REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 313 OF 2015

DANMILLAN MUTISYA MUSYOKI.....APPELLANT

VERSUS

PAWS AFRICA SAFARIS LIMITED.....RESPONDENT

JUDGMENT

1. The background to this appeal is that the appellant was the plaintiff in a suit filed in the Senior Resident Magistrate's Court at Kikuyu being Civil Case No. 315 of 2010. The appellant had sued the respondent seeking general and special damages as a result of personal injuries allegedly sustained on 15th November 2007 while in the course of his employment with the respondent. He also prayed for costs of the suit and interest.

2. Upon being served with summons, the respondent filed a statement of defence dated 27th January 2011 in which it denied the appellant's claim and put him to strict proof thereof.

3. The record of the trial court shows that after close of pleadings, the suit was fixed for hearing on 24th June 2011 but was adjourned since the respondent did not attend the court and there was no evidence of service of a hearing notice. Nothing else happened in the suit until 5th December 2014 when the respondent filed a Notice of Motion praying that the suit be dismissed for want of prosecution and that the costs of the application and the suit be borne by the appellant.

4. The application was opposed through a replying affidavit sworn by the appellant's learned counsel *Mr. Stephen Mwaura Muhia* in which he deposed that the appellant was unable to take any step towards prosecution of his case since his work caused his relocation to Tanzania and that until recently, his efforts to obtain leave to come back to Kenya to enable him take appropriate action to facilitate hearing of the suit were unsuccessful; that the appellant had always been ready and willing to prosecute his case and that he should be given an opportunity to do so. Counsel further deponed that the appellant will suffer injustice if his case was summarily dismissed.

5. The application was prosecuted by way of written submissions. After considering the parties' respective submissions, the trial court in its ruling delivered on 15th June 2015 allowed the respondent's application and dismissed the appellant's suit with costs. This is the decision that triggered the filing of this appeal.

6. In his memorandum of appeal filed on 29th June 2015, the appellant advanced six grounds of appeal which can be summarized into three main grounds namely:

i. That the learned trial magistrate erred in finding that the appellant had not provided a satisfactory explanation why the suit had not been fixed for hearing despite the weight of the reasons adduced by the appellant.

ii. That the learned trial magistrate erred in dismissing the appellant's suit thus occasioning a miscarriage of justice.

iii. That the learned trial magistrate erred by failing to consider authorities cited by the appellant which were binding on him.

7. By consent of the parties, the appeal was prosecuted by way of written submissions which were filed electronically by each of the parties. Those of the appellant are dated 30th June 2020 while those of the respondent are dated 15th July 2020.

8. This being the first appeal to the High Court, it is an appeal on both facts and the law. I am alive to the duty of the first appellate court which as succinctly summarized by the Court of Appeal in ***Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira & Company Advocates, [2013] eKLR*** is to:

"….. re-evaluate, re-assess and reanalyse 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."

9. I have carefully considered the grounds of appeal, the impugned ruling as well as the entire record of the trial court. I have also considered the rival submissions filed on behalf of the parties and all the authorities cited.

10. The law governing dismissal of suits for want of prosecution is set out in *Order 17 Rules 2* and *3* of the *Civil Procedure Rules (the Rules)* which states as follows:

"Rule 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 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.

11. A close reading of *Order 17 Rules 2 (1)* reveals that it is not couched in mandatory terms as it provides that a court *may* dismiss a suit for want of prosecution either by its own motion or upon application by the opposite party if the suit had not been prosecuted for a period of one year. This therefore means that whether or not to dismiss a suit for want of prosecution is dependent on the exercise of a court's discretion. Needless to state, that discretion must be exercised judiciously in accordance with the law and established legal principles.

12. The principles that guide courts in the exercise of their discretion in deciding whether or not to dismiss a suit for want of prosecution have been enunciated in many authorities both in the High Court and in the Court of Appeal. Two of these authorities will suffice for purposes of this appeal.

In ***Utalii Transport Company Limited & 3 Others V NIC Bank Limited & Another, [2014] eKLR*** the court listed the said principles as follows:

"1. Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;

2. Whether the delay is intentional, contumelious and, therefore, inexcusable;

3. Whether the delay is an abuse of the court process;

4. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;

5. What prejudice will the dismissal occasion to the plaintiff?

6. Whether the plaintiff has offered a reasonable explanation for the delay;

7. Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?"

13. On its part, the Court of Appeal in ***Ecobank Ghana Ltd V Triton Petroleum Co. Ltd (In Receivership) & 5 Others, CA No. 256 of 2016, [2018] eKLR*** had the following to say on the subject:

"The principle that pervades these decisions (Ivita V. Kyumbu, (supra) and Allen V. Sir Alfred McAlpine (supra) is that the court has to be satisfied that the inordinate delay is excusable and if so satisfied, then the court has to consider whether justice can still be done to the parties notwithstanding the inordinate delay. If the court is satisfied that justice can still be done, then it will, in the exercise of its discretion, refuse the application for dismissal for want of prosecution. It follows that if the court is not satisfied that the inordinate delay is excusable, then it will, again in its discretion, allow the application and dismiss the suit for want of prosecution."

14. Given the foregoing, it is my finding that the main issue that arises for my determination is whether the learned trial magistrate properly exercised his discretion in dismissing the appellant's suit given the material that was placed before him.

15. It is trite law that an appellate court will not normally interfere with the discretion of a trial court unless it is satisfied that the court in arriving at the impugned decision misdirected itself or considered irrelevant factors or failed to take into account relevant factors thereby arriving at a wrong decision. An appellate court is also mandated to interfere with the discretion of a lower court if it is manifest from the case taken as a whole that the trial court was clearly wrong in the exercise of its discretion and that as a result, there had been a miscarriage of justice. **See**: ***Mbogo V Shah, (1968) EA 93*** and ***Eurobank Limited V Shah Munge & Partners, [2016] eKLR.***

16. Having considered the trial court's record and the affidavits sworn on behalf of the parties both in support and in opposition to the Notice of Motion dated 5th December 2014, I find that it is not disputed that the last time the appellant's suit was before the trial court was on 24th June 2011 when hearing was adjourned as the respondent had not been served with a hearing notice.

17. In his ruling dismissing the suit as prayed, the learned trial magistrate correctly made reference to the law governing dismissal of suits for want of prosecution. He also considered the period of the delay complained of though he wrongly computed it by calculating the time lapse

between the date the case was last in court and the date of the ruling instead of the date the application was filed. In his view, the delay was inordinate and not satisfactorily explained.

18. Though I entirely agree with the learned trial magistrate that the reasons given by the appellant to explain the delay of about three years were not entirely convincing given that no evidence was availed to the court to prove that he had in fact relocated to Tanzania, I find that the learned trial magistrate wrongly exercised his discretion by failing to take into account several important relevant factors.

19. To start with, the learned trial magistrate did not consider whether or not justice could still be done in the case despite the delay. It is clear from the record that the case had been fixed for hearing only once and parties had not even complied with *Order 11* of the *Civil Procedure Rules* before the application was filed. There was no evidence availed to the trial court to suggest that the delay posed a risk to the conduct of a fair trial or that it was oppressive to the respondent in any way.

20. The learned trial magistrate though correctly finding that the respondent had not demonstrated what prejudice it was likely to suffer if the application was dismissed proceeded to allow the application without considering the prejudice the appellant stood to suffer if the application was allowed. Given the nature of the prayers sought in the motion, the trial court was duty bound to consider the prejudice both parties were likely to suffer if the application was allowed or declined. In applications of this nature, the court is called upon to undertake a delicate balancing act between the competing interests of the parties and the ends of justice.

21. In this case, as stated earlier, the trial court made a finding of fact that if the application was dismissed, the respondent was not likely to suffer any prejudice. The learned trial magistrate failed to appreciate the fact that if the application was allowed, the appellant stood to suffer grave injustice as he would be dislodged from the seat of justice before he was given an opportunity to be heard on merit.

22. Flowing from the foregoing, it is my finding that the learned trial magistrate allowed the respondent's application before considering all relevant facts. In so doing, he denied the appellant the right to be heard even after he had expressed interest in pursuing his case despite having established that the respondent did not stand to suffer any prejudice if the suit was allowed to proceed for hearing on its merits. In my considered view, the learned trial magistrate's decision led to a miscarriage of justice.

23. Consequently, I am satisfied that this appeal is merited and it is hereby allowed. The trial court's order dismissing the appellant's suit for want of prosecution is hereby set aside and the suit is accordingly reinstated.

24. On costs, the order that best commends itself to me is that each party shall bear its own costs of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 24th day of September 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Maina for the respondent

No appearance for the appellant

Ms Mwinzi: Court Assistant