



**Ntari v Mwikathi (Environment and Land Appeal 3 of 2023)
[2024] KEELC 5316 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5316 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 3 OF 2023**

CK YANO, J

JULY 18, 2024

BETWEEN

EUNICE MUKIRI NTARI APPELLANT

AND

JANE CUURI MWIKATHI RESPONDENT

(Being an appeal against the ruling of the Chief Magistrate's court at Meru Hon. Nyambu) in CMCC NO. 249 of 2015 delivered on 23/11/2021)

JUDGMENT

Introduction

1. The appellant herein filed an application dated 9th March, 2021 expressed to have been made under section 1A, 1B and 3A of the [Civil Procedure Act](#) and order 12 Rule 7 and Order 51 of the Civil Procedure Rules seeking to have the trial court review, set aside and vary the orders made on 9th March 2021 dismissing the appellant's application dated 24th November, 2020 for non-attendance and to have the said application reinstated. The application was opposed by the respondent. By a ruling delivered on 23rd November, 2021, the trial court Hon. D.W Nyambu (C.M) dismissed the said application with costs to the respondent.
2. Being aggrieved by the said ruling, the appellant filed this appeal on the following grounds-
 1. The learned trial magistrate erred in law and fact in that she misunderstood the law and wrongly interpreted and applied the same thus arrived at a wrong conclusion.
 2. The learned trial Magistrate erred in law and fact in her decision in her interpretation and application of Judicial discretion and failed to apply judicial discretion in a just manner.



3. The learned trial magistrate erred by failing to consider and apply the facts and evidence of the appellant in the suit before her thereby arrived at an erroneous conclusion.
4. The decision of the learned Magistrate is against the weight of evidence and the law.
3. The appellant prays for the appeal to be allowed and the ruling of the trial court to be set aside and an order reinstating the appellant's application dated 24th November, 2020 for hearing before a different Judicial Officer. The appellant also seeks to be awarded the costs of the appeal.
4. The appeal was canvassed by way of written submissions. The appellant filed her submissions dated 14th March, 2024 through the firm of Munyoki Maheli & Co. advocates while the respondent did not file any submissions either within the time granted by the court or at all.

Appellant's Submissions

5. It was submitted on behalf of the appellant that the application dated 24th November, 2020 which was coming up for hearing on 9th March, 2021 was in pursuance of the execution of the court's decree dated 15th November, 2015 wherein the appellant was awarded damages of kshs. 224,400/=. That it was essentially seeking the trial court to approve conditions of sale of the respondent's property in execution of the decree of the trial court after the respondent declined to settle the decretal sum.
6. It was submitted that when the application came up on 9th March, 2021 the appellant's counsel, Aoko Agola Otieno attempted to log into the virtual Court, but experienced challenges logging in, and opted to appear in open court physically, but found the matter had been mentioned virtually and dismissed for non-attendance. That in her ruling, the learned trial magistrate stated that the appellant's counsel did not present any evidence to show that she had attempted to log in unsuccessfully. That the trial court further grounded its decision on the fact that the court handled its matters virtually on the said date and no other counsel raised a complaint of being unable to login. The appellant contends that it is virtually impossible to prove that she tried to log in and failed, adding that it is not new that MS Teams system occasionally fails, either due to network related challenge or the specific link or device problems. That both the courts and advocates still experience challenges with the virtual court platforms for varied reasons. It was pointed out that this was in March, 2021 when the virtual platform was still a new phenomenon and that it was normal that challenges like the one experienced by counsel for the appellant would arise. The appellant's counsel submitted that as an officer of the court, she had no reason to lie to the court and neither was it proven that she was lying to the court. Learned counsel for the appellant argued that requiring her to prove that she had challenges logging into the court was a tall order.
7. It was further submitted on behalf of the appellant that the effect of the trial court's ruling dismissing the appellant's application is that the appellant has a decree that she wishes to execute, but will be left to babysit the same in light of the impugned ruling. It was submitted on behalf of the appellant that the learned trial magistrate erred in law and fact when she held that the appellant's right to access justice was not violated in any way. That it was the first time that the application was coming up for hearing and it was in the period where people were trying to navigate through the Covid – 19 season. That it is not like the appellant's counsel had always failed to prosecute the said application.
8. Learned counsel for the appellant submitted that a perusal of the authorities cited by the trial court indicates that she failed to appreciate the position of the courts in a matter such as the one that was before her. That in all the authorities cited by the trial court, the courts had favoured an approach that promote substantive justice over technicalities that hinder access to justice. The appellant's counsel referred to the case of Philip Kiepto Chemwolo & another Vs Augustine Kubende [1986]



eKLR, Mwangi Kimenyi Vs Attorney General & another [2014] eKLR and Ghehona Vs Seventh Day Adventist Church of East Africa Union [2013] eKLR cited by the trial magistrate and submitted that the learned trial magistrate went against all those authorities. That the trial court required the appellant's counsel to do the impossible. It was pointed out that this was an application made post judgment in which the appellant sought for ways to execute the decree of the court and questioned the need of the judgment and decree of the court if the appellant cannot benefit from it. Learned counsel for the appellant submitted that the appellant was sent away from the seat of justice empty handed. She prayed that this court grants her relief, as the old adage of equity states that equity shall suffer no wrong to be without a remedy.

