of the totality of the record as laid before me and assessed above. I am satisfied that the applicant's application is merited as she has demonstrated a sufficient, and plausible cause for nonattendance to prosecute the application dismissed for nonattendance to prosecute the dismissed application namely, service upon them by the court's registry of hearing notices with conflicting dates purportedly for the hearing of the application borne out by the contents of the annexed hearing notices not controverted either by the Deputy Registrar of the court or the respondent coupled with relevant notification pinned on the registry's noticeboard indicating clearly that the application was to be heard on 25th July, 2019. I also find that, no prejudice will be suffered by the respondent if the application under consideration were to be relisted for hearing and disposal on its merits as none has been preferred before her in rebuttal of the application.

21. In the result and for the reasons given in the above assessment I make orders as follows:

    1. The applicant's application dated 25th July, 2011 be and is hereby allowed in terms of prayers 2 and 3 thereof.

    2. For avoidance of doubt, the orders granted by the single Judge (M. K. Koome, J.A) (as she then was) on 23rd July, 2019 be and are hereby set aside and substituted with an order reinstating the applicant's application dated 13th December, 2018 for hearing and determination on priority basis firstly, due to its age. Second its inadvertent dismissal by the single Judge on 23rd July, 2019 was wholly contributed to by the registry staff which ends of justice demand that it should not be visited on the applicant who is an innocent party.

    3. Costs of the application to abide the outcome of the reinstated application.

DATED AND DELIVERED AT NAIROBI THIS 22ND OF OCTOBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR