INPHA Phamceuticals Limited v Waweru & another (Civil Appeal E014 of 2021) [2023] KEHC 25933 (KLR) (29 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25933 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CIVIL APPEAL E014 OF 2021

AK NDUNG'U, J

NOVEMBER 29, 2023

BETWEEN

INPHA PHAMCEUTICALS LIMITED ..... APPELLANT

AND

GEOFFREY MWANIKI WAWERU ..... 1ST RESPONDENT

JOSEPH GACHEGEA NGUNJIRI ..... 2ND RESPONDENT

(Being an appeal from the ruling of the Senior Resident Magistrates Court delivered on 2nd September 2021 in Nanyuki Chief Magistrate Court Civil Suit No. 68 of 2017)

JUDGMENT

1. By a ruling dated 2nd September 2021, the Appellant's suit was dismissed for want of prosecution following a Notice to show cause undated but set for hearing on the 21st June 2021. In response to the Notice to show cause, the Appellant had filed a replying affidavit.

2. Aggrieved by the ruling and order of dismissal, the Appellant lodged this appeal against the whole of the said ruling raising the following grounds;

    i) The Learned Magistrate erred in law and fact for dismissing the suit for want of prosecution yet the Applicant had a *prima facie* case with a high probability of success.

    ii) The Learned Magistrate erred in law and fact in find that the Plaintiff did not give sufficient reasons for the delay in setting the suit down for hearing.

    iii) The Learned Magistrate erred in law and fact in failing to consider the element of public policy in preparation for his ruling

iv) The Learned Magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis bringing law into confusion and thereby deciding on erroneous findings.

v) The Learned Magistrate erred in law and fact in failing to appreciate that justice should be served without undue regard to procedural technicalities.

3. Despite evidence of service, the Respondents did not respond to the Appeal.

4. The Appeal was disposed of by way of written submissions.

5. In its submissions, the Appellant narrowed down the issues for determination as follows;

a) Whether the Learned Magistrate erred in law and fact for dismissing the suit for want of prosecution yet the Appellant had a prima facie case with a high probability of success.

b) Whether the Learned Magistrate erred in law and fact in finding the Appellant did not give sufficient reasons for the delay in setting down for hearing.

c) Whether the Learned Magistrate erred in law and fact I failing to appreciate justice should be served without undue regard to procedural technicalities.

6. This being a first appeal my duty is clearly set out in law. Mativo J (as he then was) in *Bwire v Wayo & Sailoki* (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR) (24 January 2022) (Judgment) put it succinctly as follows;

> " A first appellate is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. (See *Selle & another v Associated Motor Boat Co. Ltd. & others*[1]). As was held by the Court of Appeal for East Africa in *Peters v Sunday Post Limited*: -[21]{1968} EA 123.[2]{1958} E.A. page 424."It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."
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> A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.[33]See *Santosh Hazari v Purushottam Tiwari (Deceased)* by L. Rs {2001} 3 SCC 179."

7. A summary of the Appellant case in answer to the Notice to show cause as gleaned from the replying affidavit is that the suit before the trial court was filed on the 3rd August 2017. The summons were

extracted on 4th August 2017. About 1 year down the line, an application to serve the defendants by way of registered post and for extension of the validity of summons was filed on 17th July 2018. The application was allowed on 26th July 2018. Service of summons by way of registered post was effected on the 18th October 2018.

8. It is the Appellant's case that in the intervening period counsel handling the matter namely Everline Nyanchama, Moffart Maroko and Geoffrey Ngeresa departed from the firm.

9. Counsel Maroko is said to have written to the court on 10th April and on 25 October 2019 seeking issuance of the order dated 26th July 2018 with a view to making a request for judgement. Maroko left the firm on 30th March 2021.

10. A further request for the order dated 26th July 2019 (sic) was sent via email on 3rd June 2021. There was no response and subsequently the firm's process server on a visit to the court was handed a Notice to show cause. It is urged that counsel for the plaintiff took action before the Notice to show cause was issued and that no prejudice would be visited on the Defendants.

11. The Appellant recounts the above narrative of facts in their submissions. It is submitted further that the Appellant was genuinely and honestly ready to prosecute its case and the failure to prosecute it arose from the premature dismissal of the case. It is urged that the Appellant should not be condemned by an unlawful dismissal premised on a procedural mistake and technicalities which he knows nothing about. This, it is urged, would be against the overriding objective of the *Civil Procedure Act*.

12. Counsel urges that the failure to prosecute the matter is an error that should not be visited on the Appellant and reliance is placed on the case of *PMM v JNW* [2020] eKLR and *James Lenawanchingel v Gulsan Insaat Sanayi Tuirizn & another* [2021] eKLR.

13. As to whether the delay was explained, it is urged that the Appellant had prepared for the matter including filing documents to be relied on. The matter was prematurely dismissed as the mandatory minimum timeline had not lapsed since the last date in court.

14. The Appellant further submits that it has a good claim which should be heard on the merits. The court is urged to do substantive justice to the parties undeterred by procedural technical rules. It is submitted that the court has unfettered discretion to set aside the dismissal order and reliance is placed on the case of *Nicholas K. Cheruiyot v Kenya Midland Sacco Limited* [2021] eKLR and *Trade Circles Limited v Family Bank Limited and another*[2021] eKLR.

15. On inability to file the request for judgement, it is submitted that the Appellant moved the court vide email sent on 3rd June 2021 seeking the orders issued on 26th July 2018. The court is blamed for not giving any response to the email thus making it difficult for the Appellant to request for judgement.

16. Before the trial court was a Notice to show cause why the subject suit should not be dismissed. The Appellant responded to it by way of a replying affidavit. The court found the case suitable for dismissal and dismissed it. For determination is whether the Appellant demonstrated sufficient cause why the suit should not be dismissed.

17. I have had due regard to the Notice to show cause and the replying affidavit. I have perused the record of the trial court. I have taken into account the elaborate submissions by counsel.

18. The applicable law is to be found under Order 17 Rule 2 of the *Civil Procedure Rules.* The rule provides;

2.

(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this order.

19. The court's exercise of power to dismiss a suit for want of prosecution under Order 17 rule 2 of the *Civil Procedure Rules* is a discretionary one. The applicable principles are summed up succinctly in the case of *Allen v Sir Alfred McAlpine & Sons Ltd* (1968) All ER 543 as follows;

> "What then are the principles which the court should apply in exercising its discretion to dismiss an action for want of prosecution on the defendant's application? The application is not usually made until the period of limitation for the plaintiff's cause of action has expired. It is then a Draconian order and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue. It is for the defendant to satisfy the court that one or other of these two conditions is fulfilled. Disobedience of a peremptory order of the court would be sufficient to satisfy the first condition. Whether the second alternative condition is satisfied will depend on the circumstances of the particular case; but the length of the delay may of itself suffice to satisfy this condition if the relevant issues would depend on the recollection of witnesses of events which happened long ago.
>
> Since the power to dismiss an action for want of prosecution is only exercisable on the application of the defendant his previous conduct in the action is always relevant. So far as he himself has been responsible for any unnecessary delay, he obviously cannot rely on it. Moreover, if after the plaintiff has been guilty of unreasonable delay the defendant so conducts himself as to induce the plaintiff to incur further costs in the reasonable belief that the defendant intends to exercise his right to proceed to trial notwithstanding the plaintiff's delay, he cannot obtain dismissal of the action unless the plaintiff has thereafter been guilty of further unreasonable delay. For the reasons already mentioned, however, mere non-activity on the part of the defendant where no procedural step on his part is called for by the rules of court, is not to be regarded as conduct capable of inducing the plaintiff reasonably to believe that the defendant intends to exercise his right to proceed to trial. It must be remembered, however, that the evils of delay are cumulative, and even where there is active conduct by the defendant which would bar him from obtaining dismissal of the action for excessive delay by the plaintiff anterior to that conduct, the anterior delay will not be irrelevant if the plaintiff is subsequently guilty of further unreasonable delay. The question will then be whether as a result of the whole of the unnecessary delay on the part of

the plaintiff since the issue of the writ, there is a substantial risk that a fair trial of the issues in the litigation will not be possible.

Next as to the personal position of the plaintiff. He may, of course, have been personally to blame for the delay; but generally the ordinary litigant, once he has consulted his solicitor, is helpless before the mysterious arcana of the law. Delay, when it occurs from this stage onwards, is usually not his own fault but that of his solicitor. If, as a result of his solicitor's default, he has a remedy in an action for negligence against his solicitor; and, as already pointed out, if the solicitor is financially able to meet the damages, this remedy is an adequate one. If, however, the solicitor would be unable to meet the damages, the hardship to the plaintiff, whose action against the defendant is dismissed for want of prosecution, is grave indeed. In strict logic, the impecuniosity of the plaintiff's solicitor would not affect the defendant's right to have the action dismissed; but in exercising a discretion, even a judicial one, the courts can temper logic with humanity and the prospect that an innocent plaintiff will be left without any effective remedy for the loss of his cause of action against the defendant is a factor to be taken into consideration in weighing, on the one hand, the hardship to the plaintiff if the action is dismissed, and, on the other hand, the hardship to the defendant and the prejudice to the due administration of justice if it is allowed to proceed."

20. These principles are broken down in our local jurisprudence in *Ecobank Ghana Limited v Triton Petroleum Co Limited & 5 others* [2018] eKLR, the court observed:

> "... it is well settled that in considering whether to dismiss a suit for want of prosecution the courts will consider the following guiding principles; whether the delay is inordinate, and if it is, whether the delay can be excused and lastly, whether either party is likely to be prejudiced as a result of the delay or that a fair trial is not possible as a result of the delay."

21. A party's right to be to heard is ring fenced in clear language under Article 50 of the *Constitution*. Article 159(d) goes further to shield parties in litigation from the rigours of undue technicalities. I hasten to add that the two constitutional edicts are not a carte blanche for parties to ignore legal procedure embedded in statute or for laxity and lethargy in prosecution of cases.

22. The need for expeditious disposal of cases cannot be gainsaid. Indeed, the constitutional underpinnings on conclusion of matters in a timely manner is contained in Article 159 of the *Constitution*, which at Sub Article (2b) provides;

> (b) justice shall not be delayed;

It is the duty of the court, litigants, as well as advocates, to ensure that matters are concluded expeditiously without inexcusable delay. Sections 1A and IB, of the *Civil Procedure Act*, Cap 21, Laws of Kenya speak loudly on this duty. One of the issues that usually confront the courts with respect to dismissal of suits for delays and the subsequent applications for reinstatement, is the need for expeditious conclusion of suits. In *Mobile Kitale Service Station v Mobil Oil Kenya Limited & another* [2004] eKLR (Warsame J as he then was) it was held:

> "I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/ or negligence of

the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders."

23. Turning back to the facts before the court in this matter, the cause of action arose from a road traffic accident that occurred on 12th August 2014. The suit was filed on 3rd August 2017. The record readily shows that the Defendants neither entered appearance nor filed defence. The Appellant made an application to serve summons by way of registered post which orders were granted on 26th July 2018. A letter seeking re-issuance of summons dated 13th August 2018 was received by court on 12th October 2018. Service was effected on 18th October 2018.

24. The subsequent action in the matter relate to letters dated 10th April and on 25 October 2019 seeking issuance of the order dated 26th July 2018 with a view to making a request for judgement. A further request for the order dated 26th July 2019 (*sic*) was sent via email on 3rd June 2021.

25. The duty to explain the delay to the satisfaction of the court lies with the Appellant. The Appellant's explanation is predicated on letters written to the court requesting for orders of court issued on 26th July 2018. To put the matter in proper perspective, it is worthwhile to mention that those orders essentially granted the Appellant leave to serve summons by way of substituted service through registered post. I note that the letters dated 10th April 2019 and 25th October 2019 are not on the court record.

26. Suffice it to note that even assuming all the letters were written and received by the court, the letters do not explain the delay in the prosecution of the case. By their own admission, the plaintiff confirm that service of summons was effected on 18th October 2018. It is submitted that that upon service, the Respondents delayed to enter appearance within the stipulated time of 14 days. Having been granted the order to effect service by way of registered post, orders which are in the court file, nothing stopped the Appellant to file a request for judgement with an affidavit of service by the process server confirming how the process was served. The unavailability of the orders of 26th July 2018 is a red herring and does not assist the Appellant to explain away the delay.

27. Covid and departure of counsel from the firm have been cited as causes for the delay. The default in the filing of defence by the Respondents occurred long before Covid was confirmed in Kenya by the Ministry of Health in early 2020. The departure from the firm by counsel handling the matter is not a satisfactory explanation for the delay. If changes in staffing in legal firms was to be liberally accepted as a cause for failure to prosecute matters timeously, we would be opening up a pandoras box in the litigation arena whose effect would impact negatively on the administration of justice. It is upon legal firms to manage change-overs and hand-overs seamlessly alive to client's interests.

28. The delay in the prosecution of the matter before the court is inordinate and inexcusable. Even if I was to take the view that the delay was excusable or consider that even if inexcusable, justice could still be done to the parties, I have reviewed the facts of the case. The cause of action as noted above was a road traffic accident that occurred on the 12th August 2014. A successful prosecution of the matter would depend on the recollection of the witnesses of an event that occurred 9 years down the line. In those circumstances, a fair trial may be elusive given human frailties of memory loss, misplacement of documents or even non-availability of witnesses.

29. The position was well articulated in *Ivita v Kyumbu* [1984] KLR 441 (Chesoni J), where the court stated:

> " 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."

30. In the instant suit there would be obvious prejudice on the Respondents as recounting the happenings at an accident scene a decade after is no mean task given that such incidents occur in a quick flash and reliance would be placed on the evidence of eye witnesses who may not be found or who may not be in a position to vividly remember important details after a long lapse of time.

31. Finally, I have perused the record and have been unable to find a properly filed Notice of Change of Advocates other than the one exhibited as "Exhibit CNO" annexed to the affidavit of Chellion Nyamweya Onuko in reply to the Notice to show cause at the trial court. In essence therefore, it is questionable whether the firm of Mose, Mose & Mose Advocates were properly on record in the subsequent proceedings before the trial court and now before this court, the result of which, appeal would stand struck out.

32. In the end, I reach the conclusion that the exercise of discretion on the part of the trial magistrate cannot be faulted. With the result that the Appeal herein has no merit and is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 29TH NOVEMBER 2023

A.K. NDUNG'U

JUDGE