



REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 14 OF 2017

HANIF IGBAL KHAN.....APPELLANT

VERSUS

WINES & SPIRITS KENYA LIMITED .....RESPONDENT

[An Appeal from the ruling delivered on 7<sup>th</sup> March, 2017 by L. N. Juma, RM in Kilifi SPMCCC No. 46 of 2013, Hanif Igbal Khan v Wines & Spirits Kenya Limited]

**JUDGEMENT**

1. In a ruling delivered on 7<sup>th</sup> March, 2017 in Kilifi SPMCCC No. 46 of 2013 Hanif Igbal Khan v Wines & Spirits Kenya Limited, L. N. Juma, RM allowed an application by the Respondent, Wines & Spirits Kenya Limited seeking dismissal of the suit of the Appellant, Hanif Igbal Khan. The Respondent was also awarded costs of the suit.

2. The Appellant being aggrieved by the said ruling, through the memorandum of appeal dated 14<sup>th</sup> March, 2017 and filed in court on the same date, seeks to set aside the said ruling on the grounds that:-

**“1. That the learned trial court erred in law and fact in holding that the delay in this case is inexcusable.**

**2. That the learned trial court erred in law and fact in holding the parties are bound by the Advocates they chose and therefore hold that the mistake done by the Advocate was binding on the appellant.**

**3. That the learned trial magistrate erred in law and fact in exercising her discretion contrary to common sense and to justice.**

**4. That the learned trial court erred in law and fact in not taking into consideration that the Mombasa suit and the Kilifi case both referred to the same cause of action.**

**5. That the learned trial court erred in law and in fact in considering extraneous matters that were not related to the application but were related to the main suit.**

**6. That the learned trial court erred in law and fact in delivering a ruling contrary to the weight of evidence before it especially in failing to hold that the respondents were also part of the delay.**

**7. That the learned trial court erred in law and fact in holding that the respondents were greatly prejudiced.**

**8. That the learned trial court erred in law and fact in not giving the applicant an opportunity to be heard.”**

3. Before considering the appeal, I need to deal with the grounds of opposition filed by the Respondent on 20<sup>th</sup> July, 2018 through which the Respondent opposes the appeal as follows:-

**“TAKE NOTICE that the RESPONDENT will oppose the Appeal dated 14<sup>th</sup> March, 2017 filed on the 15<sup>th</sup> May, 2017 on the following grounds:**

**1. That the appeal is bad in law, incompetent, fatally defective and otherwise an abuse of the court process of this**

**Honourable Court, in view of the fact that Section 79G of the Civil Procedure Act (Cap 21) Laws of Kenya is procedural to warrant an appeal to be admitted to this Honorable Court and the same should therefore be struck out and/or dismissed.**

**2. That indeed the record as so filed before this court cannot be admitted in its form for it exhibits no order or decree so appealed against and there is no necessary record to certify the delay in filing the same. This pits the entire appeal as incurable at this stage.**

**3. That the Appellant further has not demonstrated that there was no inordinate delay in filing the appeal making the appeal defective, and fatally incurable at this stage without following the laid down principles of law in proceeding in circumstances as the appeal seem to manifest and as such the appeal should be struck out and/or dismissed.**

**4. That the appellant herein has not convinced this court that indeed he deserves to be heard in light of the defects that the appeal carries before this court as the record of appeal as filed is not contemplated under the Rules.**

**5. That it is in the interest of justice, fair and expedient in all circumstances of the case that the appeal is dismissed.”**

4. Submitting in support of the grounds of opposition, counsel for the Respondent stated that the appeal was filed outside the 30 days provided by Section 79G of the Civil Procedure Act, Cap. 21 (CPA). According to the Respondent’s counsel, the Appellant did not give reasons in order to satisfy the court that he had good and sufficient cause for not filing the appeal on time. The decision of the Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] KLR 486** was cited as outlining some of the reasons that can satisfy the court that there was good and sufficient cause for not filing the appeal within the statutory period.

5. The Respondent’s counsel also submitted that the failure to file a certified copy of the decree or order appealed against is not a mere procedural requirement that can be overlooked or dismissed as a peripheral procedural technicality. Counsel’s position is that this is a requirement that is rooted in a statutory provision of the CPA and it goes to the appellate jurisdiction of the court. Citing the decision of the Court of Appeal in the case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1**, counsel urged this court to find that it has no jurisdiction and proceed to down its tools.

6. On the absence of a certificate of delay, counsel for the Respondent submitted that apart from the memorandum of appeal and the decree, the Appellant having filed his appeal out of time ought to have filed a certificate of delay certifying the time taken to prepare and deliver the decree or the order. Counsel supports his argument by referring to page 187 of a Court of Appeal decision whose citation is not provided in the written submissions. Another case cited in support of this point is that of **Lawrence Nguthiru Richard v George Ndirangu [2015] eKLR**. Counsel for the Respondent stressed that failure to avail a certificate of delay from the trial court is fatal to the Appellant’s case.

7. Counsel for the Respondent urged this court to dismiss the Appellant’s claim that he had applied for a certificate of delay but the same had not been issued by the trial court. According to him, this cannot be correct since a certificate of delay can only be issued by a trial court where there is a delay in availing the proceedings. Counsel’s view is that the failure to issue a certificate of delay can only mean that there was no delay on the part of the trial court.

8. Finally, counsel for the Respondent submitted that the appeal cannot be salvaged by reference to Article 159 of the Constitution because Section 79G of the CPA is procedural as well as substantive and is not about form. Counsel therefore urged that the grounds of opposition be upheld.

9. In response, counsel for the Appellant urged this court to find the grounds of opposition without merit. According to counsel for the Appellant, the grounds of opposition were filed without the leave of the court after the appeal had been argued through the written submissions filed by the parties.

10. Counsel for the Appellant asserted that the Appellant availed the order appealed against which is an alternative requirement to a decree hence the requirements of Section 79G of the CPA were complied with. The Appellant therefore urged the court to dismiss the grounds of opposition and deal with the appeal.

11. The question herein is whether the appellate jurisdiction of this court has been properly invoked. Section 79G of the CPA provides that:-

**“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:**

**Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”**

12. The said provision cannot be read in isolation but must be read together with the other provisions of the CPA relating to appeals and Order 42 of the Civil Procedure Rules, 2010 (CPR) which deals with appeals.

13. Order 42 Rule 1(1) states what a civil appeal is by providing that:-

**“Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.”**

14. Order 42 Rule 2 provides that where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order. My understanding of this rule is that once a memorandum of appeal is filed within 30 days as required by Section 79G of the CPA, a decree or order appealed against can be filed later. It is my opinion that under Section 79G of the CPA, a certificate of delay is only required where an appellant opts to wait for the supply of a copy of decree or order by the trial court before filing the memorandum of appeal.

15. The impression I get from the submissions is that the Respondent believes the appeal was filed on 15<sup>th</sup> May, 2018. This view is misplaced for that is the date the record of appeal was filed. A perusal of that record shows that the memorandum of appeal was filed on 14<sup>th</sup> March, 2017 about a week after the ruling appealed against was delivered on 7<sup>th</sup> March, 2017. The appeal therefore complied with Section 79G of the CPA. The authorities cited by counsel for the Respondent are therefore not relevant to this case as they relate to appeals filed out of time.

16. The manner in which a decree is prepared and the contents of a decree are provided for by Order 21 rules 7, 8 and 9 of the CPR. Although a decree is a separate document from a judgment, Section 2 of the CPA appears to fuse the two for purposes of an appeal. The said Section which is the interpretative provision of the Act states that:-

**““decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—**

**(a) any adjudication from which an appeal lies as an appeal from an order; or**

**(b) any order of dismissal for default:**

**Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;**

**Explanation. — A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.”**

17. Order 42 Rule 12 (4) of the CPR which provides the contents of a valid appeal should therefore be read together with the interpretative provision of the CPA. Where a formal decree in pursuance of a judgment may not have been drawn up or may not be capable of being drawn up, the appellate court should proceed to determine the appeal based on the judgment or ruling appealed against. To insist that an appellant should avail a formal decree failure to which the appeal should be dismissed is to pander to procedural technicalities thus defeating the requirement by Article 159(2)(d) of the Constitution that justice shall be administered without undue regard to procedural technicalities.

18. A decree is simply an extract of a judgment or ruling and once the judgment or ruling is provided, it beats logic that one should then insist on the necessity of a decree. In determining the appeal, the appellate court considers the pleadings, proceedings and the decision of the trial court. The decision is found in the order, ruling or judgement of the court whose decision is being appealed. When these have been availed to the appellate court, there is no reason why an appeal should be dismissed for being defective.

19. Indeed Order 42 Rule 12(4)(f) provides that an appeal can proceed where there is a memorandum of appeal, pleadings and the judgment, order or decree appealed from, and where appropriate, the order (if any) giving leave to appeal. All the other requirements can be dispensed with. As already stated, a decree includes the judgment hence once the judgment is provided the requirements of Order 42 Rule 12 (f) are complied with.

20. Consequently I find the Respondent's grounds of opposition dated 20<sup>th</sup> July, 2018 and filed on 23<sup>rd</sup> July, 2018 without merit and I dismiss the same.

21. I now turn to the appeal. A brief history is necessary. The Appellant who was the Respondent's tenant filed a suit against the Respondent before the Magistrate's Court at Kilifi on 13<sup>th</sup> February, 2013 mainly seeking an order of injunction restraining the Respondent from evicting him from L.R. No. 562/111 M. N. Mtwapa Creek. At the time of filing the plaint, the Appellant also filed a notice of motion under a certificate of urgency praying for injunctive orders pending the hearing and determination of the suit.

22. The notice of motion was successful and the Respondent's attempt to lift the injunction was dismissed on 27<sup>th</sup> December, 2013. Nothing took place thereafter until the Respondent filed the application dated 22<sup>nd</sup> June, 2016 asking for the dismissal of the suit for want of prosecution. The application was allowed through a ruling delivered on 7<sup>th</sup> March, 2017. That decision is the subject of this appeal

23. Counsel for the Appellant argued grounds 3 and 4 of the appeal together. He submitted that the Appellant gave sufficient reasons as to why the suit had not been prosecuted. It was the Appellant's case that he did not prosecute the Kilifi matter because he was busy fighting another case, being Mombasa Miscellaneous Application No 166 of 2013, Evans M Maabi t/a Murphy Merchants Auctioneers v Hanif Igbal Khan Trading as Mtwapa Lodge, Bar & Restaurant, instituted by the Respondent in Mombasa in which the Respondent wanted to evict him from the suit premises. According to him, this was a good reason that explained the delay in prosecuting the Kilifi case and his suit should not have been dismissed.

24. Turning to ground 2 of the appeal, counsel for the Appellant submitted that the trial magistrate erred by holding that a party is bound by

the mistakes of his advocate. Counsel submitted that an advocate is just but an agent and the Appellant being a lay person could not have known that there were timelines prescribed by the law within which he was to prosecute his case. Counsel pointed out that upon discovering that his case was about to be dismissed the Appellant changed advocates and the mistake of his previous advocate should not therefore be visited upon him.

25. It was submitted for the Appellant that the Respondent was not prejudiced by the failure to prosecute the case because the only prejudice was non-payment of rent which was mitigated by the fact that the Appellant had carried out repairs on the premises to the tune of Kshs.716,822.

26. Counsel also submitted that the Appellant has complied with the conditions of stay issued by this court and continues paying rent to the Respondent.

27. It was submitted for the Appellant that the dismissal of a suit should be an order of last resort. This court has been urged to reopen the Appellant's case so that the matter can proceed to hearing on merit. The decision in **Nairobi HCCC No. 616 of 2004 Cyrus Stanslaus Muasa Muli v Wilfred Njoka Murithi** is cited in support of the proposition that a court should be slow in dismissing a suit.

28. In opposition to the appeal, counsel for the Respondent urged this court to dismiss the appeal stating that in **Nilesh Premchand Mulji Shah & another t/a Ketan Emporium v M.D. Popat & others & another [2016] eKLR** it was held that Article 159 and Order 17 Rule 2(3) gives the court the discretion to dismiss a suit where no action has been taken for over one year. Counsel submitted that in exercising its discretion the court considers whether the party instituting the suit has lost interest and whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable and is likely to cause serious prejudice to the opposite party. Counsel cited the decision in **Ivita v Kyumba [1984] KLR 441** as espousing the test to be applied in exercising the power of dismissal of a suit for want of prosecution.

29. Referring to the decision in **Naftali Onyango v National Bank of Kenya [2005] eKLR**, counsel submitted that the Respondent discharged the burden of proof hence the trial court was correct in finding that the delay was inordinate and the reasons given for the delay were insufficient.

30. Counsel for the Respondent asserted that the only reason given by the Appellant for the delay is that he was attending to another case in Mombasa. According to counsel, this reason establishes that the Appellant was personally to blame for delaying the prosecution of the matter.

31. The issue that needs to be decided in this appeal is whether the trial magistrate correctly exercised her discretion in dismissing the Appellant's case. Over 2½ years had lapsed between the time the matter was last in court and the time of filing the application for the dismissal of the suit. The suit was therefore ripe for dismissal as per the provisions of Order 7 Rule 2(1) CPR since no step had been taken by either party for one year.

32. The power afforded to the court by Order 7 Rule 2(1) CPR is a discretionary one. However the exercise of such power must be supported with reasons. Explaining how discretion should be exercised in **Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others [2018] eKLR; Election Petition Appeal No. 1 of 2017 (Nyeri)**, the Court of Appeal stated that:-

**“In our understanding, rules of procedure must be applied to the advancement of substantial justice, to enforce rights in a manner not injurious to the society, by enlarging the remedy, if necessary, in order to do justice, to prevent delay, reduce expenses and inconveniences. We must also state that many things, especially in the domain of procedure, are left to the discretion of trial judges, and the best judge is the one who relies least on his/her own opinion.**

**A trial judge has a wider field for the exercise of his/her discretion and an appellate court, would be most reluctant to interfere with such exercise of discretion. It will only interfere where the trial judge is shown to have been clearly wrong.**

**Again, where discretion is left to a trial judge, the court is to a great extent unfettered in its exercise. Discretion, when properly applied, means sound discretion grounded on the law, and rules; it must not be arbitrary, vague or fanciful; but judicious and regular. Discretion must not be exercised in a manner absolutely unreasonable and opposed to justice.”**

33. In my view therefore, in order for a decision reached in exercise of discretion to be set aside, the person seeking to set aside the decision ought to establish unreasonable and capricious exercise of discretion on the part of the trial court. It is not sufficient for a party to draw the attention of the court to his/her difficult circumstances. Those circumstances must be linked to the inability to prosecute the suit.

34. The Appellant's case is that the failure by his advocate ought not to have been visited on him. In her ruling, the trial magistrate commented that the Appellant was bound by the actions of the advocate he had picked to represent him. Based on this statement counsel for the Appellant submitted that this evidenced unreasonable exercise of discretion. I do not agree with the Appellant.

35. In **Sitarani Hiralal Shorilal Luthra v Loresho Gardens Limited & another [2013] eKLR**, Justice Mary M. Githumbi observed that:-

**“While the Plaintiff attributes his delay to her lawyers, I am not convinced that she can wholly escape blame. While she was entitled to rely on her lawyers to advise her on the way forward with her case, it is clear that she was the one who was responsible to ensure that her lawyers were adequately instructed on the way she would like her suit handled.”**

36. Those words are apt in this case. A case belongs to the party and not the advocate. A party is under an obligation to follow up the case with his advocate. You do not go to sleep once you instruct an advocate. In the circumstances I find nothing wrong in the trial magistrate's statement that the Appellant was bound by the actions of his advocate. Any shortcomings on the part of the advocate, cannot in the

circumstances of this case, be said to be a good excuse for the failure by the Appellant to prosecute the case. The Appellant did not table any evidence to show that he gave his advocate instructions to prosecute the matter and the advocate let him down.

37. Another reason advanced by the Appellant for not prosecuting his case was that he was busy defending another case that had been filed in Mombasa by the Respondent. The trial magistrate also found this reason insufficient stating that the fact that the Appellant was pursuing another case did not mean that he was estopped from pursuing his case at Kilifi. There is nothing to make me fault the trial magistrate for this statement. The Appellant is the one who filed the case at Kilifi and he was supposed to prosecute it to conclusion. He did not explain how the case at Mombasa impeded him from pursuing the case at Kilifi.

38. In any case, both cases were filed in 2013 and the Mombasa case is said to have been a distress for rent, which in my view, had been stopped by the Kilifi case.

39. Was the subsistence of the case without action prejudicial to the Respondent? The trial court found that it was. This finding was correct. In a situation where a tenant was using the premises of the landlord without paying rent, the landlord was highly prejudiced. It appears that upon obtaining the injunctive orders the Appellant realized that he had achieved what he wanted in the main suit. For the Appellant, there was no other reason for ensuring that the suit was heard and determined. This amounted to an abuse of the court process and the trial magistrate was right in putting this state of affairs to an end by dismissing the Appellant's suit.

40. From what I have stated in this judgement, it becomes clear that the trial magistrate correctly exercised her discretion and this court has no reason for interfering with the exercise of that discretion. I therefore uphold the ruling dated 7<sup>th</sup> March, 2017 dismissing the Appellant's suit with costs to the Respondent. It therefore follows that the Appellant's appeal is without merit and the same is dismissed with costs to the Respondent.

**Dated and Signed at Nairobi this 24<sup>th</sup> day of April, 2019**

**W. Korir,**

**Judge of the High Court**

**Dated, Countersigned and Delivered at Malindi this 20<sup>th</sup> day of June, 2019**

**R. Nyakundi,**

**Judge of the High Court**