



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 115B OF 2016

FRANCIS WANJALA THOMAS.....1ST APPELLANT

FLORENCE NEKESA WAFULA.....2ND APPELLANT

SOLOMON SHOSO.....3RD APPELLANT

ELIZABETH KIGEN.....4TH APPELLANT

-VERSUS-

MUNICIPAL COUNCIL OF ELDORET.....RESPONDENT

(Being an appeal from the Ruling and Order of Hon. L. Nafula, Senior

Principal Magistrate, delivered on 30 June 2016 in Eldoret CMCC No. 533 of 2011)

JUDGMENT

[1] This is an interlocutory appeal from the ruling and order of the Senior Principal Magistrate delivered on **30 June 2016** in **Eldoret CMCC No. 533 of 2011: Francis Wanjala Thomas & 3 Others vs. Municipal Council of Eldoret**. The appellants had sued the Respondent in that suit claiming **Kshs. 1,380,000/=** together with costs of the suit on the ground that the Respondent unlawfully encroached on their property and destroyed structures thereon. The suit was initially filed in the High Court on **25 February 2008**, but was thereafter transferred to the lower court on **13 April 2011**, where it remained pending until its dismissal on **30 June 2016** for want of prosecution.

[2] The record of the lower court shows that the prosecution of the suit was not smooth sailing, as numerous adjournments were sought by and granted to the parties. Ultimately, the respondent opted to file its application for dismissal dated **28 April 2016**. Upon hearing the parties' representations in respect of that application, the learned magistrate was satisfied that indeed the suit was ripe for dismissal for want of prosecution. The lower court suit was accordingly dismissed for want of prosecution vide the ruling dated **30 June 2016**, thus triggering this appeal.

[3] In their Memorandum of Appeal dated **29 July 2016**, the appellants contended that:

[a] The learned magistrate erred in law and fact in failing to consider the explanation given by the appellants over the delay in prosecuting the case.

[b] The learned magistrate erred in law and fact in failing to accord the appellants an opportunity to conclude the prosecution of their case, which was part-heard.

[c] The learned magistrate erred in law and fact in failing to consider that despite the delay justice could still be done by an expedited prosecution of the matter.

[4] Accordingly, the appellants prayed that the appeal be allowed; that the decision of the lower court be set aside; and that the appellants be accorded an opportunity to continue with the prosecution of their suit. The appeal was urged by way of written submissions, which were filed herein on **27 August 2019** and **16 September 2019**, respectively. Counsel for the appellants laid emphasis on the fact that the appellants had already called two witnesses before the lower court; and that they were not fully to blame for the delay. He submitted therefore that the learned magistrate ought to have focused on the reason for the adjournment of **26 June 2013**; which, in his submission, was granted at the

instance of the Respondent. He relied on Utalii Transport Co. Ltd & 3 Others vs. NIC Bank Ltd & Another [2014] eKLR and Communications Courier & Another vs. Telkom Ltd [1999] eKLR, for the applicable principles. Counsel also cited John Muruti Thumi & 4 Others vs. Fidelity Commercial Bank Ltd & 4 Others [2016] eKLR to support his submission that, even where there is inordinate delay, the court can nevertheless grant leave to prosecute if justice can still be done to the parties in spite of the delay.

[5] Counsel for the respondent defended the decision of the lower court, contending that there was a clear demonstration that the delay in prosecuting the suit before the lower court was not only inordinate, but also unexplained, for a cause of action that allegedly arose in **August 2007**. Counsel made reference to **Article 159(2)(b)** of the Constitution for the imperative that justice shall not be delayed. He also made reference to Ivita vs. Kyumbu [1975] eKLR and Mwangi S. Kimeny vs. Attorney General & Another [2014] eKLR to underscore his argument that justice is justice to both sides and not just the appellants. Counsel urged the Court to note that the same pattern of tardiness was employed in this appeal, which had been pending since **2016**.

[6] On whether justice could still be done, counsel relied on Tana Teachers' Cooperative and Credit Society Limited vs. Andriano Muchiri [2018] eKLR in which the Court of Appeal affirmed the dismissal of a suit for want of prosecution on the ground that the plaintiff's indolence was inexcusable. Hence, the Court was urged to enforce the provisions of **Sections 1A(3)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, by dismissing this appeal. Counsel was of the strong view that a party cannot egregiously fail or refuse to comply with the directions of the Court and thereafter seek refuge in the overriding objective as the appellant had done.

[7] The well-trodden path, in such matters, is that an appellate court ought not to interfere with the exercise of discretion by the trial court, even if, on the facts, it would have come to a different conclusion. Accordingly, the limited circumstances under which an appellate court can interfere with the exercise of discretion by the trial court were well articulated by *Madan, JA* (as he then was) in United India Insurance Co. Ltd V. East African Underwriters (Kenya) Ltd [1985] EA 898, as follows:

"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

[8] With the foregoing principles in mind, I have carefully considered the impugned ruling dated **30 June 2016** in the light of the grounds set out in the Notice of Motion dated **28 April 2016** and its Supporting Affidavit. That application had been brought primarily under **Order 17 Rule 2(3)** of the **Civil Procedure Rules** for dismissal of the lower court suit for want of prosecution. **Order 17 Rule 2** of the **Civil Procedure Rules** provides that:

- (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 should not be 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.**

[9] And, as was well elucidated by **Lord Denning MR** in the case of Allen vs. Sir Alfred McAlpine [1968] All E.R 543 at **546**, any delay in the administration of justice is to be deprecated. 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."

[10] Nevertheless, each case must be considered and decided on its own facts. To this end, the guiding principles as restated in Ivita vs Kyumbu [1975] eKLR provide an objective basis for the exercise of discretion in such matters. It was held thus:

"...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."

[11] The same principles were outlined in the cases of Utalii Transport Co. Ltd & 3 Others vs. NIC Bank Ltd & Another (supra); Communications Courier & Another vs. Telkom Ltd (supra); John Muruti Thumi & 4 Others vs. Fidelity Commercial Bank Ltd & 4 Others (supra) and Mwangi S. Kimeny vs. Attorney General & Another (supra) that were cited by learned counsel. Thus, the two

pertinent issues for consideration in the instant appeal are:

[a] whether there was a delay in the prosecution of the lower court suit; and if so, whether the delay was prolonged and inexcusable;

[b] whether justice could still be done in the lower court matter despite such delay.

[12] There is no dispute that the suit was filed in 2008 and that the last step, for purposes of **Order 17 Rule 2** of the **Civil Procedure Rules**, was taken on **26 June 2013** when the matter was adjourned to enable counsel ascertain the legal status of the defendant. The lower court record shows that no action was taken thereafter by the appellants to progress the matter, thereby prompting the filing of the dismissal application. Thus, it is manifest that there was a period of indolence of about three years since the last step was taken; and therefore that the delay was prolonged.

[13] As to whether the delay was excusable, I have looked at the Replying Affidavit filed on behalf of the appellants in response to the dismissal application. It was sworn on **12 May 2016** by **Mr. Raphael Wambua Kigamwa, Advocate**, and in the main, **Mr. Kigamwa** blamed the respondent for the delay in the prosecution of the suit. In particular, He averred that, when the suit came up for further hearing on **26 April 2013**, the Advocate for the respondent applied for adjournment on the grounds that the status of the defendant as a body corporate was unclear owing to the enactment of the **County Governments Act, 2012**. Thus, it was the appellant's contention that, since the delay from **26 April 2013** was attributable to respondent, it was a flagrant abuse of the court process for the same party to apply for dismissal of the suit for want of prosecution that it was responsible for in the first place.

[14] The court record however shows that it was **Mr. Kigamwa** who applied for the adjournment of **26 June 2013**. He is on record as having told the lower court that:

"We are ready to proceed but there is a problem with the defendant in terms of the County Transitions Act. We have to take a mention date and enjoin another party."

[15] On behalf of the defendants, **Mr. Aseso, Advocate**, was in attendance and was ready to proceed. He was, nevertheless, not averse to the application for adjournment. Thus, in so far as the court record goes, the adjournment was granted by consent at the instance of the appellant's counsel, to enable the counsel for the defendant ascertain the status of the defendant. The record of the lower court further shows that appellants' explanation for the delay as set out in **Mr. Kigamwa's** Replying Affidavit was indeed taken into account by the trial magistrate and found to be untenable. In particular, the court ruled out the assertion that the respondent was the cause of the adjournment of **26 June 2013** and the ensuing delay. It is inexplicable why **Mr. Kigamwa** would insist on the same stance when it is plainly at variance with the record of the proceedings of the lower court. It is therefore not true that the lower court failed to consider the explanation given by the appellant over the delay in prosecuting the suit.

[16] More importantly, it is noteworthy that **Mr. Kigamwa's** affidavit is completely silent on why the appellants did not sidestep the respondent's alleged inaction and prosecute their claim; or otherwise seek the necessary amendments to bring on board the necessary party, in view of the pertinent legal developments that prompted the adjournment of **26 April 2013**. That omission is, of itself, a demonstration that no plausible excuse was proffered by the appellants to explain their inordinate delay in prosecuting their claim. Hence, even if I were to find that the respondent was responsible for the adjournment of **26 June 2013**. That alone did not, in my considered view, lessen in any way the primary responsibility of the appellants to get on with their case. In **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696** it was held that:

"It is the duty of a plaintiff to bring his suit to early trial, and he cannot absolve himself of this primary duty by saying that the defendant consented to the position."

[17] Lord Denning made remarks to a similar effect in **Fitzpatrick vs. Batger & Co. Ltd [1967] 2 All ER 657** thus:

"...it is the duty of the plaintiff's advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition...The delay [of two years] is far beyond anything we can excuse...It is impossible to have a fair trial after so long a time..."

[18] It is also noteworthy that the impugned dismissal for want of prosecution was not the first. The suit had earlier on **26 May 2010** been dismissed by **Hon. Ang'awa, J.** for want of prosecution before its transfer to the lower court. In the premises, I find no basis at all for faulting the decision of trial magistrate as the delay was clearly prejudicial to the defendant; noting that it was then undergoing transition. As has been pointed out herein above, justice is justice to both sides and not just the plaintiffs. I would accordingly resolve the second issue in favour of the Respondent. Indeed, in the case of **Victory Construction Co. vs. Duggal [1962] EA 697**, it was held that:

"The purpose of rule 6 of Order 16 [now Order 17] is to provide the court with an administrative machinery whereby to disencumber itself of case records in which parties appear to have lost interest..."

[19] In the result, I find no merit in this appeal. The same is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 22ND DAY OF MAY 2020

OLGA SEWE

JUDGE