



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NUMBER 477 OF 2014

PATRICK MAINA KARERI.....APPELLANT

VERSUS

H. YOUNG CO. (EA) LIMITED.....RESPONDENT

(Being an appeal against the Judgment and Decree of the Chief Magistrate's Court

at Milimani (Hon. Atembo, PM) dated and delivered on the 26th September, 2017

in CMCC No. 107 of 2006)

J U D G M E N T

1. On 26th September, 2014, Hon. Atembo, learned Principle magistrate delivered a ruling dismissing the appellant's suit for want of prosecution.
2. The Appellant being aggrieved filed this appeal and put forward the following grounds of appeal: -
 - i) the learned magistrate failed to appreciate the law hence arrived at the wrong decision.***
 - ii) The learned magistrate erred in law and in fact by holding that the plaintiff did nothing in the suit for one year.***
 - iii) The learned magistrate failed to appreciate the pleadings by the plaintiff, the reply and submissions by the plaintiff on record in arriving to the decision.***
 - iv) The learned judge's orders are illegal null and void.***
3. When the appeal came up for hearing, learned counsels prompted this court to issue directions to have the appeal disposed of by written submissions.
4. I have re-evaluated the arguments and material presented before the trial court in support and against the application seeking for the dismissal of the appellant's suit for want of prosecution.
5. The background of the matter appears to be brief and straightforward. The appellant is said to have sustained a work related injury while in the employment of the Respondent on 30th April, 2004. It is alleged that the appellant got injured while driving motor vehicle registration No. KAK 908N which got involved in road traffic accident along Nyamira-Kisii Road.
6. The Appellant filed a compensatory suit before the Chief Magistrate's court at Milimani Commercial Courts vide the amended plaint dated 18th November, 2011.
7. The Respondent filed a defence denying the Appellant's claim. The Respondent subsequently took out the motion dated 28th February, 2014 in which it sought for the Appellant's suit to be dismissed for want of prosecution.
8. In the aforesaid motion, the Respondent averred that a period of over one year and three months had lapsed since the suit was in court without any steps being undertaken to have it heard. It was also alluded that the Appellant lost interest in prosecuting the case.

9. The Appellant filed the replying affidavit he swore to oppose the motion. He averred that he had taken steps to prosecute the suit by filing his documents, witness statements and the list of witnesses. He also pointed out that the Respondent had not done any discovery to enable the suit to be fixed for pre-trial directions.
10. The trial court directed the parties to file written submissions. She considered the material placed before her plus the rival submissions and came to the conclusion that the suit is a fairly old matter and that for a period of more than a year since the matter was in court the appellant never took any steps to have the suit heard and determined. She also came to the conclusion that the appellante had failed to give sufficient explanation for his inaction.
11. On appeal, the appellant urged this court to set aside the dismissal order arguing that he had shown cause vide his replying affidavit. He stated that he informed the trial court that the cause of the delay was that parties were explaining an out of court settlement which process was not successful.
12. The appellant further pointed out that he had informed the trial court that he had already filed his documents, witness statements and the list of witnesses as proof that he was interested in pursuing the suit.
13. The Appellant also stated that having taken out the aforesaid steps it was wrong for the trial court to dismiss his suit. It was further pointed out that the Respondent had not filed any witness statements nor any documents, therefore, it cannot be said that its witnesses had left employment.
14. The Respondent on the other hand urged this court to dismiss the appeal arguing that the appellant had taken no steps to have the suit ready for hearing for a period of more than one year five months from the date when the suit was last in court.
15. The Respondent further argued that the appellant had given no satisfactory reason to enable the court exercise its discretion to spare the suit from being dismissed.
16. The record shows that the suit was filed on 10th January, 2006 and the Respondent filed its defence on 23rd March, 2006. The cause of action is said to have arisen on 30th April, 2005. Pleadings closed seven days from the date of filing the defence i.e. on or about 30th March, 2006.
17. The record also shows that on 31st October, 2012, Mr. Eboso, the Respondent's advocate appeared before the trial court and informed the court that he had instructions from the client to explore an out of court settlement and that the appellant's advocate had been informed.
18. On the basis of that information, the learned magistrate adjourned the hearing of the case by marking it as stood over generally.
19. The record shows that there was a will for the period between 31st October, 2012 and 9th April, 2014 when the Respondent filed the motion dated 26th February, 2104.
20. It is clear from the averments made by the appellant before the trial court that he had stated that he had taken steps to have the suit heard and determined.
21. Unfortunately the record does not support his assertion. The Appellant did not state in his replying affidavit that his failure to fix the suit for hearing was due to their ongoing negotiations to settle the matter out of court.
22. In fact even in the written submission, there is no mention of the existence of out of court negotiations for settlement. The truth is that the appellant had not taken any steps to have the suit fixed for hearing in the period between 31st October, 2012 and 9th April, 2014.
23. The issue is now being stated in the written submissions filed on appeal. The Respondent did not controvert the argument that the record is clear that the suit was taken out of the hearing list of 31st October, 2012 to enable the parties attempt to negotiate for an out of court settlement.
24. Had the appellant put this issue to the attention of the trial magistrate, it is possible she could have come to a different conclusion.
25. However, in broad interest of justice, I think the appellant has convinced me that there was a valid reason why there was a delay in having the suit prosecuted. The reason advanced by the Appellant that the parties were engaged in negotiations to settle the matter was not controverted by the Respondent.
26. In the end, and on the basis of the aforesaid singular ground, the appeal is allowed. The order allowing the motion dated 26th February, 2014 is set aside and is substituted with an order dismissing the aforesaid motion.
27. The suit is reinstated to be heard by another magistrate of competent jurisdiction other than Hon. S. Atambo on priority basis.
28. In the circumstances of this matter, a fair order on costs is to order which I hereby do that each party bears its own costs of the appeal and the motion.

Dated, signed and delivered at Nairobi this 23rd day of October, 2019.

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J. K. SERGON

JUDGE

.....for the Appellant

.....for the Respondent