APA Insurance Limited v Ndegwa (Civil Appeal 36 of 2018)
[2022] KEHC 14193 (KLR) (19 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14193 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL 36 OF 2018

RM MWONGO, J

OCTOBER 19, 2022

BETWEEN

APA INSURANCE LIMITED ..... APPELLANT

AND

MOSES WAHOME NDEGWA ..... RESPONDENT

(Being an appeal from the Ruling dated 31st May, 2018 by SMS Soita, Chief Magistrate in CMCC No 249 of 2014)

JUDGMENT

Background

1. This appeal seeks to set aside the decision of the lower court dismissing the appellant's application of February 2, 2018 seeking to set aside the court's order dismissing the suit for want of prosecution and to reinstate the suit.

2. The brief background facts are that the plaintiff/appellant filed suit in the lower court on November 12, 2014. It seeks a declaration that the defendant breached the provisions of the insurance contract and thus that the plaintiff was entitled to avoid any claims of liability arising thereunder. A defence was filed on February 17, 2015. The plaintiff, on July 30, 2015, also filed a motion seeking stay of proceedings in Kerugoya CMCC Nos 178 and 180, pending the hearing and determination of the suit.

3. In the process, the appellant was unable due to time scheduling issues to prosecute its case on the hearing date resulting in it making an application for adjournment. The application was heard and dismissed

4. The plaintiff filed a formal application to set aside the dismissal order and reinstate the suit. After due consideration of the parties written submissions the trial court on May 31, 2018 dismissed the application.

The Appeal

5. The appellant's grounds of appeal are as follows:

    a. That the learned magistrate erred in both law and in fact in dismissing the plaintiff's application dated February 2, 2018 despite the overwhelming evidence placed before him.

    b. That the learned magistrate erred in both law and in fact in failing to appreciate the fact that the plaintiff's counsel was engaged in an election petition when the matter came up for hearing and which petitions are time sensitive and are given priority hence arriving at an erroneous decision.

    c. That the learned magistrate erred in both law and in fact in failing to re-instate the suit for hearing despite the fact that the applicant was an innocent litigant as the suit was dismissed for at worst the mistakes of counsel and which ought to be excused.

    d. That the learned magistrate erred in both law and in fact in failing to consider or ever adequately adopt and appreciate the written submissions of the appellant on record.

6. In submissions before this court the appellant correctly referred to the well settled principle that this court on appeal has to retry the subject matter of appeal as set out in *Selle v Associated Motor Boat Co Ltd* [1968] EA. It rehashed its arguments in the lower court that: the suit raised triable issues and ought not to have been struck out; that the adjournments sought in the trial court were well explained and justified; that there are excusable mistakes of counsel which ought not to be visited on their clients.

7. The appellant further submitted that the notice of the election petition was communicated verbally only two days earlier which was a good explanation for the request for adjournment; that the appellant was desirous of prosecuting the suit; that the door of justice must never be closed to a party because a mistake has been made by the counsel and that even courts make mistakes(citing Madan J in *Belinda Murai & Others v Amoi Wainaina* (1978) EA); and that blunders by counsel 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 be made to suffer (per Apaloo JA in *Philip Chemowolo & Another v Augustine Kubende* [1982-88]1KAR 103).

8. Further the appellant argued that the right to a hearing is protected under articles 50 and 159 of the *Constitution* and is a cornerstone of the rule of law

9. Finally, counsel argued that the injustice suffered by the appellant must be weighed against the prejudice likely to be suffered by the respondent; and that the curt must weigh the two. In this case, it argued, there was no prejudice that could be suffered by the respondent that could not be remedied by an award of costs. Whereas for the appellant the prejudice would be its complete shutting out from the seat of justice.

10. The respondent submits that the appeal is fatally defective, incompetent and lacks merit; that the appellant did not extract the order from the ruling since an appeal must be from an order or decree in terms of sec 75(d) and order 42 rule 13(4)(f) *CPR*.

11. The respondent pointed out that the record clearly showed that on December 7, 2017 when the matter was called out counsel holding brief for Mr Ngigi for the plaintiff stated that counsel was engaged in Election Petition No 2 of 2017 Michael Gichuru v Rigathi Gachagua at Nyeri and sought another hearing date. Further, that the court's orders for costs to be paid from the previous adjournment had not been complied with, nor had any missing witnesses been substituted. Thus, the file was placed aside until 2.00pm. When Mr Ngigi arrived, he was still not ready to proceed, stating he had just arrived from a petition in Embu.

12. Counsel pointed out that the contradictions in the information received sufficiently, and correctly, guided the trial court to reject any further adjournments.

13. The respondent submitted that the power to reinstate a suit is discretionary, but such discretion must be exercised judiciously and not capriciously (see *CMC Holdings Limited v Nzioki*[2004] 1 KLR 173). It is argued that in this instance such discretion could not have been exercised in favour of the appellant

14. Finally, the respondent submitted on the principles that: legal business cannot be handled in a casual leisurely and sloppy manner on the expectation that a party would be excused for his counsel's mistakes; that a client is entitled to sue an advocate for inexcusable delay; that a litigant has a duty to pursue the prosecution of his case; and that the court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel. These principles are in the following authorities: *R v University of Nairobi ex parte Lazarus Wakoli Kunani & 2 others*[2017] eKLR (which cited John Ongeri Mariaria & 2 ors v Paul Matundura {2004}2 EA 163) and *Savings and Loans Ltd v Susan Wanjiru Muritu* Nairobi Milimani HCC No 397 of 2002).

