NIC Bank Limited v Paul (Civil Appeal 429 of 2018)
[2022] KEHC 11164 (KLR) (Civ) (31 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11164 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 429 OF 2018

JK SERGON, J

MAY 31, 2022

BETWEEN

NIC BANK LIMITED ..... APPELLANT

AND

STEPHEN MUBICHI PAUL ..... RESPONDENT

(Being an appeal from the ruling and order of A.N. Makau (Mr.) (Senior Resident Magistrate) delivered on 17th August, 2018 in Civil Suit No. 1566 of 2007)

JUDGMENT

1. The appellant, being also the plaintiff in Civil Suit No. 1566 of 2007, instituted the said suit against the respondent herein and another person ("other person") now deceased, vide the plaint dated 14th February, 2007 claiming the sum of Kshs.762,692.46 plus costs of the suit and interest thereon, under the claim for breach of contract.

2. The appellant pleaded that by way of a hire purchase agreement entered into on or about the 22nd day of December, 2003 the appellant had agreed to finance the hire purchase by the respondent and other party, in respect to the motor vehicle registration number KAR 250M Isuzu TFR 30 Pick-up ("the subject motor vehicle") at a consideration of Kshs.1,303,204/= payable by monthly instalments of Kshs.213,204 for a period of 36 months or by way of hire purchase instalments of Kshs.36,200/= with effect from 15th January, 2004.

3. The appellant pleaded in the plaint that the respondent and other party only paid seven (7) instalments of Kshs.36,200/= between 9th January, 2004 and 9th August, 2004 and therefore fell into arrears in the sum of Kshs.738,571.45 which the appellant was claiming in the suit together with accrued interest at the sum of Kshs.24,121.21 as at 21st July, 2005, totaling the sum of Kshs.762,692.46.

4. Upon entering appearance, the respondent and other party put in their joint statement of defence dated 6th March, 2015 to deny the averments made in the appellant's claim.

5. Going by the record, the trial court subsequently dismissed the suit for want of prosecution on 5th May, 2017 noting that no action had been taken by any of the parties for one (1) year. Subsequently, the appellant's advocate filed the application dated 9th April, 2018 seeking to reinstate the suit and which application was opposed by the respondent.

6. Following written submissions by the respective parties on the Motion, the trial court through its ruling delivered on 17th August, 2018 moved to dismiss the said Motion with costs.

7. The abovementioned ruling has triggered the appeal now placed before this court. The appellant has filed the memorandum of appeal dated 13th September, 2018 on the basis of the 13 grounds hereunder:

    i. That the learned trial magistrate erred in law and in fact by finding that the failure of the court to serve the appellant with the notice to show cause prior to dismissal of the suit for want of prosecution was a mere technicality.

    ii. That the learned trial magistrate erred in law and in fact by finding that there was undue delay on the part of the appellant in filing the application seeking to reinstate the suit after its dismissal on 5th May, 2017.

    iii. That the learned trial magistrate erred in law and in fact in finding that the suit was first dismissed on 21st November, 2014 and that 5th May, 2017 was the second time the suit was being dismissed.

    iv. That the learned trial magistrate erred in law by failing to consider the prejudice to be occasioned to the appellant by dismissing the appellant's application.

    v. That the learned trial magistrate misdirected herself on the facts and erred in finding that the appellant did not take any action since reinstatement of the suit.

    vi. That the learned trial magistrate misdirected herself and erred by failing to take into account the fact that the appellant was never served with the notice to show cause prior to the dismissal of the suit.

    vii. That the learned trial magistrate misdirected herself on the facts by finding that the appellant did not discharge its obligation of diligently prosecuting the suit.

    viii. That the learned trial magistrate misdirected herself on the facts and erred by finding that the appellant did not offer any explanation for the "undue delay" in filing the application to reinstate the suit.

    ix. That the learned trial magistrate misdirected herself on the facts and the law and based her findings on wrong and irrelevant considerations.

    x. Thatin all the circumstances of the case, the finding by the learned trial magistrate is totally insupportable in law.

    xi. That the learned trial magistrate erred in law and in fact in placing reliance on extraneous evidence and matters in arriving at his decision.

    xii. That the learned trial magistrate was openly biased in favor of the respondent.

xiii. That in all the circumstances of the case, the learned trial magistrate failed to do justice before the appellant.

8. This court gave directions for the appeal to be canvassed by way of written submissions. At the time of writing this judgment, only the submissions by the appellant had been availed. There is no indication as to whether the respondent complied with the directions requiring him to file his submissions.

