REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 4 OF 2014

MAGUNANDU COMPANY LTD.....APPELLANT/APPLICANT

-VERSUS-

1. JOYCE WAIRUMU NGUGI

2. SWALEH OMAR MACHIO (suing as the administrators of the

estate of NOOR MUSA MACHIO – DECEASED)....RESPONDENT

RULING

1. By Chamber Summons application dated 26th August, 2019 and filed on the 27th August, 2019 pursuant to Section 10 of the Judicature Act, Rule 3(1) of the High Court Vacation Rules, Section 1A, 1B and 3A of the Civil Procedure Act, the Appellant/Applicant seek orders that:-

a. Spent;

b. Spent;

c. That the Honourable Court be pleased to review the orders issued on the 28th August, 2018 as the same was issued by mistake;

d. That the Honourable Court do issue orders setting aside the dismissal orders of the Appeal on the 28th August, 2018 and be reinstated for hearing on merit.

e. Spent;

f. That costs of Application be provided for;

2. The grounds upon which the Applicant relies on in support of its application include that the appeal had been admitted and parties had filed their respective submissions and the only issue pending was the highlighting of submissions. Further that the Appellant/Applicant was not served with any notice to attend court on the 28/8/2018. It is averred that the appeal was thus dismissed without any notice to the parties despite numerous letters addressed to the Deputy Registrar enquiring on the position of the file.

3. The Applicant's further grounds are that a notice of appeal received by it was showed that the Appeal was to be heard between 16th-26th July, 2018 which never materialized. Therefore the Orders made dismissing the Appellant/Applicant's appeal for want of prosecution was made by mistake hence should be reviewed. It is argued that since the order was made in the absence of the applicant due to the fact that there was no service upon the Applicant, the same amounted to the Appellant/Applicant being condemned unheard. The Applicant is of the view that the order should be reviewed to enable it to ventilate its case on merits.

4. The Applicant avers that it learnt of the dismissal order upon perusal of the court file and brought the instant application timeously without undue delay. The Appellant/Applicant further argues that the dismissal of the Appeal exposes the Appellant to imminent execution against it and if the Respondent proceeds to execute, then the Appellant/Applicant shall suffer substantial loss and damages since it will be difficult to recover the dectretal sum from the Respondent. It is the assertion of the Appellant/Applicant that its appeal has high chances of success and shall be rendered nugatory if the orders sought herein are not granted.

5. The said application is supported by the sworn affidavit of Michael O. Oloo, Advocate for the Applicant/Appellant sworn on 26/8/2019.

6. The application has been opposed by the Respondents vide the grounds set out in the Replying affidavit sworn on 27/9/2019 by Joyce Wairimu Ngugi; the 1st Respondent herein. It has been deponed therein that the orders issued on 28/8/2018 were not a mistake as alleged but a deliberate order issued by court. According to the Respondents the application is therefore bad in law, misconceived and an abuse of court process.

7. It is the Respondents' case that a hearing Notice dated 25/7/2018 was issued by the high court indicating that the Appeal was to be heard on 28/8/2018. It is averred that the notice was served on the Applicant's advocate on 20/8/2018.

8. It is further deponed that it is not the first time the court has been moved to dismiss the matter. That the Respondents had filed an application seeking the Appeal to be dismissed for want of prosecution but withdrew the application so that the parties could canvass their issues expeditiously. It is the Respondent's assertion that the appeal was filed over five years ago and there should be an end to litigation. The respondents aver that the Applicant is guilty of latches and indolence which this court should not support. It is argued that the application has been brought a year after the dismissal orders were issued and as such it cannot warrant the granting of the orders sought.

9. The application was disposed of by way of written submissions on consent of both parties. The Appellant's submissions are dated 28/11/2019 and filed on the even date. The Appellant/Applicant identified four issues for determination in its written submissions. That is ;

i. Whether the Appellant was properly served with a hearing notice;

ii. Whether there was inordinate delay on part of the Appellant to prosecute the appeal;

iii. Whether the orders dismissing the appeal should be set aside;

iv. Who is to bear the cost of this application?

10. On the first issue, it is submitted that it would be a miscarriage of justice and against the rule of natural Justice to condemn a party unheard. It is argued that the Appellant/Applicant learnt of the dismissal upon perusal of the court file. That there was no proof adduced to show that the Applicant was served with any hearing notice and such failure is not only unfair but contrary to the rule of natural justice. To buttress this argument reliance is placed on the cases of **Monica Wambui Kamau & Another –v- Golden Sparrow Trading Company Ltd & 3 others [2019]eKLR.**

11. On the issue of whether there was inordinate delay in prosecuting the appeal, it is submitted that service week is only meant for cases which have been pending for a period of over five years while the Applicants appeal was short of the five years period requirement. It is argued that the Applicants effort of filing its submission which were pending highlighting is an indication of the desire for expeditious disposal of the appeal.

12. As for whether the orders dismissing the Appeal should be set aside; it has been submitted that the Respondent has not produced any proof that the Applicant was aware of the hearing date of the appeal or whether the Appellant was served with any notice. It is submitted that the Applicant's case should not be dismissed and that it would only be fair to avail the Appellant/Applicant an opportunity to ventilate its case meritoriously. This line of argument has been supported by excerpts from the cases of **Eldoret Grain Limited –vs- Richard *Makokha Simuyu [2019]*** and ***D.T Dobie & Co. (K) Ltd-vs- Joseph Mbaria Muchina CA 37 of 1978.***

13. The Respondents on the other hand, filed their submissions on 20/1/2020. It is submitted therein that the Appellant has the duty to expedite the prosecution of its appeal having filed the same five years ago. It is also submitted that the Appellant has not shown that they were faced with challenges beyond their control, if any, for the delay. The laxity is said to be prejudicial to the Respondents who have been delayed from enjoying the fruit of their litigation.14

14. The Respondents further submitted that due to such laxity, they once filed an application seeking the court to dismiss the matter for want of prosecution but later withdrew the application in the guise of intended negotiations which yielded no fruits. The foregoing notwithstanding, it is averred that the instant application was filed a year after the appeal was dismissed clearly indicating that the Appellant/Applicant was not following the progress in this appeal. The reason for such delay according to the Respondents, has not been properly explained. According to the Respondent, such indolence is not deserving of equity. To buttress their arguments, the Respondent placed reliance on the cases of; **Bilha Ngonyo Isaac –v- Kembu Farm Ltd & Another [2018] eKLR, Eric Oluoch Olele –vs- Kenneth O. Obae ELC No. 322 of 2009, Fran Investments Ltd-vs- G4S Security Services Limited [2015] eKLR.**

Analysis and Determination

15. I have considered the grounds in support of the application and the grounds in opposition thereto. It is the discretion of the court to reinstate the hearing of a suit that has been dismissed. However, such discretion has to be exercised judiciously. In the cae of **Alex Wainana t/a John Commercial Agencies - vs – Janson Mwangi Wanjihia (2015) eKLR**, the Court of Appeal set out the principles governing the exercise of discretion and held that:-

> **"The principles governing the exercise of judicial discretion were set out by Ringera JA (as he then was) in the case of Gathiaka vs Nduriri (2004) 2KLR 67. These are that such discretion should be exercised on sound reason rather than whim, caprice or sympathy and with the sole aim of fulfilling the primary concern of the court that is to do justice to the parties before it."**

16. In the case of **Nixon Andati v Moses Mudaki Ndeya & another [2019] eKLR,** the court cited with approval the case of **Stephen Ndichu –vs – Monty's Wines and Spirits Ltd (2006) KLR** wherein Azangalala, J considered the applicable principles for reinstatement of a suit and held that:-

> **"……..The discretion is free and the main concern of the court is to do justice to the parties before it (See patel versus EA cargo Handling Services Ltd 1974 EA 75.) The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, 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 cause of justice (See Shah –Vs- Mbogo 1969 EA 116.). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration -Vs-Gasyali 1968 EA 300). It also goes without saying that the reason for failure to attend should be considered.**

17. In the case of **Ivita – vs – kyumbu (1984) KLR 441 Chesoni J** (as he then was) stated that the test as to whether a suit should be reinstated is whether there is delay that is prolonged and inexcusable and if justice will be done despite the delay.

18. The Appellant/Applicant herein has explained that it was not served with a notice showing that the case was to be heard on 28/8/2018,when its appeal was dismissed for want of prosecution. It is the Applicant's averment that there was a notice showing that the appeal was to be heard between 16th- 26th August, 2018 but the same did not materialize. Therefore, according to the Applicant, such orders were issued by mistake since the appeal had been admitted and parties directed to file their respective submissions.

19. The Respondents on the other hand submitted that the Appellant/Applicant has not been keen in prosecuting its appeal and such laxity does not deserve equity. Nonetheless, the Respondents' submission is that this application was filed a year after the appeal had been dismissed for want of prosecution and the Applicant does not give an explanation for the delay.

20. In my considered view, the legal basis for dismissal of suits for want of prosecution is the requirement of expediency in the prosecution of Civil Suits. This is provided for under **Article 159(2) (b) of the Constitution** that justice shall not be delayed. Equally, **Sections 1A and 1B of the Civil Procedure Act** gives the courts unlimited power to ensure fair and just administration of justice and to economically utilize judicial resources and time.

21. In the case of **ET Monks & Company Ltd Vs Evans [1985] 584** the court made it clear that public policy interest demands that the business of the court be conducted with expedition. The flipside of it was as held in the case of **Agip (K) Ltd V Highlands Tyres Ltd [2001] KLR 630.** Where Visram, J (as he then was) stated:

> **"It is clear that the process of the judicial system requires that all parties before the court should be given an opportunity to present their cases before a decision is given. It is, therefore, not possible that the rules Committee intended to leave the plaintiff without a remedy and to take away the authority of the court when it made Order IV1 Rule 5 of Civil Procedure Rule."**

22. The above decision by Visram J (as he then was) no doubt echo the provisions of Article 48 of the Constitution that provides that access to justice should not be impeded, as well as Article 50(1) of the Constitution on the right to a fair hearing.

23. Nonetheless, Article 159 of the Constitution and Order 17 Rule 2(3) of the Civil Procedure Rules gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without reasonable explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of **Ivita V Kyumba [1984] KLR 441** espoused that:

> **"The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court."**

24. The instant appeal was dismissed on 28/8/2018 for want of prosecution and in the absence of both parties. The Appellant/Applicant seeks the setting aside of that order of dismissal on the basis that it was not served with the hearingnotice before the matter was dismissed. The applicant also argues it stands to be condemned unheard contrary to the rule of natural justice if the order of dismissal is not vacated and the suit reinstated. Albeit, the Respondent having annexed a hearing notice served to the Applicant, the Applicant contended that the Respondent has not tendered any proof showing that the hearing notice was indeed served unto it.

25. Nonetheless, it is this court's observation that the instant application was filed a year after the appeal was dismissed. I find that it beats all logic why it took such a long period of time for the applicant to file the instant application for its appeal to be reinstated. If it really was still interested having the same prosecuted. The applicant has not given any reasonable explanation for its long delay in filing the instant application and its claim that it was not served with a hearing notice does not hold any water as the respondent has provided evidence to confirm this which has not been challenged otherwise.

26. In every Civil Suit, it is sole duty of the Plaintiff or the Appellant as the case may be, seeking remedy to take all necessary steps at his/her disposal to ensure just and expeditious disposal of its his/her claim. He/she should not be guilty of latches. It is its/his/her duty to ensure

he moves the court to have its / his/her case set down for hearing and exhaust all the relevant provisions of the law to its/his/her advantage. The Appellant in this suit has failed to move court to hear its case by failing to move the court to hear it. Save for the issue of service of the hearing notice, there is nothing on record to show that the appellant offered any other explanation for the delay in having the appeal prosecuted.

27. Finally, I consider the submission that in dismissing the Appeal, the appellant was denied a right to be heard. It is trite that rules of natural justice dictate that a party should not be condemned unheard. However, in this case there is no cogent demonstration of the prejudice that the appellant stands to suffer. The principle of expeditious disposal of cases applies across the board for the efficient administration of justice. Further delay would therefore amount to delayed justice on part of the Respondents. The appellant seems to have lost interest in its appeal for it to have taken a year in filing the instant application after the appeal had been dismissed.

28. I am of the considered opinion that the delay has not been satisfactorily explained and do further find that delay is a source of prejudice to the respondent as it affects the fair administration of justice. Article 159 of the Constitution provides that justice shall not be delayed. It is my finding that the application lacks merit.

29. The upshot of the above is that the application dated 26/08/2019 is hereby dismissed with costs to the Respondents.

It is hereby so ordered.

Dated, signed and delivered at Mombasa on this 25th day of February, 2020.

D. O CHEPKWONY

JUDGE