REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 183 OF 2018

MATANO KHAMIS ALI.....APPELLANT

-VERSUS-

BRIEK AHMED.....1ST RESPONDENT

YUSUF NASSORO.....2ND RESPONDENT

KENGA CHARO MANGI.....3RD RESPONDENT

(Being an appeal from the entire ruling and Order of Hon. Mr. G. Kiage (RM) delivered at Mombasa on 31st August 2018 in Mombasa CMCC NO. 3412 of 2002)

Coram: Hon. Justice Reuben Nyakundi

Kanyi J and Co. Advocates for the Appellant

Timamy & Co. Advocates for the Respondents

JUDGEMENT

1. Unimpressed by the learned trial magistrate's Ruling delivered on 31st August 2018 in Mombasa CMCC No. 3412 of 2002 allowing an application by the Respondents' herein to dismiss that suit for want of prosecution. The Appellant, by memorandum of appeal dated 3rd and filed on 13th September 2018 appeals to this Court seeking essentially to have the suit reinstated and heard before a different trial magistrate and Costs of the appeal.

2. Condensed, the grounds upon which the appeal is premised are that the learned trial magistrate misapprehended the provisions of **Order 17 Rule 2(3) of the Civil Procedure Rules, 2010**, ignored the proceedings on record and therefore fell into errors of law and fact in dismissing Mombasa CMCC No. 3412 of 2002.

3. The matter in issue at trial came about with the Respondent's filing an application dated 24th May, 2018 seeking inter alia to dismiss the Appellant's suit for want of prosecution. In response to this Application, the Plaintiff/Appellant had averred that at the time the Application was being made, as was also evident from the court's record of proceedings, a hearing date in the matter had been issued and thus the matter had been fixed for and awaiting hearing.

4. The relevant findings of the trial magistrate disputed by the appellant are:

> ***"I have considered the argument of the court and it is indeed not in dispute that this suit was filed in the year 2002. It is also not in dispute the passage of a considerable amount of time 16 years -to be precise the matter has never taken off and not even a single witness has testified in all that time.***
>
> ***The Plaintiff offered no explanation or excuse for failure of the matter to take off and started arguing that since the date for hearing has been fixed the provisions of Order 17 Rule 2 be called into play.***
>
> ***While it is not disputed that the matter has finally been set down for hearing the past indolent conduct of this matter by the Plaintiff is not explained. I found that to excuse the Plaintiff's conduct in the present circumstances without any just or reasonable explanation is the part for the inordinate delay in prosecuting his case would count to encouraging and strengthening indolence and as such. I will allow the application dated 24th May, 2018 and proceed to dismiss the suit with costs to the***

Defendant/Applicant."

5. Per the Court's directions, this suit was prosecuted by way of written submissions. The Appellant filed submissions dated 21st August 2019 while the Respondents filed their submissions dated 3rd September 2019.

Appellant's Submissions

6. Counsel acting on behalf of the Appellant pursued the line of argument that per the record of appeal, it was evident that as of 19th June 2018 when the Respondents Application dated 24th May 2018 was filed, a hearing date of 20th August 2018 had already been set when the matter had come up in court on the 14th June 2018. According to Counsel therefore, at the time the said Application was filed in court, the order for the hearing of the matter was actually in existence and the Respondent was aware of the same and this fact was brought to the attention of the court.

7. On dismissal, Counsel submitted that the Application by the Respondents at the lower Court sought to subvert the course of justice prematurely. Reliance was placed on the overriding principles of the **Sections 1A and 1B of the Civil Procedure Act** and Counsel cited **D.T Dobie & Company (Kenya) LTD vs Muchina (1982) KLR 1** for the submission that the Court should aim at sustaining a suit rather than having it struck out.

8. Regarding whether there had been a delay as alluded to by the learned trial magistrate, it was submitted that the court's concern was not so much so that there had been a delay but whether in such circumstances justice could still be attained. In this regard, reliance was placed on **Ivita vs Kyumbu (1984) KLR 44** and on **Halsbury's Laws of England Vol. 37 paragraph 448.**

9. On whether the Notice Motion dated 24th May 2018 was res judicata, it is submitted that it was as it was a second application seeking similar orders and made by the Applicant. The first one, it is argued, was an application dated 13th May 2011 which was dismissed vide a ruling delivered on 19th October 2011. Reliance is placed on **Section 7 of the Civil Procedure Act**. It is further submitted that the said Section bars a party from reopening a subject matter that been the subject of a previous determination. For this, reliance is placed on the case of **Henderson vs Henderson (1843-60) ALL ER 378.**

10. As for whether the rule of res judicata applies to Applications, it is submitted that it did and this is supported by **Mburu Kinyua vs Gachiri Tuti (1976-80) I KLR 790.**

11. Based on the foregoing arguments, Counsel urged that the appeal be allowed.

Respondents' Submissions

12. The Respondent's advocate begun by outlining the lower court history of the matter, stating that the plaintiff/appellant filed the suit vide a plaint date 10th September 2002 and filed in court on the 25th September 2002 the plaint was later amended by consent of all the parties and was filed in court on the 2nd September 2003. It is submitted that since the filing of the pleadings in court for a period of about 8 years the matter never proceeded until sometimes on 7th July 2011 when the matter was mentioned for fixing a Notice of Motion Application for hearing on the 27th July 2011. The application sought to dismiss the suit for want of prosecution. It is further submitted that, in his ruling of 19th October 2011, the **Honourable Magistrate E. Michieka** disallowed the application directing that the matter be set down for hearing within 90 days.

13. According to Counsel, from the date of the ruling, other than the matter being mentioned in court, the plaintiff never prosecuted the matter for a period of about 8 years until sometime on 30th July 2018 when the defendant's Notice of Motion Application dated 24th May 2018 seeking to dismiss the plaintiff's suit for want of prosecution was heard and the suit was eventually dismissed.

14. For the Respondents, the sole issue for determination is whether the Honourable Magistrate in dismissing the suit for want of prosecution, exercised his discretion judiciously.

15. Turning to the law, it is submitted that the legal basis for dismissal of a suit for want of prosecution has been well elaborated to be the requirement of expediency in the prosecution of civil suits. Reliance is placed on **Nilesh Premchand Mulji Shah & another T/A Ketan Emporium Vs M. D. Popat and Others [2016] eKLR** and **Protein Fruit Processors Limited and Another vs Diamond Trust Bank Kenya Limited [2015] eKLR.**

16. In his analysis, Counsel for the Respondents' expounded that the Plaintiff/ Appellant in this suit has not prosecuted this matter for a period of over 16 years this matter has been court. The Respondent filed two applications seeking to dismiss the suit for want of prosecution. The first was disallowed by the court vide a ruling dated 19th October 2011. Further, it is submitted that after the said ruling for a period of about 7 years the plaintiff again did not prosecute the matter and the Respondent herein on the 30th July 2018 sought for similar orders, and the application was allowed.

17. It is contended that no explanation whatsoever has been brought forth by the Appellant as to why the suit has not been prosecuted. Reliance is placed on the maxim, 'Equity aids the vigilant and not the indolent.' It is urged that justice delayed is justice denied; for a matter that has stayed for all that time without being prosecuted is not only an abuse of the court process but it is very prejudicial for the defendant as his witnesses can no longer be traced.

18. In closing, it is submitted that the learned trial magistrate was correct in dismissing the suit for want of prosecution and that the instant

appeal lacks ought to be dismissed.

Analysis, Findings and Determination

19. In light of the arguments presented by the respective Counsel on appeal and cognizant of the evidence and the record of the case at trial, I find that the issue that arises for determination is whether the trial magistrate erred in dismissing Mombasa CMCC No. 3412 of 2002 for want of prosecution.

20. Bearing in mind that this is a first Appeal, I can only appreciate the evidence on the record afresh but without the benefit of first hand testimony. This principle is discussed by the Court of Appeal in the case of **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**, wherein it held inter alia

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."***

21. In **Selle and another vs Associated Motor Boat Company Ltd & Others [1968] EA 123**, it is held:

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally"***

22. I having duly executed my duty to reappraise the evidence and the record of the matter at trial in the antecedent part of this Judgement. What remains therefore is to delve into the central question for determination. The law that relates to dismissal of suits for want of prosecution is **Order 17 Rule 2 of the Civil Procedure Rules, 2010** which provides:

> *"[Order 17, rule 2] Notice to show cause why suit should not be dismissed.*
>
> *2. (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.*
>
> *(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.*
>
> *(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.*
>
> *(4) The court may dismiss the suit for non-compliance with any direction given under this Order."*

23. For the principles the court ought to consider in arriving at its decision, I turn to **Ivita vs Kyumbu [1975] eKLR** where the Court finds:

> ***"The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."***

24. A similar parallel to the instant case is to be drawn from the finding of my learned colleague in **Ruth Wachera Karanja v James Muiruri Ng'anga' & 3 others [2017] eKLR** where discussing the issue of delay in the prosecution of a suit, draws inspiration from Lord Denning in **Allen vs. Sir Alfred McAlpine [1968] All E.R 543 at 546** where he stated thus:

> ***"The delay of justice is a denial of justice...all through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear...To put right this wrong, we will in this court do all in our power to enforce expedition; and if need be, we will strike out actions when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the court, and the rules of court expressly permit it."***

25. The statutory requirement is that no application has been made or step taken by either party for one year. In the instant case, in the view of the trial magistrate, while it was not denied that the matter may have been set down for hearing, the past indolent conduct of the Appellant could not be condoned. As argued by Counsel and going by the record of the lower court, as of 19th June 2018 when the Respondents filed the Application dated 24th May 2018, a hearing date of 20th August 2018 had already been set when the matter had come up in court on the 14th June 2018.

26. Taken together the above discussion cements the view of this court that the learned trial magistrate misapprehended the law and therefore

arrived at a wrong conclusion in dismissing the Appellant's suit.

27. In the upshot, the memorandum of appeal dated 3rd and filed on 13th September 2018 is allowed as prayed with throw away costs of Kshs.20,000/= to be borne by the appellant. Further, Mombasa CMCC No. 3412 of 2002 is hereby reinstated and shall be heard before a different trial magistrate. This order be served upon the Chief Magistrate Mombasa to move with speed and allocate a trial Magistrate to hear and determine the case within a reasonable time.

28. The Appellant shall have the Costs of the appeal.

29. It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF MARCH 2020

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R NYAKUNDI

JUDGE

In the presence of:

1. Mr. Maugu for the appellant