9. The appellant on its part contends that notwithstanding the discretion that may be enjoyed by a court of law in determining whether to serve parties with a notice to show cause pursuant to the proviso of Order 17, Rule 1 of the *Civil Procedure Rules* on dismissal of a suit by the court suo motu, such discretion ought to be exercised judiciously and judicially, as held by the Court of Appeal in the case of *Judicial Service Commission v Davis Gitonga Karani* [2020] eKLR.

10. The appellant states in its submissions that the learned trial magistrate did not appreciate the fact that the appellant had provided a reasonable and excusable explanation for failing to prosecute its suit and that the learned trial magistrate also did not consider the prejudice that it would suffer as a result of the dismissal order and yet there is a reasonable cause of action against the respondent.

11. To buttress its argument above, the appellant has made reference to the case of *Anchor Limited v Sports Kenya* [2017] eKLR where the court held that:

> "Madan JA stated in the oft quoted case between *DT Dobie & Company (Kenya) Ltd v Muchina* (1982) KLR 1 that
>
> The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of court.
>
> No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment."

12. It is the contention by the appellant that the trial court fell into error by concluding that the suit had remained unprosecuted for a prolonged period of time and yet the appellant had made attempts to prosecute the same on various occasions prior to the dismissal order.

13. For all the foregoing reasons, the appellant urges this court to allow the appeal and to disturb the ruling of the learned trial magistrate by reinstating the suit.

14. I have carefully considered the submissions for the appeal, as well as the applicable authorities relied upon. I have likewise studied the relevant documents and proceedings placed before the trial court and its ruling on the same.

15. By and large, the 13 grounds raised on appeal are co-related in the sense that they revolve around the subject of dismissal and reinstatement of the suit. I will therefore address them contemporaneously.

16. The Notice of Motion dated 9th April, 2018 set out among its grounds that the appellant's advocate was never served with a notice to show cause as to why the suit should not be dismissed and that the appellant has a good case against the respondent.

17. The above sentiments were echoed in the supporting affidavit of advocate Vivienne Eyase, save to add that prior to dismissal of the suit, the appellant's advocate had severally tried to have the suit set down for hearing to no avail and that the respondent does not stand to suffer any prejudice if the dismissal order is set aside.

18. In his replying affidavit, the respondent stated that the appellant had neither taken any active steps towards prosecuting its case nor communicated to the respondent's advocate regarding setting a date for hearing, and without reason.

19. The above arguments were reiterated by the parties' respective advocates at the submissions stage of the Motion.

20. Ultimately, the learned trial magistrate outlined in his ruling that that was the second time the appellant's suit had suffered a dismissal since the same had initially been dismissed on 21st November, 2014 in the absence of any action being taken for over four (4) years after filing the suit.

21. The learned trial magistrate pointed out that he agreed with the sentiments made by the respondent that there has been an inordinate delay in prosecuting the claim which is a clear indication that the appellant has lost interest in the matter.

22. The learned trial magistrate also took into account the overriding objective which requires the just and expeditious determination of matters with efficiency and in a timely manner, and stated that judicial discretion in reinstating a suit can only be applied where there is a clear indication of steps taken to prosecute the claim expeditiously.

23. It is the reasoning by the learned trial magistrate that the giving of a notice to show cause is not mandatory and hence the appellant cannot be heard to peg its application for reinstatement purely on the fact that no notice to show cause was served upon it.

24. Finally, the learned trial magistrate found that the appellant had not provided reasons for not prosecuting its claim and therefore declined to set aside the dismissal order.

25. The typed proceedings attached to the record of appeal indicate that prior to the dismissal order, the suit was last in court on 26th February, 2015 on which day the trial court gave the parties a mention date in respect to an application which was filed by the respondent.

26. It is apparent from the typed proceedings that the suit was dismissed by the trial court on 5th May, 2017 on its own motion and in the absence of the parties and pursuant to Order 17, Rule 2(1) of the *Civil Procedure Rules, 2010* which stipulates as follows:

> "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."

27. From the foregoing provision, it is clear that the trial court was enabled to exercise its discretion as it deemed fit in deciding whether to dismiss the suit for want of prosecution.

28. It is noteworthy that once a court applies its discretion in dismissing a suit, the same can only be set aside under reasonable circumstances and where justice would be achieved.

29. It is also noteworthy that the law on expeditious prosecution of suits is well settled. As the learned trial magistrate aptly put it, the overriding objective of civil procedure requires that parties exercise a high level of diligence and commitment in prosecuting their suits.

30. On the subject of the notice to show cause, upon my perusal of the record, I did not come across anything to indicate that the same had been served upon the parties prior to the dismissal order.

