REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 165 OF 2018

FK (Minor suing through his mother and next friend

NMK.....APPELLANT

-VERSUS-

JONES MUTUA.....1ST RESPONDENT

PETER WAMBUA DAUDI....2ND RESPONDENT

BUSWAYS KENYA LTD.....3RD RESPONDENT

DAVID MUASA WAMBUA..4TH RESPONDENT

[Being an appeal from the ruling of Hon. C.A. Ocharo (Principal Magistrate) in Machakos Chief Magistrate's Court Civil Case No. 1418 of 2010 delivered on 3/10/2017

BETWEEN

FK (Minor suing through his mother and next friend

NMK.....PLAINTIFF

-VERSUS-

JONES MUTUA.....1ST RESPONDENT

PETER WAMBUA DAUDI..2ND RESPONDENT

BUSWAYS KENYA LTD.....3RD RESPONDENT

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JUDGEMENT

1. In the court below, appellant through his mother and next friend sued the respondents jointly and severally for general damages, costs of the suit and interests. He claimed to have been injured as a result of an accident when she was aboard the vehicle KAZ 802B which vehicle collided with motor vehicle KBG 475E.

2. In their respective written statements of defence, the defendants refuted the plaintiff's claim and refuted negligence. They blamed negligence as against each other.

3. It would appear that thereafter the appellant did not take active steps to proceed with the hearing of the suit. However, there is a hearing notice dated 15.4.2011 fixing the suit for hearing on 24.5.2011. On 8.11.2016 an application for dismissal of the suit was fixed for hearing in the registry when the hearing date of 1.12.2016 was given. When the matter came before the trial magistrate on 1.12.2016, the same was reserved for ruling on 31.1.2017 whereupon the suit was dismissed. This resulted in the application dated 24.3.2017 for review of the dismissal orders as well as the reinstatement of the dismissed suit that was filed and the ruling was reserved for the 3.10.2017.

4. The ruling was indeed delivered with the trial magistrate noting that there was no explanation for the 5-month delay in bringing the application for review and as such the application was dismissed.

5. Being dissatisfied with the decision, the appellant appealed on the following grounds;

a) The learned trial Magistrate erred in law and fact when she rejected the application for review orders dismissing the suit even when there were good grounds and new discovery to warrant review;

b) The learned magistrate erred in law and fact when she dismissed the appellant's suit for want of prosecution yet the proceedings of the said case had been stayed awaiting/pending hearing and determination of a test suit;

c) The learned magistrate erred in law and fact when she failed to consider that the appellant would not fix the case for hearing when the test suit was pending hearing and the stay of proceedings orders had not been discharged;

d) The learned magistrate erred in law and fact when she failed to exercise powers to demand to be availed to her the file of case No. 15 of 2013 which was the test suit as it's the practice when a court wants to confirm existence of orders

e) The learned magistrate erred in law and fact when she failed to take cognizance of the fact that the court has a duty in the interest of justice to do its own due diligence to establish the existence of a court order staying proceedings before dismissing a case for want of prosecution;

f) The learned magistrate erred in law and fact when she dismissed the appellant's case on flimsy reasons yet she had other remedies before her including giving the appellant who was interested and willing to prosecute her case another opportunity to do so.

6. The appellant prayed that the appeal be allowed and the appellant's suit CMCC 1418 be reinstated for hearing to its logical conclusion.

7. The appeal was canvassed by way of written submissions.

8. In his submissions, counsel for the appellant, cited the provisions of Order 45 Rule 1 of the Civil Procedure Rules as well as section 80 of the Civil Procedure Act and submitted that the delay in the prosecution of the case was not inordinate as the appellant proved to the court of the existence of the Case number 15 of 2013 which the 3rd and 4th respondents herein had instituted seeking stay of the proceedings in inter alia the appellant's case and the selection of a test suit. Counsel placed reliance on the cases of **Nasibwa Wakenya Moses v University of Nairobi & Another (2019) eKLR** and **Naftali Opondo Onyango v National Bank of Kenya Ltd (2005) eKLR** and urged the court to allow the appeal and reinstate the CMCC 1418 of 2010 for hearing and determination.

9. In reply, counsel for the 1st respondent vide submissions dated 17.6.2017 equally cited the provisions of section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules as well as the case of **Francis Njoroge v Stephen Maina Kamore (2018) eKLR** and urged the court to dismiss the appeal with costs.

10. Having considered the grounds of the appeal and the submission of counsel, the issue for determination is whether the appeal has merit.

11. It is evident from the procedural history of these proceedings as summarized above, that there has been delay in the trial and disposal of the underlying suit. Nearly five years following the filing of the suit on 16th November, 2010, not a single witness has testified.

12. The history of the delay in the instant case commenced with the plaintiff's failure to take any step in the matter for one year. The rules are silent on where there are instances that a person is impeded from taking such step hence the import of the discretion of the judge.

13. I wish to point out that the right to a fair trial in civil matters is guaranteed by article 50 (1) of *The Constitution of Kenya, 2010*. In the determination of civil rights and obligations, a person is entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. Entailed in that right to a "speedy hearing" is the right to a trial within a reasonable time, often termed the right to be tried without undue delay or the right to a speedy trial. For the realization of this right, all parties, including the courts, have a responsibility to ensure that proceedings are carried out expeditiously, in a manner consistent with this article. The overriding objective under article 50 of *the Constitution of the Kenya, 2010* and *the Civil Procedure Rules* in general is that courts should deal with cases justly, in a way which is proportionate to the amount of money involved, the interests and rights involved, the importance of the case, the complexity of the issues and the financial position of each party.

14. The overriding objectives of the Civil Procedure Act emphasizes efficiency and economy in the conduct of litigation, in that the courts' resources should be used in such a manner that any given case is allocated its fair share of resources, the most important of which in civil litigation is time. Each case whose trial is unduly prolonged deprives other worthy litigants of timely access to the courts. Courts must ensure that each suit is dealt with expeditiously and fairly. Where the reason for delay involves abusing the process of the court, such as that which may be evident in maintaining proceedings when there is no intention of carrying the case to trial, or delay that is intentional and contumacious, or where a party is guilty of inordinate and inexcusable delay, giving rise to a substantial risk that a fair trial would not be possible, or to serious prejudice to the other party, the court is entitled to dismiss the proceedings (see ***Birkett v. James [1978] AC 297*** **and** ***Allen v. Sir Alfred McAlpine & Sons [1968] 1 A11 ER 543***). Conducting proceedings in a manner manifesting an intention not to bring them to an expeditious conclusion is a subversion of the process of the court and will constitute an abuse justifying a stay or dismissal.

15. In making a balancing act between considerations of policy and justice, a judge in the exercise of his discretion ought to decide whether there has been an abuse of process, which amounts to an affront to the public conscience that requires the proceedings to be stayed. Where there has been a serious abuse of the process the court should express its disapproval by refusing to prolong the proceedings any further.

"*Litigants who, having started litigation, elect to allow that litigation to sink into indefinite abeyance, who have had no serious and settled intent to pursue that litigation and who have, in consequence, acted, in respect of that litigation, in knowing disregard of their obligation to the court and to the opposing party, should not be allowed to carry out with litigation conducted in that manner*" (see ***Solland International Ltd v. Clifford Harris & Co [2015] EWHC 2018***).

16. In the English case of ***David Phelps v Peter Button [2016] EWHC 3185*** it was stated that in situations of delay, the court ought to consider the following factors. First, the length of the delay; secondly, any excuses put forward for the delay; thirdly, the degree to which the claimant has failed to observe the rules of court or any court order; fourthly, the prejudice caused to the defendant by the delay; fifthly, the effect of the delay on trial; sixthly, the effect of the delay on other litigants and other proceedings; seventhly, the extent, if any, to which the defendant can be said to have contributed to the delay; eighthly, the conduct of the claimant and the defendant in relation to the action; ninthly, other special factors of relevance in the particular case. It requires examining the reasons advanced by the person who is accused of abuse of process. It also means a close examination of facts, taking into account the reasons, if any, advanced by the person accused of abusing the process for the adoption of a particular course and then deciding whether what occurred is a sufficiently serious misuse of the process of the court to warrant being barred from continuing the case with the consequence that the actual merits of the case are not explored.

17. Under Order 17 rule 2 (1) of *The Civil Procedure Rules*, it is stated that "*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*"

18. The appellant had mentioned that an application was made (Machakos HCC 15/2013) seeking a stay of proceedings in this matter and for the said suit to be selected as a test suit. The position of the law is that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible, but also where it would be contrary to the public interest in the integrity of the justice system that a trial should take place (see ***Regina v. Horseferry Road Magistrates' Court, ex Parte Bennett (No 1), [1993] 3 WLR 90, [1994] 1 AC 42, (1993) 3 All ER 138, (1994) 98 Cr App R 114***).

19. I have seen a copy of the application on the court record that is annexed to the application for reinstatement of the suit. However, I do not have the benefit of the outcome of the said application.

20. From the record, the other observation that can be made is that there is a hearing notice dated 17.2.2011 and although the notice indicates that the hearing was to take place on 24.5.2011, there is no corresponding record by the trial magistrate as to what transpired on that date. The next activity on the file was on 22.8.2013 where a consent was recorded. On 11.10.2015, there is an indication on the record that the matter came up before the trial magistrate and it is not clear how the date was fixed. However, the matter was stood over generally and later the application for dismissal of the suit was filed. When the trial magistrate dismissed the suit on 31.1.2017 under Order 17 rule 2 of *the Civil Procedure Rules*, the decision was erroneous on two grounds; the court ought to have ensured that a dismissal notice was issued; but there was nothing to show that the parties most especially the plaintiff was given notice to show cause why the suit should not be dismissed; the provision that was invoked in dismissing the suit invited the court to give dismissal notice and also gives a party leverage to apply for dismissal. Because the court took a back seat in giving such notice to the plaintiff, I find that it is necessary to interfere with the decision that was made.

21. After the suit was dismissed, there was a desperate effort by the appellant to have the same reinstated; In addition, there was a pending application for stay of proceedings that the plaintiff deserved every right to be heard on its merits.

22. Whereas it is clear that the expeditious disposal of the suit was culled, i have found no circumstances to suggest that a fair trial is no longer possible despite the prolonged delay nor anything to suggest that it would be contrary to the public interest in the integrity of the justice system that a trial of the main suit on its merits should take place.

23. The appellant has availed evidence to the effect that a test suit had been selected in the series of cases and therefore it was obvious that the rest of the cases had to await a determination thereon. Under those circumstances, the appellant could not be blamed for the delay. The learned trial magistrate was clearly in error when she dismissed the appellant's application. The appellant had given plausible explanation regarding the matter of delay and which ought to have been accepted.

24. In the result, it is my finding that the appellant's appeal has merit. The same is allowed. The orders made by the trial court dated 3.10.2017 are hereby set aside and substituted with and order reinstating the appellant's suit namely **Machakos CMCC No, 1418 of 2010** for hearing to its logical conclusion. As the parties are still litigating in the lower court, I find it is just to order that they each bear their own costs.

Orders accordingly.

Dated and delivered at **Machakos** this **28th** day of **July, 2020.**

D. K. Kemei

Judge