



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 645 OF 2017

JACKSON KIOKO NYAMAIAPPELLANT

-VERSUS-

THE BOARD OF TRUSTEES

METHODIST CHURCH KENYA..... 1ST RESPONDENT

DUMICIANO KABURI MBIJIWE 2ND RESPONDENT

(An appeal from the ruling of the Chief Magistrate's Court at Nairobi delivered by Hon. D. O. Mbeja (Mr) Senior Resident Magistrate on 14th November 2017 in CMCC No. 1928 of 2011.)

JUDGEMENT

1) Jackson Kioko Nyamai, the appellant herein, filed an action against the Board of Trustees, Methodist Church of Kenya and Dumiciano Kaburi Mbiijiwe, the 1st and 2nd respondents herein before the Chief Magistrate's Court, seeking for damages for the injuries he sustained on 2/3/2011 when he was knocked down by motor vehicle registration no. KAZ 150G belonging to the 1st respondent while being driven by the 2nd respondent.

2) The respondent filed a joint statement of defence to deny the appellant's claim. Hon. D. O. Mbeja, learned Senior Resident Magistrate heard and subsequently dismissed the suit on 16th May 2017, when the appellant and his counsel failed to turn up for the hearing of the suit.

3) The appellant took out the motion dated 18.5.2017 and sought for the dismissal order to be set aside and for the suit to be reinstated. The respondents contested the aforesaid motion. The learned Senior Resident Magistrate heard the application and had it dismissed on 14th November 2017.

4) The appellant being aggrieved, preferred this appeal and put forward the following grounds:

i. THAT the learned magistrate erred in law and in fact by dismissing the appellant's application dated 18th May 2017.

ii. THAT the learned magistrate erred in law and in fact by striking out the plaintiff's suit for non-attendance.

iii. THAT the learned magistrate erred in law and in fact by failing to consider the authorities and submissions of the appellant.

iv. THAT the learned magistrate erred in law and in fact by failing to be guided by

a) The Civil Procedure Act Chapter 21 Laws of Kenya.

b) The Civil Procedure Rules 2010

c) The Constitution of Kenya.

5) When the appeal came up for hearing, learned counsels recorded a consent order to have the same disposed of by written submissions. I have re-evaluated the arguments put forward by the parties before the trial court in support and against the motion dated 18th May 2017. I have also considered the rival written submissions. It is the submission of the appellant that his application was unjustifiably dismissed.

6) The appellant pointed out that the learned Senior Resident Magistrate failed to take into account the reasons and grounds he put forward in support of the application. The respondents on the other hand are of the submission that the learned Senior Resident Magistrate rightly dismissed the appellant's application on account of the appellant's previous conduct of failing to prosecute his case which at some point forced the trial court to make an order directing the appellant to pay court adjournment fees.

7) In her ruling, the learned Senior Resident Magistrate stated that the appellant had submitted before her that his advocate failed to turn up in court at the scheduled time due to a long delay in the banking hall when he went to pay the court adjournment fees.

8) She further noted that the appellant had argued that his advocate was held up in a matter before Justice Ojwang only to turn up in court to find that his suit had been dismissed for want of attendance and prosecution.

9) The trial magistrate further noted that the respondents opposed the application by relying on the replying affidavit of their advocate Faith Gachuhi.

10) Upon taking into account the rival submissions, the learned Senior Resident Magistrate proceeded to dismiss the appellant's motion stating that it is the duty of every litigant to attend court for the hearing of their cases noting that when the matter was called out on 16.5.2017 neither the appellant nor his advocate were present in court. The trial magistrate further stated that there was inordinate delay in prosecuting the suit and that litigation must come to an end.

11) It is apparent that learned Senior Resident Magistrate merely took note of the grounds put forward by the appellant to explain his absence from court but she did not consider them in determining the appellant's application. In short, the appellant had specifically stated that he was unable to be in court at the time the suit was allocated for hearing because he was held up in the court's banking hall where his advocate's staff had gone to pay the court adjournment fees.

12) It is also noted that the appellant's advocate was held up in Justice Ochieng's court to attend to H. C. Commercial Suit no. 516 of 2016. The record shows that the proceedings of 16th May 2017 indicate that when the parties appeared before the learned Senior Resident Magistrate, one Mr. Maina appearing for the appellant informed the court that the plaintiff was ready for hearing.

13) It is also apparent that one Miss Gichuhi appearing for the defendant had indicated that the defendant was not ready to proceed as the defence witness was away attending a seminar in Naivasha. It would appear Miss Gichuhi also indicated that the plaintiff was absent. The learned magistrate without assigning reasons proceeded to dismiss the suit for want of prosecution with costs to the respondent.

14) It is also not in dispute that the suit was first mentioned and the appellant was given time to visit the bank to pay the court adjournment fees before the suit could proceed for hearing. When the matter was called out the second time, that is when both the appellant and his advocate were found to be absent from court.

15) In the application seeking to set aside the dismissal order the appellant gave the reasons enumerated hereinabove to explain his absence from court. I find the reasons advanced by the appellant to be plausible. In response to the motion, the respondents filed the replying affidavit of Faith Gichuhi. In the aforesaid affidavit, the deponent did not controvert the assertion that there was a long line in the banking hall. She did not also controvert the fact that the appellant's advocate was held up in Justice Ochieng's court. Had the learned Senior Resident Magistrate considered the reasons advanced by the appellant, she would have come to a different conclusion in determining the motion.

16) In the end, the appeal is allowed. Consequently, the order dismissing the appellant's motion dated 18th May 2017 is set aside and is substituted with an order allowing the motion. Costs of the motion and the appeal to abide the outcome of the suit which is hereby ordered reinstated to be heard by another magistrate of competent jurisdiction other than Hon. D. O. Mbeja on priority basis.

Dated, signed and delivered at Nairobi this 27th day of September, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent