Kimata v Maloba & another (Civil Appeal 103 of 2018)
[2022] KECA 1114 (KLR) (7 October 2022) (Judgment)

Neutral citation: [2022] KECA 1114 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 103 OF 2018

PO KIAGE, M NGUGI & F TUIYOTT, JJA

OCTOBER 7, 2022

BETWEEN

EMMANUEL ESADIA KIMATA ..... APPELLANT

AND

MARY ROBAI ..... 1ST RESPONDENT

FELISTUS MALOBA ..... 2ND RESPONDENT

(An appeal from the ruling of the Environment and Land Court of Kenya at Kakamega (Matheka, J.) dated 27th June, 2018inELC Misc. No. 19 of 2017)

JUDGMENT

JUDGMENT OF KIAGE, J. A

1. This appeal is against a ruling delivered on 27th June, 2018, by which Matheka, J. dismissed the appellant's application under Order 12 rule 7 of the *Civil Procedure Rules, 2010*. The appellant had sought orders;

    3. That this court orders dated 7.3.2018 be reviewed and set aside and the suit be reinstated for hearing;

    4. That upon the suit being reinstated the applicant, Emmanuel Esadia Kimata be substituted in place of Raphael Chasimba deceased;

    5. That the Land Registrar, Vihiga County be directed not to effect any transactions in respect of L.R. No. South Maragoli/Kegoye/656 until further orders of this court".

2. The essence of the appellant's complaint before that court was that the original appellant, Raphael Chasimba (deceased) died on 4th September, 2017 and the suit, being ELC Misc. Application No. 19 of 2017 was dismissed on 7th March, 2018 after he had passed away. The appellant asserted that it was

unfair for the respondents' counsel to indicate to court on 7th March, 2018 that the deceased appellant was absent yet she knew that he was deceased, having filed a suit in Kakamega ELC No. 316 of 2017 praying for an injunction to stop the deceased from being buried on the land in dispute.

3. The appellant averred that on the said day when the suit was dismissed, his counsel had instructed Mrs. Akinyi Advocate to hold brief for him but she not only arrived late, she also did not immediately relay the unhappy outcome to his advocates on record. On later perusing the court file, his advocates found that the suit had been dismissed on 7th March, 2018 for non-attendance. Moreover, the appellant contended, the suit was dismissed during a mention to give directions which ought not be the case.

4. The respondents opposed that application stating that the appellant's counsel had sought for consolidation of the subject suit with Succession Cause No. 163 of 2016. To them, the appellant was using consolidation tactics to delay the suit because the Environment and Land court cannot hear a succession case. Further, the respondents averred that the suit was solely based on determination of ownership of land parcel LR. No. South Maragoli/Kegoye/656, and the same was going to be determined vide a suit filed in ELC Case No. 316 of 2017 wherein the appellant's rights could be realized. The respondents objected to the reinstatement of the suit asserting that the dismissal was warranted.

5. Upon consideration of the application, the learned Judge dismissed it holding that she found the reasons given by the appellant inexcusable.

6. That dismissal provoked this appeal in which the appellant complains that the learned Judge erred in; failing to judiciously exercise her discretion to reinstate the suit when sufficient reasons had been given by the appellant, failing to appreciate that the suit could not be dismissed for want of prosecution when a party to the suit had passed on and the time to substitute him had not lapsed, holding that there was an inexcusable delay when there was none, failing to appreciate that the case was fixed for mention and therefore it could not be dismissed for non-attendance, failing to appreciate that a litigant should not be punished or condemned for the mistake of his or her advocates, and that it was necessary to have the appellant substituted to have the matter heard and justice done to all.

7. At the virtual hearing, learned counsel Mr. Athung'a and Mr. Nyanga appeared for the appellant and the respondents respectively. Mr. Athung'a had filed written submissions which he orally highlighted. He asserted that a court exercising discretionary powers must do so with fairness, avoiding prejudice and enquiring whether reasons given are excusable. Counsel charged that the court ought to have reviewed the dismissal order, reinstated the suit and substituted the appellant in place of the deceased in view of the fact that he had put forward cogent reasons to support the same. The reasons included that; the applicant had passed on, a fact that was well known to the respondents' counsel and she ought to have informed the court of the same as an officer of the court, on 7th March, 2018 when the matter was dismissed it had been listed for mention and not hearing, and the appellant had adduced limited grant of letters of administration ad litem in respect of the deceased's estate.

8. Counsel further submitted that a suit cannot be dismissed when one party is deceased, especially where an application to have the deceased substituted by the appellant had been lodged within time. Moreover, there was no inordinate delay in prosecuting the case or filing the application, the suit having been dismissed on 7th March, 2018 and the application to have it reinstated made on 18th April, 2018. Mr. Athung'a contented that a litigant should not be punished for the mistake of his or her advocate specially where the appellant's counsel had instructed another counsel to hold his brief but the counsel arrived late. In such a case the non-attendance cannot be said to be deliberate, urged counsel.

9. Counsel further submitted that the court ought to have looked at any prejudice that may have been occasioned to the respondents if the suit was reinstated. To counsel, no prejudice would have been occasioned to the respondents, the subject matter being land which is emotive, both parties would have been given an opportunity to state their case. Mr. Athung'a faulted the learned Judge for finding that no action had been taken in the suit since 2015 yet the Environment and Land Court was established in 2017 and that is when the case was given the current number being ELC Misc. No. 19 of 2017.

