



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL SUIT NO. 78 OF 2016**

**C. DORMAN LTD.....APPELLANT**

**-VERSUS-**

**KORIR RAYMOND.....1<sup>ST</sup> RESPONDENT**

**ALFRED LANGAT.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling of Hon. J. Nthuku, SRM, delivered on 24<sup>th</sup> June 2016 in Nakuru CMCC No.336 of 2010)*

**JUDGMENT**

**INTRODUCTION**

1. This appeal arise from suit filed in the lower court on 9<sup>th</sup> April 200 through plaint dated 8<sup>th</sup> April 2008 against the respondent seeking the following prayers:-

**a. Special damages of kshs.346, 414.**

**b. loss of user for a period of 30 days.**

**c. costs of the suit and**

**d. Interest on a, b and c above.**

2. The claim is in respect an accident which occurred on 23<sup>rd</sup> April 2008 involving the plaintiff's motor vehicle registration number KAQ 224U and the 1<sup>st</sup> defendant's motor vehicle registration number KAK 420H driven by the 2<sup>nd</sup> defendant.

3. The defendant entered appearance on 24<sup>th</sup> September 2010 and filed defence on 15<sup>th</sup> October 2010.

4. The respondent filed application dated 11<sup>th</sup> February 2016 seeking to dismiss the plaintiff's suit for want of prosecution. By ruling delivered on 24<sup>th</sup> June 2016, the trial magistrate dismissed the suit for want of prosecution.

5. Being aggrieved by the ruling, the appellant filed this appeal on the following grounds:-

i. That the learned trial magistrate erred in law and fact in failing to exercise her discretion judicially in making a determination of the application dated 13<sup>th</sup> January, 2016.

ii. That the learned trial magistrate erred in law and fact in failing to take into consideration several and serious legal issues that were raised by the Appellant at the hearing of the application dated 13<sup>th</sup> January, 2016.

iii. That the learned trial magistrate erred in law and fact in failing to hold that the matter was a part-heard and that there was evidence on record; five witnesses having testified for and on behalf of the Appellant and therefore could not be dismissed for want of prosecution.

iv. That the learned trial magistrate erred in law and fact in failing to consider that the matter is a part-heard before a different court and therefore directions needed to be taken before further action was taken contrary to the Provisions of Order 18 Rule 8 of the Civil

Procedure Rules 2010.

- v. That the learned trial magistrate erred in law and fact in failing to consider the reasons advanced by the Appellant for the delay in fixing a hearing date.
- vi. That the learned trial magistrate erred in law and fact in failing to consider the circumstances of the case as a whole before dismissing the Appellant's case.
- vii. That the learned trial magistrate erred in law and in fact by dismissing this matter for want of prosecution notwithstanding the fact that this matter had a hearing date.

### **APPELLANT'S SUBMISSIONS**

- 6. Appellant submitted that the matter was adjourned in the lower court on 22<sup>nd</sup> July 2014 when the defendant sought adjournment after 5 of the plaintiff's witnesses had testified to enable them enjoin a 3<sup>rd</sup> party.
- 7. That the ground for dismissal of suit by the respondent was that it had been pending for one year. Appellant stated that the application was opposed but the trial magistrate dismissed the suit leading to this appeal.
- 8. Appellant submitted that the trial court failed to exercise its discretion judiciously; that dismissing the suit is draconian act which drives the plaintiff from judgment seat and before dismissal the court should have considered the following principles:
  - a) Whether there has been inordinate delay on part of plaintiff in prosecuting the case.
  - b) Whether the delay is intentional, contumelious and therefore inexcusable.
  - c) Whether delay is an abuse of court process.
  - d) Whether delay gives rise to substantial risk or causes serious prejudice to defendant.
  - e) What prejudice will dismissal occasion to plaintiff?
  - f) Whether plaintiff has rendered reasonable explanation for delay.
  - g) Even if there is delay, what does the interest of justice dictate?
- 9. The appellant submitted that the trial magistrate limited herself to the fact that the suit had been pending for 14 months and failed to address herself to what happened when the matter was last in court
- 10. Secondly that the trial magistrate erred in failing to note that 5 witnesses had testified leaving only one witness for the plaintiff; that the magistrate who heard the 5 witnesses was transferred and Hon. Nthuku who dismissed the suit had not heard the matter; and even if the matter was listed before her, it could not have taken off before directions were taken as the matter was part-heard; that it is not proper for the court to dismiss the suit when there is evidence on record.
- 11. Appellant further submitted that sufficient explanation for delay was given in that counsel indicated in the affidavit that the firm's representatives visited the registry serially to fix the matter for hearing but that the file was not available.
- 12. Appellant further submitted that delay of 12 months was not inordinate in the circumstances and that the respondent never demonstrate any prejudice it was going to suffer. Appellant urged court to consider facts surrounding the dismissal, find that the appellant was not indolent litigant, and set aside dismissal order.

### **RESPONDENT'S SUBMISSIONS**

- 13. Respondent submitted that the legal basis for dismissal of suit for want of prosecution is the requirement for expediency in the prosecution of civil suit and is founded in **Article 159(2) (b)** of the **Constitution** that justice shall not be delayed and **Section 3a** of the **Civil Procedure Act** gives courts powers to make such orders as are necessary for ends of justice and to prevent abuse of court process.
- 14. Respondent submitted that the suit was inactive for 14 months and that it is primary duty of plaintiff to take steps to prosecute the matter; that the requirement of justice and overriding objective is to assist the court to attain just and expeditious disposal of case; that appellant has committed acts of inordinate delay which occasion injustice to the respondent. That ruling was delivered on 24<sup>th</sup> June 2016 and record of appeal filed on 20<sup>th</sup> April 2017.

### **ANALYSIS AND DETERMINATION**

- 15. Record show that on 23<sup>rd</sup> April 2013, 4 witnesses testified. The 5<sup>th</sup> witness testified on 5<sup>th</sup> August 2014. When the matter came up on 5<sup>th</sup> August 2014, the defendant sought adjournment to enjoin a 3<sup>rd</sup> party. The plaintiff's witness was present on 5<sup>th</sup> August 2014. What came

next was application dated 13<sup>th</sup> January 2016 whose ruling is subject of this appeal.

16. There is no clear explanation of inaction between 5<sup>th</sup> August 2014 until when application dated 13<sup>th</sup> June 2016 was filed. I however note that the plaintiff had availed 5 witnesses, a witness was present on 22<sup>nd</sup> July 2014 when the respondent sought adjournment to enjoin 3<sup>rd</sup> party it seemed the defendant abandoned the intention to enjoin 3<sup>rd</sup> party and instead sought to dismiss this suit 14 months after.

17. There is no indication that parties were given directions on how to proceed before the Hon. Nthuku as the 5 witnesses who testified adduced evidence before Hon Otindo. There was also substantial evidence on record at the time the suit was dismissed. My view is that the suit was not suitable for dismissal as evidence was already on record, which the court could look at to make a determination after giving directions on further hearing after taking over the hearing. The trial magistrate had option of ordering plaintiff to close their case with evidence on record and give direction of defence hearing.

18. From the foregoing, I find that that the trial magistrate erred in dismissing the suit.

19. FINAL ORDERS

1. Appeal allowed.
2. Ruling delivered on 24<sup>th</sup> June 2016 and consequential orders are set aside.
3. Costs of this appeal in the cause.

**Judgment dated, signed and delivered at Nakuru this 25<sup>th</sup> day of July 2019.**

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**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:-**

Jeniffer Court Assistant

Nonappearance Counsel for Appellant

Muchemi holding brief for Njuguna Counsel for Respondent