



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, J.J.A)

CIVIL APPEAL NO. 13 OF 2014

BETWEEN

SUSAN WANGARI MWANGI APPELLANT

AND

NANGENYE GATONYE WARAGANIA RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nyeri (Sergon, J.)

dated 14th October, 2011

in

H.C.C.A No. 36 of 2000)

JUDGMENT OF THE COURT

1. Before us is an appeal from the ruling of the High Court dated 14th October, 2011. The High Court in the said ruling declined to reinstate the appellant's appeal which had been dismissed for want of prosecution and attendance.
2. The background of this appeal is that the respondent filed suit in the Principal Magistrate's Court at Muranga seeking *inter alia* an order dissolving the trust over land parcel Loc.19/ Kiawambogo/806 (suit land) measuring 4.7 acres; transfer of the suit land to the respondent. It was the respondent's case that he left the suit land to one Macharia Waruinge to hold in trust for him; Macharia Waruinge consolidated the suit land and registered it in the name of Mary Kamwagira Karuga who held the same in trust for the respondent. Macharia Wariunge and Mary Kamwagira Karuga refused to transfer the suit land to the respondent hence the suit. After considering the evidence, the trial court vide a judgment dated 25th February, 2000 ordered a portion of 3 acres of the suit land be transferred to the respondent and a portion of 1.7 acres to remain with Macharia Wariunge and Mary Kamwagira Karuga. Aggrieved with the decision, Macharia Wariunge and Mary Kamwagira Karuga filed an appeal in the High Court on 4th May, 2000.
3. Before the appeal could be heard, both Mary Kamwagira Karuga and Macharia Wariunge died on 1st December, 2001 and 16th July, 2003 respectively. Consequently, the appellant substituted both of the

deceased persons in the appeal. On 22nd March, 2010 the appeal in the High Court was dismissed for want of attendance and prosecution.

4. Subsequently, the appellant filed an application dated 22nd March, 2011 seeking *inter alia*:-

- ***Stay of further proceedings in Muranga PMCC No. 228 of 1999 pending the hearing and determination of the application.***
- ***The appeal be re-admitted for hearing.***

The grounds upon which the appellant relied on were that after the 2007/2008 post- election violence, her daughter's family was affected by the clashes; she moved to Rift Valley to assist her daughter who had lost her husband during the clashes. While in Rift Valley, the appellant contracted a strange disease in her leg which incapacitated her between the year 2009 and 2010. She regained her mobility in the year 2010 and returned home in the year 2011. She learnt that the appeal had been dismissed in the year 2011. She maintained that she has always been keen to prosecute the appeal save for the misfortune that befell her. She deposed that she stood to suffer irreparable harm if the appeal was not heard on its merits.

5. By a ruling dated 14th October, 2011, the learned Judge (Sergon, J.) dismissed the appellant's application. Aggrieved with the ruling, the appellant filed this appeal based on the following grounds:-

- ***The learned Judge erred in law and in fact in denying the appellant a basic right to be heard.***
- ***The learned Judge erred in law by ignoring and/or failing to take into consideration evidence and/or the reasons advanced by the applicant for failure to attend court.***
- ***The learned Judge erred in law and in fact by finding that the appeal had taken many years without being prosecuted without plausible reasons.***
- ***The learned Judge erred in law and fact by failing to consider the merits of the appeal.***

During the hearing of the appeal, Mr. Kimwere appeared for the appellant. Despite being served with the hearing notice, there was no appearance for the respondent. Mr. Kimwere submitted that the learned Judge denied the appellant the right to be heard. He argued that the respondent could have been compensated by way of costs if the appeal had been reinstated. Further, that the respondent would not have suffered any prejudice because he had never occupied the suit land. Mr. Kimwere submitted that the learned Judge did not consider any of the reasons advanced by the appellant for her failure to attend court. He argued that the appeal was filed in the year 2000 but the original appellants died before the matter was concluded. The appeal was admitted for hearing in the year 2007 and the appellant's counsel had only been absent on two occasions. He contended that the learned Judge did not consider the merits of the appeal.

7. We have considered the grounds of appeal, the Record of Appeal, submissions of the parties and the law. The issue that is before us is whether the learned Judge (Sergon, J.) erred in declining to reinstate the appellant's appeal which had been dismissed for non-attendance and want of prosecution. In declining to re-instate the appeal, the learned Judge exercised his discretionary jurisdiction. Before we can interfere with the learned Judge's discretion we must be satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or, that he misapprehended the law or failed to take into account some relevant matter. See ***Mbogo & Another- vs- Shah (1968) E.A. 93.***

8. The appellant's appeal was dismissed for non-attendance under the provisions of ***Order 42 rule 20*** of the ***Civil Procedure Rules***. ***Order 42 rule 21*** of the ***Civil Procedure Rules*** provides:-

“where an appeal is dismissed under rule 20, the appellant may apply to the court to which such appeal is preferred for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.”

In ***Richard Nchapi Leiyagu -vs- IEBC & 2 others- Civil Appeal No. 18 of 2013***, this Court expressed

itself as follows:-

“We agree with the noble principles which go further to establish that the court's discretion to set aside an ex parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.”

Therefore, we have to ask ourselves whether the failure to attend court or prosecute the appeal by the appellant constituted an excusable mistake or was it meant to deliberately delay the cause of justice.

9. The appellant contended that she was unable to attend court or prosecute the appeal because of a series of misfortunes that befell her. It was her contention that after she was substituted with the deceased persons, the appeal was admitted for hearing in the year 2007. Following the post-election violence in the year 2007/2008 she went to Rift Valley to assist her daughter. Thereafter, she was incapacitated by a strange illness between the years 2009 and 2010. After her recovery she returned home in the year 2011 and found out that the appeal had been dismissed. We find that the explanation given by the appellant was candid and excusable. In addition this Court in ***Twiga Chemicals Industries –vs-Allan Stephen Reynolds- Civil Appeal No. 300 of 2006***, while considering instances that a court ought to exercise its discretion in setting aside *ex parte* orders held,

“The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or otherwise to obstruct or delay the cause of justice. (See Shah –vs- Mbogo [1969] E.A. 116.) In exercising the discretion, the court considers inter alia the facts and circumstances both prior and subsequent and the merits of either side. The court also considers whether or not the affected party can reasonably be compensated by costs for the delay, always remembering that to deny a party a hearing based on merits should be the last resort of the court.”

In this case, the inconvenience caused to the respondents by the non-attendance of the appellant could have been compensated by costs.

10. We are of the considered view that the learned Judge ought to have reinstated the appellant's appeal to give the parties herein an opportunity to be heard on the same and for the appeal to be determined on merit. In ***Richard Nchapi Leiyagu -vs- IEBC & 2 others (supra)***, this Court expressed itself as follows:-

“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 at the end of the day there should be proportionality.”

11. We find that the learned Judge misdirected himself in exercising his discretion by declining to reinstate the appellant's appeal and by extension denying the appellant a hearing. Accordingly, we allow the appeal herein, set aside the ruling dated 14th October, 2011 and substitute thereto with an order allowing the appellant's application for reinstatement of the appellant's appeal in the High Court. We further direct that the appeal in the High Court be heard on its merits. We however award costs to the respondent for the application for reinstatement of the appeal dated 22nd March, 2011 in the High Court. Costs of this appeal to abide by the outcome of the appeal in the High Court.

Dated and delivered at Nyeri this 17th day of June, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR