



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 256 OF 2019

PALACINA DEVELOPMENTS LIMITED.....1ST APPELLANT

BARTENO EDWINO KOECH.....2ND APPELLANT

VERSUS

PRESTIGE DISTRIBUTORS (K) LTD.....RESPONDENT

(Being an appeal from the orders of the Chief Magistrate's court at Nairobi delivered by the Hon. M. Murage (RM) on 9th

August 2018 in the Chief Magistrate's Civil Suit No. 3203 of 2015)

JUDGMENT

1. **Palacina Developments Limited** and **Barteno Edwino Koech** referred to as the 1st and 2nd appellants are the defendants before the lower court while Prestige Distributors (K) Limited referred to as the respondent is the plaintiff in the said court.

2. The appellants filed a notice of preliminary objection (P.O.) dated 8th March 2018 before the trial court on 8th March 2018. The same was dismissed on 9th August 2018 on the ground that it had not complied with the court's direction that it had to be prosecuted within 30 days.

3. Being aggrieved the appellants filed this appeal raising the following grounds:

(i) The Learned Magistrate erred in law and fact in dismissing the Appellants' notice of P.O. without giving them a chance to argue it on its merits.

(ii) The Learned Magistrate erred in law and fact in dismissing the Appellants' Notice of P.O. based on a procedural technicality contrary to Article 159(2) of the Constitution of Kenya.

(iii) The Learned Magistrate erred in law and fact in allowing a suit that is clearly time barred by mandatory provisions of the Limitation of Actions Act to proceed.

(iv) The orders of the learned Magistrate are against the law and weight of the evidence on record.

4. The appeal was canvassed by written submissions.

5. The firm of Musyoka Wambua and Katiku advocates for appellants have in their submissions argued that failure by the appellants to comply with the trial court's directions issued on 13th April 2018 constitutes a procedural technicality under Article 159(2)(d) of the Constitution. This issue had been addressed in the cases of:

(i) James Mangeli Musoo v Ezeetec Limited [2014] eKLR

(ii) Anchor Ltd vs Sports Kenya [2017] eKLR

(iii) Kenya Ports Authority v Kenya Power & Lighting Co. Limited [2012] eKLR where Justice Mwangi states as follows: -

“Combining the meanings of these words, “procedural technicalities” may be described as those that more concern the modes of

proceedings and the rules involved that regulate formality and processes rather than substantive rights under law. This may not be an all encompassing definition, but I think people generally associate procedural technicalities with annoying strictures and rules which hinder the achievement of substantial justice. An example would be citing a provision from a non-existent or wrong statute when the context is clear as to the statute intended.”

6. Counsel has submitted that the trial court’s strict enforcement of its directions was to prevent the P.O. from being heard on merits, which should not have been the case.

7. While referring to Articles 25 and 50 of the Constitution on fundamental rights and freedoms and the right to fair hearing Counsel contends that the appellants’ rights were infringed by being condemned unheard. He relied on the case of **Gold Lida Limited vs Nic Bank Ltd & 2 others [2018] eKLR** to buttress this argument. In the said case the court held that:

“In my view, the overriding objective of our constitutional and statutory framework on civil procedure is to achieve substantive justice to the litigants. This view is informed by Article 50 of the Constitution of Kenya which secures the right to a hearing before the court. This court is obligated to safeguard that right.”

8. Counsel submitted that courts are well equipped to address issues like non-compliance with court directions or orders e.g. condemning a party to pay costs etc. A measure of last resort may duly be applied in cases of blatant and recurring non-compliance with relevant directions. He referred to the case of **Philip Chemwolo & Anor. Vs Augustine Kubende [1982-88] KAR 103** which was cited with approval in the **Gold Lida Limited** case (*supra*) as follows:

“Apaloo JA outlined the following approach to a similar question in Philip Chemwolo & Another vs Augustine Kubende (1982-88) KAR 103;

“Blunder 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 heard on merit. 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 purposes of deciding the rights of the parties and not the purpose of imposing discipline.”

9. He contends that the present case was not a case of recurrent non-compliance and so the dismissal was unfair.

10. In opposing the appeal the respondent through the firm of Mose, Mose and Millimo advocates gave an outline of the case, from the beginning to the end. Counsel submits that the appellants were on 13th April 2018 ordered to serve the P. O. on the respondent and prosecute it within thirty (30) days failure which it would stand dismissed. There was no compliance as the respondent was served on 12th July 2018 while the P.O. came for hearing on 9th August 2018 which was outside the thirty (30) days period granted.

11. Counsel argued that the court upheld the respondent’s opposition on 9th August 2018 by confirming that the P. O. stood dismissed on or about 13th May 2018 for failure to prosecute it within thirty (30) days given by the court. Counsel contends that the actual dismissal of the P. O. was on 13th May 2018 and not 9th August 2018 as submitted by counsel for the appellants. Therefore, the appeal is incompetent. He has submitted that the appellants cannot hide behind Article 159 (2) (d) of the Constitution to cover their wrong doing. He cited the cases of (i) **Saidi Mohamed v Diamond Industries Ltd [2018] eKLR** and (ii) **Speaker of the National Assembly vs Njenga Karume [1992] eKLR**.

12. Counsel has argued that the appellants and their advocates had ample time to seek for an extension of the period given for prosecuting the P. O. but they did not. They cannot therefore blame the trial court for failing to give them a chance to prosecute the same. Secondly they should have sought for the orders of dismissal to be set aside.

He submitted a lot on whether the suit before the magistrate’s court was time bared. This was not an issue for determination by this court.

13. Counsel has urged this court to dismiss this appeal as it lacks merit.

Analysis and determination

14. This being a first appeal this court has a duty to re-examine and reconsider the evidence on record and arrive at its own conclusion.

See the case of: (i) **Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. advocates [2013] eKLR** (ii) **Gitobu Imanyara & 2 others v A. G. [2016] eKLR**.

15. I have carefully considered the grounds of appeal, evidence on record, both submissions and the authorities cited. I find one issue falling for determination. The issue is whether the failure to accord the appellants a hearing violated their right to fair hearing.

16. It is not disputed that on 13th April 2018 the counsel for the appellants informed the court of a notice of P. O. which they had filed, and wanted it sorted out first before the matter could proceed to full hearing.

The court gave two orders namely:

(i) *Hearing date at the registry.*

(ii) P.O. to be prosecuted within 30 days.

17. Contrary to what counsel for the respondent has submitted “there was no order indicating that if the P.O. was not prosecuted within 30 days it stood dismissed.”

18. The trial court did not give any directions on service of the preliminary objection and did not give a hearing date. The parties were directed to take a date at the Registry. The record shows that the hearing date was given on 9th July 2018. It of course does not show why the hearing date was not taken within the 30 days period. We are all aware of the challenges parties face at the registries when it comes to the issue of taking hearing dates!

19. What transpired on 9th August 2018 is clearly on record. The respondent’s counsel has insisted that the P. O. was dismissed on 13th May 2018. There is no record to that effect. The directions given by the court on 13th April 2018 in respect to the 30 days were discretionary. It was not a statutory requirement and so could be reviewed depending on the circumstances.

20. In the instant case the court should have given the appellants’ counsel an opportunity to explain why she was not able to get a hearing date within 30 days at the registry. The issue that the appellants were raising in the P. O. went to the root of the respondent’s case and it was an issue that ought to have been fully addressed and a decision made on it. Dismissing it on such a flimsy ground has not resolved it. It all boils to deliberately denying a party a right to fair hearing which violates Article 50 of the Constitution.

21. I therefore find merit in the appeal which I allow and make the following orders:

(i) The order of 9th August 2018 dismissing the preliminary objection dated 8th March 2018 is hereby set aside.

(ii) The preliminary objection dated 8th March 2018 to be heard and a decision be made on it.

(iii) This matter to be placed before the Chief Magistrate (incharge) Milimani Law Courts (Civil) for reallocation of the case to any magistrate with competent jurisdiction besides Hon. M. W. Murage (Magistrate).

(iv) Costs to be in the cause.

DELIVERED ONLINE SIGNED AND DATED THIS 27TH DAY OF MAY 2021 IN OPEN COURT AT NAIROBI.

H. I. ONG’UDI

JUDGE