9. It was further submitted that the appellant had filed the application to reinstate the dismissed application timeously, the same having been filed on the same date that the initial application had been dismissed. That therefore, there was no delay on the part of the appellant and neither was there any prejudice to be suffered by the respondent herein had the application dated 24th November, 2020 been reinstated for substantive hearing.
10. The appellants counsel urged the court to set aside the decision and ruling of the learned trial magistrate and substitute it with an order reinstating the appellant's application dated 24th November, 2020 for hearing before a different court. The appellant therefore prays for the appeal to be allowed with costs.

Determination

11. I have perused and considered the record of appeal, the grounds of appeal, the written submissions filed and the authorities cited. This appeal is against the exercise of discretion on the part of the learned trial magistrate to dismiss the appellant's notice of motion application dated 9th March, 2021 which sought to reinstate the application dated 24th November, 2020 which was dismissed on 9th March 2021 for non-attendance. In determining this appeal therefore, the issue is whether the trial court properly applied the laid down principles in refusing to reinstate the appellant's application. As rightly held by the learned trial magistrate, setting aside is a discretionary remedy and an applicant must give sufficient reason for the court to exercise its discretion in his/her favour.
12. In the case of Mbogo V Shah (1968) EA 96, the Court of Appeal stated as follows:

“I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion...”
13. In John Nahashon Mwangi Vs Kenya Finance Limited (in liquidation [2015] eKLR, the tests to apply in an application to reinstate a suit were stated to be -;

“Whether there are reasonable grounds to reinstate, considering the prejudice that the defendant would suffer if reinstatement of the suit was made against the prejudice the plaintiff would suffer if the suit is not reinstated.”
14. The question therefore is whether the appellant herein had demonstrated reasonable grounds for setting aside the dismissal order and for the reinstatement of the application and whether the respondent would have suffered prejudice if the application was reinstated.



15. The court's main mandate is to do justice to parties and must exercise the discretion judiciously to avoid injustice resulting from accident, inadvertence or excusable mistake. It is trite law that the discretion to reinstate a suit or an application is to be exercised not in a design of assisting a person who has deliberately sought to obstruct the course of justice.
16. In this case, the appellant's counsel blamed technological hitches and argued that she was not able to log into the microsoft teams on 9th March 2021. That she immediately went to open court but found that the matter had already been dealt with and the application dismissed for non-attendance. The learned trial magistrate held that there was no evidence presented to confirm that indeed the appellant's counsel made an attempt to log into the system but failed. That it was just the word of the advocate and the appellant. The trial court further noted that other matters proceeded via teams and that no other advocate claimed that they were unable to log in. With utmost respect to the learned trial magistrate, this conclusion, in my view was erroneous. I say so because the alleged technological hitch could have been on the side of the appellant's advocate and not other parties.
17. In *Mutinda Musila Malua Vs Ngunga Yatta Deputy County Commissioner Kitui West Sub-County & 2 others* [2021] eKLR, Angote J reinstated a dismissed petition due to the failure of internet connectivity since the advocate addressed the court albeit late after the petition had been dismissed as a sign of his efforts to reach court at the earliest opportunity possible. In the instant case, the appellant's counsel indicated that following her inability to log into the teams she immediately went physically to the open court, but found that the appellant's application had already been dismissed for non-attendance. The appellant filed the application for reinstatement on 9th March, 2021, the very day that the application dated 24th November, 2020 was dismissed for non-attendance.
18. It is my finding and I so hold that the application for reinstatement was filed timeously, and the appellant's counsel tried to reach out to the trial court to express her predicament immediately the impugned orders were made. In my view, the reason given by learned counsel for the appellant for her failure to appear online to prosecute the appellant's application was sufficient and there was no prejudice to be suffered by the respondent had the application been reinstated for hearing on merit.
19. Article 48 and 50 of *the Constitution* of Kenya guarantees every Kenyan right to access justice and a fair hearing. Further, Article 159 requires that justice shall be administered without undue regard to technicalities while Section 3, 4 and 13 of the *Environment and Land Court Act* and Sections 1A, 1B and 3A of the *Civil Procedure Act* expects courts to strive towards substantive justice.
20. On the whole, upon the re-evaluation of the material on record, I am satisfied that the trial court erred in the manner it evaluated the application for reinstatement and in applying it to the relevant principles of law. There was thus no factual or legal basis for making the finding that there was no sufficient reason given to enable her exercise discretion in favor of the appellant.
21. Consequently, it is my finding that this appeal is meritorious. I allow it with the result that the ruling and orders of the learned trial Magistrate made on 23rd November, 2021 are set aside. I substitute therefore an order allowing the appellant's application dated 9th March 2021 with no order as to costs. The appellant's application dated 24th November, 2020 is reinstated for hearing before a different magistrate other than Hon. D.W Nyambu, C.M.
22. Considering that the respondent did not file submissions, I order that parties bear their own costs of the appeal.
23. Orders accordingly.

DATED SIGNED AND DELIVERED AT MERU THIS 18TH DAY OF JULY, 2024



IN THE PRESENCE OF

Court Assistant – Tupet

Maheli for appellant

C.K YANO

JUDGE