31. Nonetheless, going by the above provisions of Order 17, Rule 2(1) (*supra*), it is well settled that the issuance of a notice to show cause is discretionary and not mandatory; as the learned trial magistrate

rightly pointed out. In this manner, I concur with the finding of the learned trial magistrate on the subject.

32. Concerning the number of dismissals, upon my study of the record, I note that the suit had initially been dismissed on 21st November, 2014 for similar reasons.

33. The circumstances surrounding the reinstatement have not been clearly captured in the typed proceedings but it is apparent that the suit was reinstated sometime in 2015 when the respondent filed the application dated 5th February, 2015 seeking leave of the court to file a fresh statement of defence and counterclaim. It remains unclear whether a determination was made in respect to that application. This was the last action in the suit.

34. Suffice it to say that, it is apparent that the appellant's suit has so far suffered two (2) dismissals and the learned trial magistrate was correct in pointing this out in his ruling.

35. On the subject of reasons for the delay in prosecuting the suit, I did not come across anything any explanation by the appellant for the delay of over two (2) years in prosecuting the suit, prior to its second dismissal. The learned trial magistrate termed the delay as being inordinate.

36. In that respect, the question remains: what constitutes inordinate delay? The case of *Mwangi S. Kimenyi v Attorney General & another* [2014] eKLR cited in the submissions by the appellant, brings perspective into what may be considered to be inordinate delay in the following manner:

> "There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable...Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases."

37. Upon considering the fact that the suit was filed over 10 years ago in the year 2007 and the same had not proceeded for hearing, I am convinced that there was a prolonged delay in its prosecution. I am also convinced that the defendant contributed to the delay since the last action in court concerned the hearing of his application which it would appear was not determined on merit.

38. Further to the foregoing and as earlier noted, the appellant did not provide any reasonable explanation for the delay in prosecuting the suit or the delay of close to one (1) year in bringing the application for reinstatement following the second dismissal order.

39. That notwithstanding, I am enjoined by law to still consider the interest of justice and to balance the competing interests of the parties even where there has been a prolonged and inexcusable delay. In so saying, I draw attention to the case of *Exclesior Mihaso Limited v Principal Secretary, Ministry of Health* [2016] eKLR relied upon in the submissions by the appellant and in which the court determined thus:

> "...the test in any Application's for dismissal of the suit for want of prosecution is a balance between a prolonged and inexcusable delay and the need to give justice to both parties. Hence, the Court need to weigh and establish whether justice can still be done despite the delay if any. I fully agree with the finding therein that. Justice is Justice to both the Plaintiff and Defendant"

40. In close relation to the foregoing, the courts have unanimously held that in determining an application for reinstatement of a suit, the principle on prejudice ought to be considered. It is apparent that the learned trial magistrate did not address his mind on this principle.

41. Upon considering the above, I find the arguments by the appellant on the one part to be reasonable in light of the existing constitutional right of a party to be heard on merit. On the other part, I did not come across anything by the respondent demonstrating by way of evidence the prejudice he would suffer should the suit be reinstated, to the extent that an award of costs would not constitute adequate compensation. From the record, it is apparent that save for filing a statement of defence, the respondent had equally not pursued his application seeking leave of the court to file a fresh statement of defence and counterclaim.

42. In so saying, I am supported by the following decision made by the court in the case of *Ivita v Kyumbu* [1975] eKLR as cited in the case of *Jim Rodgers Gitonga Njeru v Al-Husnain Motors Limited & 2 others* [2018] eKLR:

> "...it was made explicit that it is the duty of the defendant to demonstrate the prejudice alleged by it. The defendant must satisfy the court that it will be prejudiced by the delay by showing that justice will not be done in the case due to the prolonged delay on the part of the plaintiff."

43. The courts have been heard to say that litigation must surely have an end to it. Nonetheless, courts are called upon to consider the circumstances of each case uniquely in determining whether to order a dismissal or not.

44. In the present instance, while I have not come across anything to indicate bias on the part of the learned trial magistrate as was claimed by the appellant, it is my reasoned view that the learned trial magistrate ought to have taken into account the principles on prejudice and substantive justice and granted the appellant a final opportunity to prosecute its case. In the premises, I find it fair to interfere with the ruling.

45. The upshot therefore is that the appeal is allowed and the following orders are made consequently:

    i. The ruling and order dismissing the Motion dated 9th April, 2018 are hereby set aside and are substituted with an order allowing the Motion and consequently, reinstating the suit.

    ii. However, given the age of the suit, I hereby direct the lower court to issue strict timelines to ensure its expeditious prosecution at the earliest opportunity by another magistrate of competent jurisdiction other than Hon. A. N. Makau.

    iii. Parties shall bear their own costs of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31ST DAY OF MAY, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent