



**Solpia Kenya Limited v Kanunga (Civil Appeal 176 of 2018)
[2022] KEHC 16556 (KLR) (Civ) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16556 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 176 OF 2018

DO CHEPKWONY, J

NOVEMBER 24, 2022

BETWEEN

SOLPIA KENYA LIMITED APPELLANT

AND

AUGUSTINE MUSYIMI KANUNGA RESPONDENT

(Being an Appeal from the whole of the Judgment of E. Wanjala, Senior Resident Magistrate delivered on 21st March, 2018 in CMCC NO. 7566 of 2016)

RULING

Background

1. The appellant being dissatisfied by the judgment in CMCC No 7566 of 2016, preferred this appeal against the respondent *vide* a memorandum of appeal dated April 5, 2018. The memorandum of appeal is anchored on the following grounds;
 - a) That the learned trial magistrate erred in law and in fact in disregarding the appellant's evidence on record and erroneously finding that the appellant breached the duty of care owed to the respondent.
 - b) That the learned trial magistrate erred in law and fact in apportioning liability against the weight of evidence.
 - c) That the learned trial magistrate erred in law in awarding excessive general damages at Kshs 480,000/= as to amount to a misapplication of the principles of assessment of damages.



- d) That the learned trial magistrate erred in relying on expert testimony from a witness who was not an expert in the issue before the court.
- e) That the learned trial magistrate erred in law and in fact in not considering the evidence and exhibits adduced by the appellant.
- f) That the learned trial magistrate erred in Law and in fact in finding in the respondent's favor without considering legal precedents submitted by the appellant.
- g) That the learned trial magistrate erred in law and in fact in awarding damages where no negligence was proved by the respondent.

It is proposed to ask the court for the following orders: -

- a) The court be pleased to set aside the judgment delivered on March 21, 2018.
 - b) The award on quantum be dismissed and /or set aside.
 - c) The court be pleased to make orders as to costs of this appeal.
2. The appeal was certified ready for hearing on September 27, 2019 and the appellant having taken no action regarding the hearing of this matter, this court issued a Notice to Show Cause why the case should not be dismissed for want of prosecution.
 3. The said notice was served upon all parties and a return of service filed before this court on March 25, 2022, in the absence of the parties and respective counsel, the appeal was dismissed for want of prosecution under order 42 rule 35(2) of the *Civil Procedure Rules*, 2010.
 4. The appellant was once again dissatisfied with the orders dismissing this appeal for want of prosecution and filed this application before court dated June 3, 2022. The application is couched in the following terms;
 - a) That this court be pleased to review the order made on the March 25, 2022.
 - b) That the award on quantum be dismissed and /or set aside.
 - c) That the court be pleased to make orders as to costs of this appeal.
 5. The application is premised on the grounds on its face and further supported by the grounds set out in the affidavit of Joram Mwenda Guantaisworn on even date, wherein he has deposed that:-
 - a) the record of appeal did not have a copy of the decree appealed from as the same was not provided with the proceedings and Judgement which they had applied for on the April 9, 2018.
 - b) they applied for a certified copy of the decree to enable them prepare a supplementary record of appeal on the October 29, 2019.
 - c) the appellant eventually got a copy of the certified decree on the April 1, 2022 and prepared a supplementary record of appeal.
 - d) they prepared a supplementary record of appeal and on attempting to serve the same, they established that the matter had been dismissed on the March 25, 2022 for failure to show cause why the same should not be dismissed for want of prosecution.



- e) upon perusal of the court record, they established that the notice to show cause dated January 28, 2022 was not served on them and that is why the matter proceeded in their absence.
6. This matter was rescheduled for hearing of the application dated June 3, 2022 on July 12, 2022 and in the absence of counsel for the respondent the appellant addressed the court on the application coming up for ruling before this court.

Analysis And Determination

7. I have carefully considered the application before court alongside responses filed by all counsel for the parties and the oral submissions by the counsel for the appellant. In my view, the only issue for determination before this court is whether the appellant has satisfied this court to move it to reinstate this appeal.
8. The application is premised on order 45 rule 1 of the *Civil Procedure Rules*, 2010 which provides as follows;
- “(1)-any person considering himself aggrieved—
- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
 - c. (2)A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”
9. Order 42 rule 35 of the *Civil Procedure Rules*, 2010 on the other hand provides that
- a) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.
 - b) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in Chambers for dismissal.



10. The principles governing reinstatement of suits were laid down in the case of *John Nabashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR, where the court stated as follows:

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in article 159 of the *Constitution*. Article 50 coupled with article 159 of the *Constitution* on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such act are comparable only to the proverbial “Sword of the Damocles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”

11. It is important to note that the notice to show cause was issued by the Deputy Registrar of this court and served on the parties as evidenced on the return of service but there was no response from the respondent.
12. Therefore, there being no objection by the Respondent to the application by the appellant requiring this appeal to be reinstated for hearing and in line with the provision of article 50 of the *Constitution* of Kenya, 2010 on the right to be heard, I find the need to and provide the applicant a right to be heard against her decision.
13. Be that as it may, as earlier indicated that dismissal of suits is a draconian measure which should be exercised in very clear cases, I am of the view that the appellant is deserving of leniency of this court.
14. In the end, I do believe that the applicant has made out a case to warrant the orders of this court and allow the application with directions that;-
- a) this appeal be fixed for hearing forthwith or within thirty (30) days from the date of this ruling, failure to which the appeal shall stand dismissed.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED IN NAIROBI THIS 24TH DAY OF NOVEMBER, 2022.

DO CHEPKWONY

JUDGE

In the presence of:

Mr. Kimathi holding brief for Mr. Mwenda counsel for Appellant

Mr. Sing'ora counsel for Respondent

**Court Assistant - Simon