15. Further the respondent relied on ELC Kerugoya Appeal No 17 of 2015 *Maganjo Joshua Kago v Rose Njeri Mbuiimbwe* and Kerugoya ELC Misc Applic No 8 of 2020 *Joseph Justin Muthee v Henry Kinyua Mbui* where Cherono,J delved into the issue as to whether lapses of counsel could be a salve for the delays occasioned.

Analysis And Determination

16. I have carefully considered the parties' submissions, the authorities and all the other material before me in this matter. The only issue is whether the lower court properly exercised its discretion in declining to set aside the ruling and whether the suit should be reinstated.

17. In particular, I have carefully perused the file and proceedings of the lower to understand how the situation leading to the dismissal arose.

18. I note that the first hearing fixed for September 10, 2015 was abandoned due to an error in the notice, and cause-listing. A pre-trial was then fixed for October 29, 2015, but the defence was not ready. At an appearance on November 12, 2015 both parties confirmed compliance with pre-trial formalities. Hearing of the suit was then fixed for March 24, 2016. However, on that date the plaintiff was not ready with witnesses. Thus, another hearing was fixed by consent in the registry for July 21, 2016, but again, the plaintiff was not ready. Defence costs and court adjournment costs were levied, and a hearing again fixed for November 3, 2016.

19. The record does not show any activity on November 3, 2016.

20. The next hearing, fixed in the registry, was on February 23, 2017, and again by consent another hearing was fixed for July 6, 2017. On that day, the plaintiff was again not ready to proceed due to absence of its witness and the court adjourned, having awarded costs to counsel and court adjournment fees against the plaintiff. The court marked the adjournment the "last adjournment" to plaintiff. Hearing was fixed for September 21, 2017.

21. On September 21, 2017, the plaintiff was again not ready to proceed as he said he was engaged in an election petition. Adjournment was opposed on grounds that a last adjournment had been granted and costs had not been paid. The court allowed the adjournment as a "final adjournment" again and awarded costs to defence, ordering that previous unpaid costs be paid. A new hearing was fixed for December 7, 2017.

22. On December 7, 2017 the plaintiff sought another hearing date on grounds that he was engaged with an election petition. His application for adjournment was canvassed orally, and was denied. Hearing was set for 2.00pm. When the time arrived, Mr Ngigi for the plaintiff insisted he was not ready to proceed, as he had allegedly just left the election court. The parties argued again before the court, which found that the circumstances since morning had not changed in the face of the final adjournment previously granted. It declined the adjournment application and "dismissed the suit for want of prosecution"

23. Having carefully considered the factual circumstances before the trial court, I have also carefully considered his ruling. In particular, I am to re-evaluate whether he exercised his discretion judiciously in declining to set aside the dismissal and to reinstate the suit.

24. The trial magistrate noted that the plaintiff's counsel submitted on mistake of counsel while the defendant submitted that there was indolence. On this issue he referred to the cases of *Lucy Wambui Maina & 2 ors v Peter Sundra Maina* [2005] eKLR; *Ndungu Njoroge v George Waweru Muchai* [2014] eKLR and *R v University of Nairobi* (supra). He also considered the record of proceedings and noted that previous adjournments had been granted to the appellant and costs awarded thereby had not been paid. He also took into account the provisions of order 12 r 7 on setting aside judgments and section 1A & 1B on the overriding principles of the *CPA* as regards the facilitation o the just expeditious proportionate and affordable resolution of disputes. Finally, the trial magistrate considered article 159 on the administration of justice without undue regard to procedural technicalities.

25. Having done this, he found no merit in the application.

26. I am unable to find that the trial magistrate did not exercise his discretion judiciously. Nor do I think that his decision was capriciously reached.

27. Here, the court perceived that it was being taken for a ride: counsel was enjoying adjournments but not taking the responsibility of paying costs. That appellant was picking and choosing which orders to obey. The counsel was also inconsistent – on the one hand he briefed a counsel acting on his behalf to say he was handling a petition in Nyeri, but returns to court stating that he had just arrived from a petition in Nyeri. Counsel was taking the court for a frivolous ride, and it was evident to the court.

28. Where, as in this case, a court is faced with requests for, and has granted, constant adjournments to a party; and has gone so far as to punish the party seeking the adjournments with costs, but that party – whilst enjoying the adjournment order –wholly and selectively disregards the costs order; even after the adjournments granted were on the basis of a 'last' adjournment and 'final' adjournment, the court has no further tools to remedy the delays but to take the draconian step of dismissal.

29. A party which has acted in the manner in which the appellant acted, having filed suit in November 2014, but being unable to proceed with the hearing three years later on December 7, 2017, without a rationally justifiable reason, can hardly be said to have been bundled out with prejudice from the seat of justice.

30. From the foregoing, i am unable to find any basis under which the trial court's decision to dismiss the suit, or that denying the setting aside of its order and refusing to reinstate the suit can be impugned. the trial court was, in my view, extremely patient and forbearing with the plaintiff who burnt its bridges by the conduct it adopted.

31. For these reasons, the appeal herein is hereby dismissed with costs.

32. Orders accordingly.

DATED AT KERUGOYA THIS 19TH DAY OF OCTOBER 2022

.....

R. MWONGO

JUDGE

In the presence of:

Muturi - holding brief for Rigaga for Applicant

No representation - Kahiga for Respondent