10. Counsel cited *Mbogo & Anor vs. Shah* [1968] EA93 where the predecessor of this Court opined that;

> This Court will not interfere with the exercise of its 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 has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

11. He maintained that the trial court misdirected itself when it dismissed the suit on the basis that both parties were aware of the mention notice, arguing that being aware of the mention could not warrant dismissal of suit because it was not a notice to show cause why the suit should not be dismissed for want of prosecution. Neither could the mention be changed to a hearing notice *suo moto.* In short, counsel urged us to allow the appeal so that the suit can be heard on merit.

12. For the respondents, Mr. Nyanga made oral submissions contending that there are duplicate suits still pending on the same matter where the appellant could ventilate his issues. Counsel urged rather startlingly, so, that 'counsel's coming late is not an excuse, it was dereliction of duty'. To counsel, this was a fit and proper case for dismissal.

13. Having carefully considered the submissions made before us, I decipher that the central issue for our consideration is whether the learned Judge exercised her discretion judiciously in declining to reinstate the appellant's suit.

14. It is trite that when a court is called upon to exercise its discretion, it ought to do so judiciously. That is because discretionary power is derived from the law and must be exercised upon certain legal principles and according to the circumstances of each case, to the end of doing substantialjustice to the parties. See *PAtriotic Guards Ltd vs. James Kipchirchir Sambu* [2018] eKLR.

15. The appellant is inviting this Court to interfere with the discretion of the learned judge. As rightly stated by the appellant, this Court clearly delineated the parameters of our interference with the exercise of discretionary powers by the courts below in *Mbogo & Anor vs. Shah* [1968] EA93. We can only interfere with the judicial discretion of the learned judge if satisfied that she misapprehended the facts; or misdirected herself in law; or that she took into account matters of which she should not have; or failed to take into account considerations which she should have; or that her decision was plainly wrong.

16. The discretion under Order 12 Rule 7 of the *Civil Procedure Rules* is exercised so as to avoid injustice as a result of inadvertent or excusable mistakes and errors. Therefore, a court needs to satisfy itself as to whether the reason given by the appellant was excusable, the explanations plausible. The appellant contests the learned Judge's dismissal of his application for reinstatement of the subject suit arguing that he proffered compelling reasons in favour of his application, but the learned Judge failed to appreciate those reasons. At the risk of repetition, the reasons were to the effect that; the applicant in the subject suit was deceased and there was need to substitute him before the matter could proceed, the appellant had obtained a limited granted of letters of administration ad litem with respect to

the deceased's estate, the suit could not be dismissed at a mention date for non-appearance, the respondent's counsel was aware of the expiry of the applicant but failed to bring that fact to the attention of the court, and there was no inordinate delay between the date of dismissal of the suit and the date when the application for reinstatement was made.

17. In response, the respondents supported the learned Judge's dismissal of the suit arguing that the appellants could still ventilate their issues in other pending suits concerning the same subject matter. They blamed counsel who held brief for the appellant's counsel on the material date for dereliction of duty, by the fact that she arrived late for the mention.

18. With respect to the respondent's counsel, I do not agree that this is one such case where counsel can be said to have acted so negligently as to be indicted for dereliction of duty. This is the more so because it is averred without rebuttal from the respondents that the respondents' counsel was aware of the demise of the deceased applicant in the suit. I think it is a serious dereliction of the duty of candour that, as an officer of the court, she failed to inform the court of the fact, thereby allowing the suit to be dismissed. It seems to me strange that the suit was dismissed during a mention, a session that is not a hearing per se, but an opportunity for the court to give directions to the parties on the steps to take before hearing. It must be understood that courts do not exist merely for purposes of instilling discipline. We exist to do justice, not to crack the whip and wave the red card at every seeming default or infraction.

19. I can do no better than associate myself with the sentiments of Apaloo JA in *Philip Keiptoo Chemwolo & another vs. Augustine Kubende* [1986] eKLR to wit:

> I think a distinguished equity judge has said: "Blunders 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 determined on its merits."

20. 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 the parties and not for the purpose of imposing discipline. In this case, the appellants offered to pay the costs. The respondent will not agree."

Madan J., expressed similar sentiments in *Belinda Murai & 9 Others vs. Amos Wainaina* [1979] eKLR, thus;

> "The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule".

21. I think in this case the appellant made an effort to set out satisfactory reasons for his application for reinstatement of the suit. The fact that no reason was advanced to demonstrate how the respondents would be prejudiced by the reinstatement is even more a reason why the learned Judge should have allowed the application. I find that the learned Judge fell into error by concluding that the reasons advanced by the appellants were inexcusable. The reasons were solid. To my mind, just like my worthy learned brothers who went before me in this Court in the authorities cited above, unless there is a grave injustice or prejudice that is likely to be occasioned by restoring a suit, parties should ordinarily be allowed their day in court so they can present their version of facts and the court can determine the matter in a judicious way. Default orders may seem convenient in serving expedition, but what we are called upon to do is expeditious justice. That favours merit determination, in my way of thinking.

22. It should be plain that I am persuaded that the learned Judge misdirected herself in exercising her discretion and we must in law and conscience interfere.

23. I would allow the appeal and set aside the ruling and order of Matheka J. in entirety. I also award the appellant the costs of the appeal.

24. As Mumbi Ngugi and Tuiyott, JJ.A are of the same opinion, it is so ordered.

JUDGMENT OF MUMBI NGUGI, J.A

I have had the benefit of reading in draft, the judgment of my brother, Kiage, JA. I entirely agree with the reasoning and conclusion arrived thereat and have nothing useful to add.

JUDGMENT OF TUIYOTT, J.A

I have had the advantage of reading in draft, the judgment of my brother, Kiage, JA., with which I entirely agree and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF OCTOBER, 2022.

P.O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR