



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL NO. 432 OF 2015

PURITY ANYANGO KOMER.....APPELLANT

VERSUS

SINGH AMAR SINGH.....RESPONDENT

(Being an appeal from the ruling and order of the Chief Magistrate's Court (Hon. Lorot Mr.) SPM at Milimani Commercial Courts given on 6th August 2015 in Nairobi CMCC no. 13711o f 2006)

JUDGMENT

1. On 6th August 2015, Hon. Lorot, learned Senior Principal Magistrate delivered his ruling dismissing the appellant suit for want of prosecution pursuant to the respondent's application dated 23rd August 2013.

2. Being dissatisfied with the dismissal order, the appellant preferred this appeal and put forward the following grounds:

i. The learned magistrate erred in law and fact in delaying his ruling inordinately, for a period of more than one year, and further erred when he delivered a ruling which was not only against the weight of evidence and material placed before him but also against his own views expressed in the course of proceedings before him when he advised the defendant's counsel to consider withdrawing the application seeking dismissal of the suit for want of prosecution to allow the suit to proceed on merit because "matters before courts ought to be dealt with on the merits and not dismissed on technicalities".

ii. The learned magistrate erred in law and fact in dismissing the appellant's suit for want of prosecution when there was overwhelming evidence on record that the appellant had always been keen to prosecute her case and had made efforts to prosecute the case to conclusion.

iii. The learned magistrate erred in law and fact in failing to hold the that in the circumstances of the case and facts before him, justice demanded that the case should have been preserved rather than dismissed.

iv. The learned magistrate erred in law and fact in allowing an application which had no merit and further erred when he dismissed the appellant's suit on the ground that the appellant was guilty of unexplained delay in prosecuting the suit when the delay of only 15 months had been adequately explained.

v. The learned magistrate erred in law and fact in failing to properly consider and apply relevant authorities, namely the decision in Ivita -vs- Kyumbu (1984) KLR 441 and Mary Akinyi Otieno -vs- Kwega Bus Service & Another (1999) e KLR which were cited to him by the appellant's advocates and in which the Court of Appeal and the High Court laid down the test to be applied in an application for dismissal of a suit for want of prosecution.

vi. The learned magistrate erred in law and fact in failing to find that the appellant was not solely to blame for the delay in prosecuting the case and further erred by ignoring evidence tendered before court to show that the failure to prosecute the suit had partly been as a result of the failure by the court registry to avail the court file when requested by the appellant's advocate and slap partly by the respondent's applications for adjournment.

3. When the appeal came up for hearing, this court gave directions to have the appeal disposed of by written submissions. I have re-evaluated the arguments presented before the trial court. I have also considered the rival written submissions plus the authorities cited by the parties.

4. It is the submission of the appellant that the learned Senior Principal Magistrate wrongly dismissed her suit yet she had given good reasons for the delay in prosecuting the suit. The appellant gave a chronology of the steps she took to have the suit prosecuted. It is said that the suit could not proceed for hearing of reasons beyond her control.

5. The respondent on his part urged this court to dismiss the appeal arguing that the suit was rightly dismissed by the trial magistrate for want of prosecution when the appellant failed to offer plausible reasons.

6. In allowing the application to dismiss the suit, the learned magistrate stated in part as follows:

“The case had previously been adjourned on 19th January 2011, 27.7.2010, 27.11.2009, 17.11.2008 and 15.10.2008. it is not clear why the plaintiff did not take a date a year and 5 months after the matter was adjourned and why the plaintiff did not swear an affidavit in reply to the application to dismiss the suit for want of prosecution. There is no reason given for the delay.....

There is no reason why this case should be in our dockets as pending for that period.”

7. In the replying affidavit filed in response to the respondent’s application for dismissal, the appellant’s advocate deponed that the appellant has been keen to have her suit prosecuted and this is explained by several visits she made to her advocate’s office. The deponent further stated that the appellant had executed a witness statement which could not be filed in court because the court file was not availed to the appellant’s advocate.

8. The appellant’s advocate further deponed that the appellant is not to blame for the delay in fixing a hearing date in the case as from 19th April 2012 and it will not be just to dismiss the appellant’s case for a mistake which can only be attributed to her legal advisers.

9. In the circumstances can it be said that the appellant did not give any explanation for the delay? I do not think so. It is apparent from the affidavit evidence and the submissions that the appellant had always shown interest in having her case prosecuted. It is also apparent that the appellant’s learned advocate had deponed that he was unable to gain access to the court file to file the appellant’s witness statement and the documents.

10. In other words, the deponent was unable to trace the court file.

The learned advocate also stated that the delay to fix the case for hearing was solely on the part of the advocate and not the client. In his ruling the learned Senior Principal Magistrate stated in part as follows;

“Counsel for the plaintiff is saying that the delay was caused by the legal advisers but has refused to own up to the mistake alluded to.”

11. It is clear from the above excerpt that the trial magistrate noted that the appellant’s advocate was to blame for the delay in having the case fixed for hearing. It is also clear that the advocate admitted the mistake through averments made in the replying affidavit. The learned advocate also deponed that he could not trace the court file.

12. I am satisfied that the appellant’s advocate gave plausible explanation for his failure to have the appellant’s case prosecuted. In the circumstances of this case, the client should not be made to suffer for the mistakes of her advocate since there is no evidence that she colluded with the advocate to delay the prosecution of her case.

13. In the end, I find the appeal to be with merits. The same is allowed. Consequently, the order allowing the motion dated 23rd August 2013 is set aside and is substituted with an order dismissing the motion. The suit is reinstated and should be heard by another magistrate of competent jurisdiction other than Hon. A. Lorot on priority basis. Each party to meet its own costs of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 26TH DAY OF AUGUST, 2021

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent