



IN THE HIGH COURT OF KENYA

AT KIAMBU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 90 OF 2018

BETWEEN

FESTUS KILILE KIANGI.....APPELLANT

AND

JOSHUA MUSILI.....RESPONDENT

(Being an Appeal from the Ruling, and Order in Thika CMCC No. 883 of 2015 by Hon. N.M.Kyanya (RM) on 11th November, 2018)

JUDGMENT

1. **FESTUS KILILE KIANGI** (*hereinafter referred to as Appellant*) sued **JOSHUA MUSILI** (*hereinafter referred to as Respondent*) in the lower court for damages for injuries he suffered on or about 30th April, 2015 when Respondent's motor vehicle KBW 636N was driven negligently causing it to collide with motor vehicle KAX 835K that the Appellant was travelling in as a result of which he suffered injuries.
2. The record shows that on 07th November, 2016 when the matter was listed for hearing, neither of the parties were present and the case was dismissed for want of prosecution.
3. By an application dated 04th December, 2017 and filed on 5th December, 2017, the Applicant through counsel applied for reinstatement of the suit. Munyungu Emily Wangui advocate for the Appellant explained in her supporting affidavit that she was in court but did not hear when the matter was called out.
4. The application was strongly opposed and in a replying affidavit sworn on 07th March, 2018 by Christopher Chengecha, advocate for the Respondent, who deposed that the Appellant and counsel were not in court when the suit was dismissed.
5. The trial court heard both parties and by a ruling dated **11th November, 2018** disallowed the application.

The Appeal

6. The Appellant being dissatisfied with the lower court's decision filed the Memorandum of Appeal dated 09.08.18 which sets out 9 (nine) grounds which I have summarized into 2(two) grounds to wit: -

- 1) **The trial magistrate erred in law and in fact in failing to appreciate that mistake of counsel ought not be visited on the client**
- 2) **The trial magistrate erred in law and in fact in upholding procedural technicalities as opposed to substantive justice**

SUBMISSIONS BY THE PARTIES

7. When the appeal came before me on 13.09.19, both parties had dutifully filed their written submissions.

Appellant's submissions

8. Appellant faulted the trial for denying the Appellant to have his case heard on merit.

Respondent's submissions

9. The respondent urged the court to find that the Appellant's record of appeal was not complete since submission had not been annexed and in support thereof relied on Samwel Mathenge Ndiritu v Martha Wangare Wanjira & 2 others [2017] eKLR where the court declined a review on the ground that the proceedings of the PPDT on which the appeal was grounded did not form part of the record of Appeal and Muchoki Kanyonyo v Stephen Kuyukia Kanyonyo [2012] eKLR where the court of Appeal upheld an order dismissing the appeal for failure to file vital documents necessary for the disposal of the appeal.

10. The Respondent contended that the one month's delay that the Appellant took to file the application for reinstatement was not explained and urged the court to find that litigation must come to an end. In support thereof, reliance was placed on Johanna Muturi Njogo V Joseph Njogo Mathenge & 2 Others [2008] eKLR where the court declined to reinstate an appeal 3 months after it was dismissed on the grounds that the Respondent had waited for the fruits of his judgment for 14 years and Peter Kinyari Kihumba V Gladys Wanjiru Migwi & Another [2006] eKLR where the court found that a delay of 4 months was inordinate and declined to extend time to file an appeal.

Analysis and Determination

11. I have considered the appeal in the light of the evidence on record and the cited authorities.

12. I have considered the fact that submissions in support of the application for reinstatement were not included in the record of appeal. The submissions are however not vital documents necessary for the disposal of this appeal and the omission does not affect the substance of the appeal.

13. From the record, the suit was dismissed on 07th November, 2016 and Applicant's counsel knew on the very same day that the suit had been dismissed. One would have expected, therefore that the application to reinstate the suit would have been filed immediately thereafter. Instead the Applicant files this application on 04th December, 2017 which is 13 months from date of dismissal. No explanation has been given for this inordinate delay.

14. In the absence of an explanation for the inordinate delay, I find that the trial court's discretion to disallow the application for reinstatement of the suit was properly exercised and decline to interfere with that discretion.

15. For those reasons, the appeal is disallowed with costs to the Respondent.

DELIVERED AND SIGNED AT KIAMBU THIS 25th DAY OF October 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Nancy

For the Appellant -N/A

For the Respondent -N/A