Valley View Office Park Ltd v Ongweko (Civil Appeal 499 of 2017)
[2024] KEHC 7826 (KLR) (Civ) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7826 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 499 OF 2017

DKN MAGARE, J

JUNE 27, 2024

BETWEEN

VALLEY VIEW OFFICE PARK LTD ..... APPELLANT

AND

PAULO BARASA ONGWEKO ..... RESPONDENT

(Being an appeal from the Ruling and Order of Hon. Orenge K.I (SRM) in Nairobi CMCC No. 867 of 2016, delivered on 21st August, 2017)

JUDGMENT

1. This is an appeal from the ruling and order of the Hon. Orenge SPM given on 21/8/2017 in Nairobi CMCC No. 867 of 2016. It is an appeal on court order refusing an adjournment.

2. The appellant filed the following grounds of appeal:-

    a. That the learned Senior Resident Magistrate erred in law and fact in refusing to accord the defendant a chance to present evidence in support of its defence and thereby occasioning the Defendant a miscarriage of justice.

    b. That the court order was against the rule of national justice.

    c. That the learned Senior Resident Magistrate erred in law and fact in refusing to grant an adjournment in the circumstances of the case.

    d. That the learned Senior Resident Magistrate erred in law and fact in admitting the medical report in evidence without calling the maker.

3. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate

court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

4. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial 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 is 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."

5. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another Vs Associated Motor Board Company and Others* [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

6. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

7. In the case of *Peters vs Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

> "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

8. The appellant filed defence way back on 26/4/2016. Matter proceeded and judgement was delivered on 2/2/2017. The appeal was preferred from that judgement.

9. The appellant sought to call defence witnesses. He was reminded he had not filed witness statement. The court found that there were no documents to warrant the same. This was a matter of discretion. Even if he had been given an adjournment there were no witnesses to call.

10. In the case of *Victoria Pumps Limited & another v Kenya Ports Authority & 4 others* (Civil Suit 1 of 2000) [2023] KEHC 23746 (KLR) (18 October 2023) (Ruling), I posited as follows: -

> "I find no good reason to re-open the case. It is not just because the case is 23 years old. It is because there is no witness listed in the plaintiff's list who is unheard. There is no document unproduced. There was no report which was filed, even without leave in court. The Plaintiff simply wants to delay the case in court for reasons other than the ones they are advancing. In HA v LB [2022] eKLR, justice G V Odunga as he then was, stated as doth: -
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> Whereas under order 45 rule 1, a person aggrieved by a decision whether an appeal is allowed or not but who is not appealing, is at liberty to apply for review of the decision, that provision, in my respectful view, is not a carte blanche for abuse of the process of the Court.

In the case of *Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi* (Milimani) HCCC No. 363 of 2009 Kimaru, J dealing with the issue of abuse of the process of the Court stated as follows:

"This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilized legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it."

11. In the case of *Stephen Mwallyo Mbondo v County Government of Kilifi* [2021] eKLR, Justice B O Manani posited as follows: -

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" 22. In Shanzu Investments Ltd v Commissioner of Lands [1993] eKLR, the court observed as follows on the discretion to set aside ex-parte judicial decisions: -

''The jurisdiction to vary judgment being a judicial discretion should be exercised judicially; and, as is often said, whether judicial discretion should be exercised or withheld in a party's favour, depends, on a large measure, on the facts of each particular case. The tests for the exercise of this discretion are these: - First, was there a defense on the merits? Secondly, would there be any prejudice? Thirdly, what was the explanation for any delay?''

23. In Shabir Din v Ram Parkash Anand (1955) 22 EACA 48 Briggs JA said at 51: -

"I consider that under Order IX rule 20, the discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised."

12. The court exercised its discretion. The appellant actually agreed with the court by leaving it to the court to exercise discretion. The exercise of discretion was judicious. The court cannot interfere with exercise of discretion unless the court was plainly wrong or fettered is discretion. In this matter it was not capricious. Madan JA (as he then was) in *United India Insurance Co Ltd, Kenindia Insurance Co*

Ltd & Oriental Fire & General Insurance Co Ltd Vs East African Underwriters (Kenya) Ltd[1985] eKLR stated as hereunder: -

> " The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

13. I do not find it necessary to write other issues raised as this is an academic exercise. The appeal will not even help as judgment has already been delivered.

14. The consequences of the foregoing is that I find no merit in the appeal. The same is accordingly dismissed with costs.

15. Section 27 of the *Civil procedure Act* provides as follows: -

> "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
>
> (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

13. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows:

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law,

constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

16. The respondent is thus entitled to costs for the Appeal having been sued in a baseless appeal.

Determination

17. The upshot of the foregoing is that I make the following orders: -

    a. The appeal herein lacks merit and is dismissed with costs of Kshs.105,000/= payable within 30 days, in default execution to issue.

    b. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27TH DAY OF JUNE, 2024.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for parties

Court Assistant - Jedidah