



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: D. K. Kemei – J)

CIVIL APPEAL NO. 85 OF 2019

KIZITO WAFULA (Suing as the Legal and Personal Representatives

of the estate of PAMELA NABANGALA WEBALE &

BASILISA NALONJE WAFULA (DECEASEDS).....APPELLANT

VERSUS

KASSAM HAULIERS LIMITED.....RESPONDENT

(Being an appeal from the Ruling and Order of Hon. I. M. Kahuya (Principal Magistrate) at Machakos Chief Magistrate's Court in CMCC No. 286 of 2013 delivered on the 30th day of May, 2019)

BETWEEN

KIZITO WAFULA (Suing as the Legal and Personal Representatives

of the estate of PAMELA NABANGALA WEBALE &

BASILISA NALONJE WAFULA (DECEASEDS).....PLAINTIFF

VERSUS

KASSAM HAULIERS LIMITED.....DEFENDANT

JUDGEMENT

1. By a Plaint dated and filed on 31st March 2013, the Appellant herein sought for general damages under the Law Reform Act and Fatal Accident Act, special damages of Kshs. 28,400.00/- plus costs and interest of the suit against the Respondent.

2. The Appellant pleaded vide paragraph 4 of the plaint pleaded that the deceased was a passenger in m/v reg. No. KAS 156F which was being driven along Mombasa-Nairobi road when the same was hit by m/v reg. No. KBH 960P belonging to the respondent that had been negligently and carelessly managed and/or controlled as a result of which the deceased sustained fatal injuries and died. The appellant blamed the Respondent and its driver for the accident pleaded particulars of negligence vide paragraph 6 of the plaint. The Respondent denied the particulars of negligence vide its statement of defence dated 22nd July 2013.

3. The appeal is against the ruling and order of the trial magistrate delivered on 30/5/2019 in which she dismissed the appellant's application dated 20/12/2018 that had sought for the setting aside of the dismissal of the appellant's suit on 27/6/2018. According to the trial magistrate, there was no reason furnished for the four-year delay between 1st October 2014 when the suit was last before court and 27th June 2018 when the suit was dismissed. Further, despite an advocate filing a notice of appointment on 22nd May 2018, there was no reason given why Appellant's counsel did not attend court to explain and show cause why the suit should not be dismissed for want of prosecution. According to the trial magistrate, there was delay of seven months to file the application seeking the setting aside of the dismissal orders despite the fact that the suit had already been pending for four years.

4. Aggrieved by the ruling, the Appellant lodged his memorandum of appeal dated 28th June 2019 citing the following grounds of appeal:-

*(1) **THE** learned trial magistrate erred in law and in fact in dismissing the Appellant's application dated the 20th day of December 2018.*

*(2) **THE** learned trial magistrate erred in law and in fact in not taking into consideration that the Appellant advocate was not served with the notice for dismissal of the suit.*

*(3) **THE** learned trial magistrate erred in law and fact in failing to take into consideration that the Appellant had made efforts to fix the pending application for hearing.*

*(4) **THE** learned trial magistrate erred in law and fact that the Respondent was being represented by two different advocates and that there was a pending application by one of the advocates to withdraw from acting for the Respondent.*

*(5) **THE** learned trial magistrate erred in law and in fact by not considering that a new advocate had come on record for the Appellant and that mistake of the previous counsel of not prosecuting the suit should not be visited upon an innocent litigant.*

*(6) **THE** learned magistrate erred in law and fact in finding that reinstatement of the suit would amount to an abuse of the court process.*

5.

result of the delay.

14. To counter the submissions by the Appellant that notice to show was not issued to the Appellant or its advocate, the Respondent submitted that the counsel for the Appellant knew about the notice when he filed a notice of appointment but failed to attend court. Reliance is placed on the case of ***Kestem Co. Ltd vs Ndala Shop Ltd & 2 Others [2018] eKLR*** where the court stated that a court is not required to serve notice but to give notice which can be done through official website or cause list.

15. It is submitted that the trial magistrate found that the delay of 4 years to prosecute suit was not explained. Reliance is placed on the case on ***Texas Fist District Court of Appeal Case No.01-14-00269-CV Adolfo R.Martinez vs Noel P.Benavides PAT & 9 Others, Saarel Investment Ltd vs Pyramid Construction Co.Ltd & Another[2014]eKLR, Venture Capital & Credit Ltd vs Consolidated Bank of Kenya Ltd[2006]eKLR***. According to the Respondent, the 7 months delay was in respect of the application seeking reinstatement not the delay of 4 years. Reliance is placed on the case of ***Moi Teaching and Referral Hospital vs Keny Union of Domestice Hotels Educational Institutions, Hospitals and Allied Workers [2012] eKLR***.

16. According to the Respondent, the submissions by the Appellant that the appellant was being represented by two advocates and that there was a pending application by one advocate to withdraw from acting for the Respondent has no basis since the case belongs to the Appellant and not advocates. It is submitted that the Appellant should not blame previous counsel when he himself did not show the steps he took to have the suit prosecuted. Reliance is placed on the case of ***Tirth Construction Ltd vs Orion Hotels Ltd [2020] eKLR, Tana & Athi Rivers Development Authority vs Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR and Habo Agencies Ltd vs Wilfred Odhiambo Musingo [2015] eKLR***.

17. On prejudice, it is submitted that delay is a source of prejudice as it affects fair administration of justice as stated in ***Kestem Co.Ltd vs Ndala Shop Ltd & 2 Ors.(Supra)*** and in the case of ***Mobile Kitale Services Station vs Mobile Oil Kenya Ltd & Another[2004]eKLR***. The Respondent has asked the court to dismiss the appeal with costs.

Determination

18. I have considered the pleadings, evidence and submissions of parties in this appeal. It is not disputed that the suit had not been prosecuted for 4 years since the 1st day of October 2014 when the suit was last in court and the 7 months taken to file the application for reinstatement of suit after the dismissal of the suit on 27th June 2018. The Appellant contends that the trial magistrate erred in law and in fact in dismissing the application for reinstatement of suit hence a question that this court will determine based on the law and evidence placed before it. The Appellant has asked the court to set aside the dismissal orders of 27th June 2018.

19. The court's power to set aside its ruling/judgment is discretionary. It is exercised not to cause injustice to the opposite party and hence a party seeking the court's favour must adduce sufficient and plausible reasons that are demonstrable and persuasive to the court. The court was clear in ***Shah -vs- Mbogo & Another (1967) EA 116***, where the court stated on the matter of its discretion, that:-

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

20. This being the first appellate court, its duty is to re-evaluate and subject the evidence to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. For this court to interfere with the discretion of a trial court, it must be satisfied that the trial court's findings on facts were based on no evidence or is a misapprehension of the evidence as held in ***Selle -vs- Associated Motor Boat Co [1986] EA 123***.

21. However, the court is cautioned as seen in ***Peters vs Sunday Post Ltd [1958] EA 424*** where it was held that:-

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide”

22. In my view the delay of 4 years has not been sufficiently explained by the Appellant. Before the dismissal of the suit on 27th June 2018, the suit was last in court on 1st October 2014 which is an inordinate delay of 4 years. The Appellant places reliance on a letter dated 21st May 2018 attached and marked as 'KZ-1' to state that a hearing date for the Respondent's advocate application dated 6th August 2014 to cease acting had been sought at the court registry.

23. I remind the Appellant that it is his case and not his advocate or the Respondent. In ***Utalii Transport Co. Ltd and 3 Others -vs- N.I.C. Bank and Another (2014) e KLR***, the court held that:-

“It is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court.”

24. It is urged by the Appellant that his counsel was never served with a copy of the intended dismissal as required under Order 17 Rule 2(1)

of the 2010, Rules. The court in the case of *Fran Investments Limited vs. G4S Security Services Limited [2015] eKLR* had occasion to consider the aforesaid provision and held the view that:-

“Order 17 Rule 2(1) of the Civil Procedure Rules does not require service of notice; it uses the word "give notice". The court may give notice of dismissal through its official website or through the cause list. And those mediums will constitute sufficient notice for purposes of Order 17 Rule 2(1) of the Civil Procedure Rules.”

25. It follows therefore that the Rule does not require service of the notice but the court may give notice of dismissal through the cause list. I note that no such notice is in the court file. However, it is imperative to note that no explanation has been given by the Appellant for the delay of 4years. Again, it was noted by the trial magistrate that the Appellant’s counsel despite filing a Notice of Appointment on 22nd May 2018, failed to attend court when the matter was coming up for hearing of notice to show cause why suit should not be dismissed for want of prosecution.

26. *Mulwa J* at paragraph 17 in *Bilha Ngonyo Isaac v Kembu Farm Ltd & another & another [2018] eKLR* was of the view that:-

“Pendency of a case in court when it is obvious that the plaintiff is not interested to prosecute it costs time and money to the defendants not to mention mental anguish of having a burden of the case over their shoulders for an unnecessary period of time. In the process, the court becomes the punching bag, leading to lose of confidence with the judicial system due to delays in finalizing cases, when in effect and in most of the cases, it is the parties, mostly the plaintiffs, who would take the earliest opportunity to delay finalization by requesting for unnecessary adjournments without clear and convincing reasons. A court should desist from allowing parties to have joy rides over their cases to the prejudice of other parties including the courts.”

27. The court is alive to the decisions of *Belinda Murai & Others Vs Amoi Wainaina (1978)* and *Philip Chemwolo & Another Vs Augustine Kubende (1982-88) KAR 103* on the proposition that the door of justice ought not to be locked completely as a result of a mistake by a party in a suit and hence the court ought to take a broader approach in the interest of justice.

28. However the court finds that there was no reasonable and plausible explanation for the delay of 4 years and 7 months that was given by the Appellant to salvage the suit. The decision by the trial magistrate to disallow the application for reinstatement of the suit was not an error of law and fact. It is noted that the Appellant’s plaint was described in its front title as a ‘Fast Track’ claim and which should have been set down for hearing within the shortest time possible. As no good cause was shown why the suit was not prosecuted for that long then the trial magistrate did not err in law or fact and thus the impugned ruling is sound and ought to be upheld.

29. In the result, it is my finding that the appeal lacks merit. The same is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 30TH DAY OF JUNE, 2021.

D. K. KEMEI

JUDGE