REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 282 OF 2014

PAUL MUTHINI KIMONGO.....APPELLANT

-VERSUS-

FLEX PAC INTERNATIONAL LIMITED.....RESPONDENT

(Being an appeal from the ruling delivered by the Hon. M. Chesang (Mrs) at Milimani Commercial Courts Nairobi,

CMCC No. 2565 of 2009)

JUDGMENT

The Appellant who was the Plaintiff in CMCC number 2505 of 2009 filed the plaint dated the 22nd April, 2009 seeking general damages and special damages in the sum of Kshs. 2,000/- following injuries that he sustained at the Respondent's place of work, on the 20th day of January, 2004 when he was on duty.

The respondent filed its statement of defence on the 2nd day of March, 2010.

The appellant filed his reply to defence on the 5th day of March, 2010.

On the 28th day of March, 2014, the respondent filed the notice of motion dated the same date in which it sought orders for dismissal of the suit for want of prosecution and the costs of the application.

The application was based on the grounds that the plaintiff had taken no steps to prosecute the suit since 4th December, 2012 when it was last in court but was adjourned as the appellant was not in court.

The respondent in its application stated that the appellant was not keen in prosecuting his case and has lost interest in it and the continued delay was prejudicial to the respondent as it may not be able to secure the attendance of the witnesses.

It urged the court to dismiss the suit.

In response to that application, the respondent filed a replying affidavit on the 22nd April, 2014 sworn by Stephen Mwaura Muhia, on the 22nd April, 2014 in which he deponed that since the matter was filed, it had been set down for hearing on several occasions the last time being on 26th June, 2012 but he was unable to secure a hearing date thereafter as the court file was not available. The appellant urged the court not to dismiss the matter but to allow him to prosecute the same in the interest of justice adding that the respondent would not suffer any prejudice should the matter proceed to full hearing.

The trial court considered the application and in its ruling delivered on the 12th day of June, 2012 allowed the same with costs in the cause.

The appellant filed the appeal herein against the said ruling and has listed six grounds of appeal in his memorandum of appeal dated the 11th day of July 2014, which I propose to consider together. The appeal was canvassed by way of written submission which both parties filed.

In his submissions, the appellant contended that in dismissing his application, the Learned Magistrate failed to evaluate the reason that he gave for failure to prosecute the suit, adding that dismissing a suit for want of prosecution is a draconian act which drives a party from the judgment seat. He relied on the case of ***Utalii Transport Company Limited & 3 others Vs. N.I.C Bank Limited and Another HCCC No. 32/2010 at Nairobi***

Submitting on the issue of inordinate delay, he averred that he had given good reasons for the delay and that the same was not intentional,

contumelious or inexcusable. He averred that the respondent did not state the prejudice it would suffer if the appeal were to be allowed but to the contrary it would be him to suffer more prejudice as he would lose an opportunity to claim damages for the serious injuries that he suffered and for which he should be compensated by the respondent. He urged the court to exercise its judicial discretion in the interest of substantive justice and allow the appeal.

On its part the respondent submitted that the appellant had lost interest in the case and in dismissing the same, the trial court properly exercised its discretion as the appellant had not taken action in the matter for more than a year since it was last in court.

It was further submitted that there was no confirmation from the registry that the court file could not be traced and the averment that the file was missing were not substantiated by the appellant.

On the prejudice that it is likely to suffer, it averred that its witnesses had already left its employment and it will be difficult to guarantee their attendance. It contended that it has been very expensive for it to sustain and maintain its advocates on record as they are compelled to do so for as long as the suit survives. It urged the court to dismiss the appeal.

The court has duly considered the grounds of appeal and the submissions filed herein by the respective parties. I have also perused the record of the trial court which shows that the matter was first listed for hearing on the 26/06/2012 when counsel for the appellant informed the court that parties were negotiating. In addition, the same counsel informed the court that he had since lost contact with his client and asked the court to take the matter from the day's cause list. On 6th day of November, 2012 it is noted that parties had just exchanged documents and the matter was not ready for hearing. On those two occasions, counsel for the respondent was ready to proceed while that for the plaintiff was not.

On the 4th December, 2012 the matter was again taken out for the reason that the appellant was attending to his ailing wife who had undergone a major surgery and for that reason, he was unable to travel from Kitui to attend court. Thereafter, no other action was taken by the appellant and as a consequence of the delay, the respondent filed the application dated 28th March, 2014 the ruling of which is the subject of this appeal.

The reasons given by the Appellant for failure to prosecute the suit is that there were no available dates and the court file could not be traced. A leading case in relation to dismissal of suits is the often quoted case of ***Ivita Vs. Kyumbu (1984) KLR 441*** where ***Chesoni J*** as he then was stated;

> "***The test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the defendant, so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and, or witnesses may be wanting and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however, satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time".***

The respondent contended that the appellant is guilty of inordinate delay in prosecuting the matter before the trial court and argued that since the matter was filed in the year 2003, the appellant had done little to prosecute the same. What amounts to inordinate delay was discussed by the court in the case of ***Mwangi S. Kimenyi Vs. Attorney General & Another (2014) eKLR*** where it was held thus;

> ***"There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case, the explanation given for the delay; and so on and so forth" nevertheless, inordinate delay should not be difficult to ascertain once it occurs, the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable....."***

From the record of the lower court and the material before me, it is clear that the appellant was never eager to prosecute his case and even at some point in time, his counsel informed the court that he had lost contact with him. On three occasions the matter was adjourned at the instance of the appellant and no good reasons were given for the adjournments. The court notes that between the last time it was in court and the filing of the application, the subject of this appeal, no plausible explanation has been given for the delay in prosecution of the matter. The allegations of missing court file and non availability of hearing dates have not been substantiated.

The accident that led to the filing of the suit occurred on the 20th day of January, 2004. It is now over fifteen (15) years since then. A case belongs to a client and he has a duty to follow up his case with the advocate. See the case of **Pyrethrum *Board of Kenya vs. Samuel K. Kihiu & 3 Others (2014) eKLR.***

Whereas, the court appreciates that dismissal of a suit for want of prosecution is a matter of discretion of the court, a court of law should always strive to do justice to both parties to the case. The respondent avers that the prolonged delay is prejudicial to it as it may not be able to trace its witnesses as they were employees who have already left its employment. In my considered view, that is grave prejudice as it will not be able to defend the suit. As ***Chesoni J.*** Observed in the case of ***Ivita Vs. Kyumbu (Supra), Justice is justice to both the plaintiff and the defendant.***

The appellant dragged the respondent to court and he was under duty to prosecute his matter expeditiously.

In the end, the court finds that the appeal has no merit and it is hereby dismissed. Due to the nature of the case, each party shall bear its own

costs of the appeal.

It is so ordered.

Dated, Signed and Delivered at Nairobi this **31ST Day** of **OCTOBER, 2019.**

…….

L. NJUGUNA

JUDGE

In the Presence of

……. For the Appellant

……. For the Respondent