



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 598 OF 2018

HAZRON MAIRA.....APPELLANT

VERSUS

KIKLEY INVESTMENTS LIMITED.....RESPONDENT

(Being an appeal from the ruling delivered on 22nd November, 2018 by Hon. D.Ocharo (PM) Milimani Commercial Courts in CMCC No. 1945 of 2014)

JUDGMENT

1. The application dated 23rd July, 2018 sought orders that:

1. The suit be dismissed for failure to give security of costs within the time ordered.

2. The Plaintiff do pay to the Defendant the costs of this application and of the suit.

2. It was stated in the grounds and the affidavit in support of the application that on 25th January, 2016 the Plaintiff was ordered to deposit Ksh.150,000/= in a joint earning interest bank account of the Advocates for the parties herein within 60 days or in the alternative deposit the said amount in court within the same period. In default, there was a further order that the Defendant be at liberty to file an application for the dismissal of the suit under Order 26 rule 5 Civil Procedure Rules. That the Plaintiff failed to make the said deposit and subsequently on 12th October, 2017 applied to the court to be granted leave to make the said deposit out of time. That the said application was heard and dismissed on 7th June, 2018.

3. In a replying affidavit filed in opposition to the application, it was stated that the failure to deposit the security was due to an inadvertent mistake by the Advocate handling the matter on behalf of the Plaintiff. It was averred that the Plaintiff will expeditiously prosecute the matter. That the Plaintiff was willing to deposit security herein for the suit to be heard on merits for substantive justice to be achieved as provided for under the Constitution. It was further stated that the Plaintiff would suffer a significant loss of Ksh.1,312,570.25 if the suit is dismissed.

4. In the ruling dated 22nd November, 2018 the trial magistrate allowed the application with costs. That is what triggered the Appeal herein.

5. The Appellant who was the Plaintiff in the Lower Court raised eight grounds of Appeal which can be summarized into two as follows:

(a) Whether the trial magistrate erred in dismissing the Plaintiff's suit for failure to furnish security for costs within the prescribed timelines.

(b) Whether the trial magistrate erred in giving undue regard to technicalities of procedure as opposed to substantive justice.

6. I have considered the application, the response to the same and the written submissions filed by the respective counsel for the parties.

7. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:

“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 conclusions 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 judge's findings of fact if it appears either that he has clearly failed on 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 in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".

8. It is not in dispute that the Lower Court made an order for the deposit of security as per orders issued on 25th January, 2016. The Appellant was required to deposit security within 60 days which he failed to. It is also not in dispute that the Appellant subsequently applied for the extension of time within which to deposit the security which application was also dismissed.

9. The Appeal herein is in respect of the application for the dismissal of the suit for failure by the Appellant to furnish security for costs. Once there was failure to deposit the security and the dismissal of the application for the extension of the time within which to deposit the security, the next logical step was the dismissal of the Appellant's suit. Having failed to appeal on the application for extension of time, the Appeal herein is a backdoor attempt to revisit the issue of the extension of time. Indeed the Appellant gave more or less the same reasons that were given in support of the application for extension of time.

10. The court has to balance the competing interest of both parties. The Appellant has had his day in court but appears to have slept on his rights. He cannot now be heard to raise the issue of technicalities as opposed to substantive Justice. Issues raised concerning the Appellant's advocate are matters between the Appellant and his advocates. I am not persuaded that the Appeal has any merits and I hereby dismiss the same with costs.

Dated, signed and delivered at Nairobi this 17th day of Dec., 2020

B. THURANIRA JADEN

JUDGE