



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. E 017 OF 2019

BARCLAYS BANK OF KENYA.....APPELLANT

VERSUS

MACTOSH NYATICHA NYAMACHE T/A WEST PARK.....1ST RESPONDENT

FELSITERS BOCHABERI ONKWARE T/A WESTPARK A WEST HOUSE.....2ND RESPONDENT

RULING

1. This is an Appeal from an interlocutory Ruling by Hon. M. W. Murage delivered on 27th August 2019.

2. The Ruling of the Learned Magistrate determined the Appellant's application dated 18th March 2019 in which the Appellant had sought leave to have witness statements and documents filed out of time. In the short Ruling, the Learned Magistrate held:-

“The documents annexed by the Defendant herein were filed on 23/07/2019 before filing of the application herein. In fact they were expunged from the record. The Defendant is not introducing anything new other than trying to bring back documents that had been expunged from the record back to the record. I am not persuaded to find that the application herein has merited. If anything it is a delaying tactic. In my view noting the years taken after the matter was certified ready for hearing.”

3. That is the decision that triggered the present Appeal which raises 4 grounds namely:-

(i) That the learned Magistrate erred in law and in fact in finding that the application dated 18th March 2019 had no merit and thereby dismissing the same.

(ii) That the learned Magistrate erred in law and in fact is failing to take into account the Appellant's explanation in the delay in filing the witness statements and bundle of documents.

(iii) The learned Magistrate erred in law and in fact in finding that the application was a delaying tactic while in fact the matter had been fixed for hearing.

(iv) That the learned Magistrate erred in law and in fact in not considering the submissions and authorities filed in support of the application.

4. On agreement of the parties and with the concurrence of the Court, the Appeal was argued by way of written submissions. The Court has considered those arguments. In this decision I refer to the parties as they are in the trial court.

5. There is convergence that the decision under attack was made in the discretion of the learned Magistrate. That being the case, this Court sitting on Appeal, has to be circumspect before interfering with the decision of the learned Magistrate. The approach to take is that set out by Madan J. A (as he then was) in United India Insurance Co. Ltd & Oriental Fire & General Insurance Co. Ltd -vs- East African Underwriters (Kenya) Ltd [1985] eKLR:-

“ 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. In my view Platt J did not err on any of these matters.”

6. Yet before I consider the substance of the Appeal, the Court needs to attend to an issue raised by the Plaintiffs that the application of 18th March 2019 was *res judicata* the lower Court’s decision of 23rd January 2019 (perhaps, 24th January 2019). So what transpired in Court on 24th January 2019?

7. The record shows that on that day the matter was due for hearing but the Plaintiffs were not ready to proceed because the advocate in conduct of the matter was elsewhere. Miss Nyamai holding brief then sought for an adjournment. At the same time counsel informed Court that the Plaintiffs had just been served with the Defendant’s witness statement and list of documents. Counsel for the Defendant then sought to have the documents admitted. And though not objected to by counsel for the Plaintiffs (a matter to which I shall return), the Court expunged the documents for the reason that they had been filed without leave of Court.

8. The Application which gives raise to this Appeal is that of 18th March 2019 in which the Defendant sought to have the expunged documents admitted out of time. This application in my view, was not *res judicata* what had transpired earlier because the very reason why the filed documents were expunged was because they had been filed without leave of the Court. That being the case the Defendant was perfectly in order to bring an application formally seeking leave of Court to admit the late filing of witness statements and documents.

9. Whether or not the learned Magistrate exercised her discretion judiciously needs to be considered within the parameters set out by the Supreme Court in Nicholas Kiptoo Arap Korir Salat –vs- Independent Electoral & Boundaries Commission & 7 others [2014] eKLR:-

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

10. In refusing to grant the extension of time, the learned Magistrate gave weight to the delay in bringing the application which she characterized as a delaying tactic. Indeed, there was considerable delay in bringing the application, coming as it did more than 5 ½ years after the suit was filed. Undue delay can cause a hardship and prejudice to the other party.

11. If that was all to the matter, then the learned Magistrate was entitled to reject the application. Yet it is common ground that the statement and documents sought to be brought into record were those that were expunged on 24th January 2019. Importantly, at that time, counsel for the Plaintiffs did not object to their late filing. This Court is not told why there was a change of heart between that time and the time the application was filed. It is true that the matter had been certified ready for hearing but hearing had not commenced. While some delay may have occurred because of the late filing, this Court is not persuaded that this should overawe the need to give parties a chance to present their respective cases, and more so, where the party which ought to be complaining of prejudice had not raised an objection in the first instance.

12. Turning to whether the Plaintiffs would suffer prejudice, they later argued, and again before this Court, that the documents intended to be filed raised new facts and claims for which the Plaintiffs will have to amend their pleadings. What is curious is that neither in the lower Court nor in this Court do the Plaintiffs specify what those new facts or claims are. This is not elaborated at all.

13. In the end, the Court observes that the Court’s holding that the application was a delaying tactic or sought to reintroduce documents that had been expunged was a wrong exercise of discretion given that Plaintiff’s advocates had initially not objected to their filing.

14. The Court allows the Appeal of 9th September 2019 and sets asides the Ruling and Orders of 27th August 2019. Leave is granted to the Appellant to file its witness statement and documents sought to be filed through the application of 18th March 2019 within 14 days of this order. Costs of the Appeal to the Appellant.

Dated, Signed and Delivered in Court at Nairobi this 23rd Day of June 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Mare for Appellant.

Kabira for Respondent.