Ambalasi v Lovega (Civil Appeal 27 of 2023)
[2025] KEHC 590 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KEHC 590 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 27 OF 2023

AC BETT, J

JANUARY 24, 2025

BETWEEN

CHRISPINE MACHIMBO AMBALASI ..... APPELLANT

AND

HERMAN LOVEGA ..... RESPONDENT

(Being an appeal against the ruling and orders of Honourable Principal Magistrate E. Malesi vide Kakamega MCC No. 241 of 2017 delivered on the 19th day of February 2021)

JUDGMENT

1. This Appeal arises from a Ruling of the trial court delivered on 19th February 2021 that dismissed the Appellant's application for reinstatement.

2. The Appellant herein filed a suit in Kakamega CMCC No. 241 of 2017 against the Respondent where he was seeking compensation for injuries he sustained in an accident on or about 4th December 2016 that involved a motor vehicle that was allegedly driven by the Respondent.

3. The matter came up for mention on 27th February 2018 where the trial court dismissed the case on its own motion for non-attendance by the parties.

4. The Appellant filed a Notice of Motion dated 15th October 2019 where he sought reinstatement of the suit but the same was dismissed on 19th February 2021 and being dissatisfied by the ruling of the trial court, the Appellant filed the instant appeal vide a Memorandum of Appeal dated 20th February 2023 based on the following grounds:-

    a. That the learned trial magistrate erred in law and in fact in dismissing the Appellant's application for reinstatement of the suit while misapplying the law on the implication of failure by a party and or his counsel to attend court on a date fixed for mention of a case.

b. That the learned magistrate erred in law and fact by failing to apply his discretion judiciously, when dismissing the application for reinstatement of his case.

c. That the learned trial magistrate erred in law and fact by failing to make a finding that the orders of 27th February 2018 were made per incuriam.

d. That the Learned magistrate erred in law and fact in locking out the appellant from the seat of justice by dismissing his application for reinstatement of the suit thereby infringing on his rights to a fair hearing guaranteed in Articles 50 and 159 of *the constitution*.

e. That the Learned Trial Magistrate erred in law and fact by failing to make a proper evaluation of the material before him and in particular the fact that the appellant was not aware of the mention date of 27th February 2018.

f. That the Learned Trial Magistrate erred in law and fact in blaming the Appellant for failure to attend court on 27th February 2018 when there was no basis for such a finding.

g. That the Learned Trial Magistrate erred in law and fact in visiting the mistake of the counsel on Appellant and thereby occasioning miscarriage of justice.

5. This Court directed the parties to dispose of the Appeal by way of written submissions and both parties filed their submissions.

Appellant's Submissions

6. The Appellant filed his submissions dated 11th July 2023 where he addressed the issues raised on the Memorandum of Appeal. In the submissions, the Appellant argued that the learned trial magistrate misapplied and or misinterpreted order 12 rule 1of the Civil Procedure Rules when he dismissed their case which had been set for mention on 27th February 2018 for non-attendance by the parties.

7. The Appellant averred that the suit was first mentioned on 12th October 2017 and a further mention was set on 14th November 2017 where the court gave directions that the registry fixes a date which was set for 27th February 2018 and when none of the parties appeared, the court dismissed the case.

8. The Appellant contended that order 12 rule 1of the Civil Procedure Rules is with regard to a suit being dismissed when a matter is scheduled for hearing and not for mention as it was in their case. The Appellant averred that they were unaware that the matter was coming up for mention on that day hence the non-attendance.

9. He submitted that the court's reason for dismissing the suit does not find application under Order 12 Rule 1 since the rule does not apply where the court wants to punish a party who is not vigilant in prosecuting his case. They averred that if the court wanted to take the route of punishment for want of prosecution, it should have instead invoked the provisions of Order 17 Rule 2 of the Civil Procedure Rules. They further posited that Order 17 Rule 2 of the Civil Procedure Rules only applies where a party has not taken steps to prosecute their case for more than one year but that was not their position since it was hardly six (6) months before the court dismissed their suit. They argued that the Appellant had been active to have the suit prosecuted expeditiously by attending the registry on 12th October 2017 where he took a mention date for 14th November 2017.

10. The Appellant further submitted that the trial court failed to exercise its discretion judiciously by focusing on the procedural technicalities as opposed to substantive justice and quoted under Article 50 and 159 of *the Constitution* as well as in the case of John Nahashon vs. Kenya Finance Bank Limited [2015] eKLR, in Joseph Kinyua vs. Go Ombachi [2019] eKLR and in Freight Kenya Limited vs.

Mahamed Abdi [2002] eKLR where the courts emphasized the importance of exercising substantive justice when considering reinstatement of a suit. They also relied on the case of Bilha Ngonyo Isaac vs. Kembu Farm Ltd & Another [2018] eKLR and Stephen Mwallyo Mbondo vs. County Government of Kilifi [2021] eKLR in advancing their argument that courts ought to exercise their discretion judiciously.

11. The Appellant argued that the mistakes of a party's Counsel should not be visited on the client and relied on the case of Philip Chemwolo and another vs. Augustine Kubende (1986) eKLR, and the case of CFC Stanbic Limited Vs John Maina Githaiga & Another [2013] eKLR where the courts unanimously agreed with this position.

12. The Appellant averred that he was not aware that the matter was coming up for mention on 27th February 2018 and that the trial court in its ruling dated 19th February 2018 focused on the advocate being aware and not on the Appellant hence placing the mistake of the advocate on him and overlooking the substantive justice on the appellant.

13. The Appellant submitted that they have satisfied the criteria necessary to reinstate the suit and prayed that this appeal be allowed with costs including those of the lower court.

Respondent's Submissions

14. The Respondent's advocate filed their submissions dated 10th August 2023 and submitted that the court judiciously exercised its discretion in dismissing the Appellant's suit. They averred that the Appellant through his advocates fixed the matter for mention and failed to attend court on the said date. They further posited that the court on its own motion gave a new mention date and caused service to the parties and that the Appellant's advocates acknowledged service of the same but failed to attend court and as a result, the court dismissed the suit by invoking Order 12 of the Civil Procedure Rules in order to avoid clogging the system.

15. The Respondent argued that it is the duty of the court to do justice between the parties to ensure just determination, effective and timely disposal of proceedings and effective use of judicial time and resources. They contended that it is upon this duty that courts dismiss suits that have been unprosecuted to ensure that other active cases have ample time to be determined.

16. The Respondent further submitted that the court judiciously exercised its discretion in dismissing the Appellant's Application for reinstatement of the suit since there was an inordinate delay on the part of the Appellant and his advocates in applying for the said reinstatement. The Respondent argues that the Appellant brought the Application for reinstatement one year and eight months after the dismissal of the suit. They averred that in an application for reinstatement of a dismissed suit or application, an applicant appeals to the discretion of the court and the court must caution itself not to exercise discretion in a manner that will result to injustice. They relied on the case of Richard Ncharpi Leiyagu Vs Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR where the court echoed similar sentiments.

17. The Respondent contended that there was no good reason to explain the delay in seeking for the reinstatement of the dismissed suit and thus the equity maxim of 'delay defeats equity' ought to be exerted in this case. The posited that the dismissal of the application for reinstatement was just and should therefore be upheld by this court.

Legal Analysis

18. I have carefully considered the Memorandum of Appeal and the grounds set out therein, the impugned Ruling of the trial court, the Record of Appeal, the rival submissions of the parties and the relevant legal provisions. I deduce that the main issue for determination herein is whether the trial court erred in dismissing the Appellant's application for reinstatement.

19. Orders of reinstatement of a dismissed suit are discretionary. It is trite that this court can only interfere with the discretion of a trial court if it is clear that the court acted in blatant contravention of laid out principles. The court in the case of Mbogo & Another v Shah [1968] EA 96 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..."

20. Order 12 Rule 7 of the Civil Procedure Rules provides:-

> " Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

21. Additionally, Section 3A of the *Civil Procedure Act* gives courts wide discretion over matters and issues that are before it. Section 3A reads as follows;

> " 3A. Saving of inherent powers of court. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

22. The trial court in the impugned Ruling dismissed the application for reinstatement on the ground that the application was brought after an inordinate delay. The learned magistrate held that: -

> " It would be expected that a suit at its nascent stage would elicit interest from the plaintiff and even the defendant seeking the same to be disposed of expeditiously. One year and eight months later the plaintiff emerges seeking reinstatement of the suit. The lapse herein cannot be solely attributed to the advocate. The client should equally bear responsibility and seek to know the status of his case in court."

23. In the Application seeking reinstatement of the suit in the trial court, the Appellant herein swore an affidavit where he averred that the failure to attend court that led to the dismissal of the suit was due to his advocate's failure to inform him of the mention date. He further averred that his former advocate never informed him about the court proceedings or the need to attend court.

24. Courts have time and again held the view that the mistakes of an advocate should not be visited upon a litigant. The Court of Appeal in CFC Stanbic Limited versus John Maina Githaiga & another [2013] eKLR expressed itself as follows: -

> " On the issue of the mistake of counsel, it is not in dispute that the appellant gave instructions to its advocates in good time once it was served with the pleadings and summons to enter appearance. Therefore, the failure to enter appearance and file a defence is clearly attributable to its advocate who failed to enter appearance and file defence in good time.

> This being the mistake of counsel, the same ought not to be visited upon the appellant. This Court is guided by the case of Lee G Muthoga V Habib Zurich Finance (K) Ltd & Another, Civil Application No. Nai 236 of 2009, where this Court held: "It's a widely accepted principle of law that a litigant should not suffer because of his advocate's oversight." In the instant appeal, we are of the view that the appellant should not suffer because of the mistakes of its counsel."

25. The trial court however did not find this argument appealing since it held the view that even in the light of the advocate's mistake, the client also bears responsibility to seek to know the status of his case in court. What seems to have largely influenced the trial magistrate's decision of dismissing the application for reinstatement of the suit is the delay by the Appellant to file the Application for reinstatement.

26. In resolving the question of delay occasioned by parties in prosecuting their cases, the court in the case of Ivita vs. Kyumbu [1984] KLR 441 held that:

> " The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

27. Based on the aforesaid, it is clear that even in the face of delay, justice can still be done. Courts are bound to do justice even in the event of a procedural technicality. The court in the case of Khadar Developers Limited v Diamond Trust Bank Limited [2020] eKLR supported this position and held that: -

> " The court agrees with Mr. Kaveke's submission that the court should not uphold a technicality and sacrifice substance or justice. Further that, where necessary, the court should bend backwards to accommodate a litigant rather than displace him from the seat of justice for want of form. This is what Article 159 of *the Constitution* and Sections 1A, 1B and 3B seek to buttress, the famous Oxygen principle."

28. Further, the court in Philip Chemowolo & another -vs- Augustine Kubede (1982-88) KAR 103 at 1040 held as follows: -

> " Blunder will continue to 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. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of parties and not the purpose of imposing discipline."

29. It follows that only when mischief can be deduced from a party's conduct will the court refrain from aiding such a party to obstruct justice. The Appellant herein claimed that his former advocate did not inform him of the mention date that led to the case being dismissed. The Appellant also averred that

his former advocate never used to update him on the proceedings. It is possible that even the delay in filing the application for reinstatement arose from the laxity of the Appellant's former advocate in prosecuting his case.

30. The Appellant cannot be said to have been mischievous or to have conducted himself in a manner that was likely to subvert justice. I also find that the Respondents did not demonstrate that they were likely to be prejudiced from the delay occasioned by the Appellant. In any case the inconvenience caused to the respondents by the non-attendance of the Appellant could have been compensated by costs.

31. Based on the foregoing, I find that the learned trial magistrate misdirected himself in exercising his discretion by declining to re-instate the appellant's suit and denying the appellant an opportunity to be heard on merit.

32. Accordingly, I set aside the order dated February 27, 2018 dismissing this suit. The suit is re-instated for hearing on merit. In view of the circumstances, I order the Appellant bears the cost of this appeal.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 24TH DAY OF JANUARY 2025.

A. C. BETT

JUDGE

In the presence of:

Mr. Biketi for Appellant

Ms. Jeruto for Respondent

Court Assistant: Polycap