REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 108 OF 2012

NASIM DEVJI...1ST APPELLANT

BEATRICE KABUTHU...2ND APPELLANT

FRED OLANDE..3RD APPELLANT

STEPHEN KODUMBE..4TH APPELLANT

(AS TRUSTEES OF THE DIAMOND TRUST BANK KENYA

LIMITED STAFF PENSION AND LIFE ASSURANCE SCHEME)

AND

THE RETIREMENT BENEFITS AUTHORITY....RESPONDENT

(Appeal from the Ruling and Order of the Retirement Benefits Appeals Tribunal dated 15th February, 2012 in the Retirement Benefits Tribunal Appeal No. 2 of 2011)

JUDGMENT

The Appellants herein had filed an Appeal at the Retirement Benefits Appeals Tribunal dated 22nd February, 2011, challenging the decision of the Retirement Benefits Authority delivered on 7th February, 2011. When the Appeal came up for hearing on 19th October, 2011 neither the Appellants nor their Advocate were present in Court. The Respondent's Advocate was present and submitted that they have already ventilated the issues before the tribunal and applied for the Appeal to be dismissed for non-attendance. The hearing date had been taken in the presence of both counsels.

The tribunal heard the Complainant and delivered a ruling in which it noted that it had waited for 90 minutes for the Appellants' counsel to show up but even at that juncture there was no appearance. The tribunal issued a ruling in the following terms:-

> "***We have considered the decision of the respondent and the record of the proceedings before it. On perusal and assessment in totality of the facts before us, and in previous proceedings, we have come to the conclusion that the appeal before us is devoid of merits. Consequently, we dismiss the Appeal***…"

As a result of the above decision, the Appellants filed a Notice of Motion dated 3rd November, 2011 seeking an order that the Honourable Tribunal be pleased to set aside the order made on 19th October, 2011 dismissing the Appeal for non-attendance by the Appellants, and directing the Appellants to comply with the Respondents decision made on 7th February, 2011.

The Appellant's Advocate, Mr. James Rimui deponed that he attended the previous hearing when the matter was adjourned to 19th October, 2011 but he wrongly diarized the hearing date as 27th October, instead of 19th October, 2011 and as such he did not attend the hearing on the 19th October 2011.

When the application came up for hearing on 15/11/2011, there was no appearance by the Appellants but the Respondent's Counsel who was in attendance submitted that the date had been taken by consent. The Court adjourned the hearing for 40 minutes to give time for the Appellants' Counsel to appear and after converging again, the said counsel had not appeared and the Respondents Counsel applied for the Application to be dismissed. The court noted that they had waited for too long and dismissed the Application.

Following the above ruling, the Appellants filed a further Application dated 9th December, 2011, seeking to have the orders made on 15/11/2011 dismissing the Appellants Application dated 3/11/2011, set aside and a stay of execution of the said orders.

When that Application came up for hearing on 15th February, 2012, both Parties were represented and the tribunal heard them. The Application was opposed by the Respondent and a ruling was delivered in the following terms:

> ***"…This is the 3rd attempt by the Appellants to set aside on errors in recording dates and appearing before the Tribunal. Tribunal indulged the Applicant and ordered appeal to proceed. Directions of the Tribunal disregarded. It was necessary that the application be dismissed for non-prosecution…It boils to inadequacy, inefficiency and non-observance of orders of the tribunal. We accepted previous default. This cannot be repeated. This is beyond indulgence …The application is dismissed***"

Aggrieved by the above decision, the Appellants filed before this Court, a Memorandum of Appeal dated 14th March, 2012 which is the subject of this judgment. The grounds of Appeal being;

> **(a)** THAT the Retirement Benefits Appeals Tribunal erred in law by refusing to exercise its discretion judiciously and reinstate the Appellants' Notice of Motion dated 3rd November, 2011 for hearing as outlined in the Appellants' Notice of Motion dated 9th December, 2012.
>
> **(b)** THAT the Retirement Benefits Appeals Tribunal erred in fact and in law in failing to take cognisance of the fact that the reasons advanced by the Appellants for seeking to reinstate the Notice of Motion dated 3rd November, 2011;
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> > **(i)** Were reasonable and justifiable;
> >
> > **(ii)** Were meritorious; and
> >
> > **(iii)** Demonstrated the Appellant's desire to have the Appellants Appeal before the said Tribunal heard on merit
>
> **(c)** THAT the Retirement Benefits Appeals Tribunal erred in fact and in law in failing to take cognisance of the fact that, its dismissal of the Appellant's Notice of Motion dated 9th December, 2011 was against the interests of justice as the said ruling ;
>
> > **(i)** Disposed of the Appellant's Appeal without affording the Appellants an opportunity to have their Appeal before the Tribunal heard and determined on merit ;
> >
> > **(ii)** Disregarded the fact that the parties to the Appeal before the said Tribunal had taken all steps to dispose of the appeal including summoning witnesses and filing written submissions of the same; and
>
> **(d)** THAT the Retirement Benefits Appeals Tribunal erred in fact and in law by making a decision that amounted to an improper exercise of its discretion.

The Appeal herein was canvassed by way of written submissions which I have considered together with the grounds of appeal, as well as the authorities cited. The Appellants submitted that the Advocate's failure to attend the hearing amounted to non-representation of the appellants and the error leading to the mistake was purely an error of Advocate and not due to the deliberate abandonment of the suit by the Appellants herein.

It was the Appellants' submissions that the mistake of a Counsel should not be visited upon an innocent litigant and relied on the case of **Leena Apparels Ltd vs. Mwatha Mulwa Mombasa HCCA 202 of 2007** where Justice Azangalala cited with approval the case of **Philip Chemwolo & Anor. Vs. Augustine Kubende (1982 -1988)** KAR where the Court held that,

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that party should suffer the penalty of not having his case heard on merits …I think the broad equity approach to this matter is that unless there is fraud or intention to over reach there is no error or default that cannot be put right by payment of costs. The Court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline".***

The Appellants submitted that the Advocate's actions should be excused as human is to error.

On the other hand, the Respondent submitted that the ruling of the tribunal stated that the application was dismissed inter alia for non-prosecution in line with **Order 17 rule 3** of the Civil Procedure Rules which states that;

> ***"Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 12, or make such other order as it thinks fit***."

And **Order 17 Rule 3** provides that!

> ***"Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith."***

This being an appeal, this court is tasked with re-evaluating the evidence before the lower Court and in so doing it will not interfere with the exercise of discretion by that court unless the exercise of that discretion was erroneous in law. This is well captured in **Mbogo & Another -v- Shah (1968) EA 93 at 96**, where it was stated that

> ***"an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which the court should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so, arrived at a wrong conclusion."***

In this judgment, I will seek to determine whether the tribunal properly exercised its discretion in dismissing the Applicant's application.

It is instructive to note that the suit was dismissed under order 17 rule 2 for want of prosecution. In the case of **Ceres Estate Limited v Kieran Day & 4 others [2013] eKLR, where the** plaintiff contended that the failures of its counsel should not be visited upon it, the Court held that,

> ***"The plaintiff may have been prejudiced by the conduct or failures of its previous counsel. The plaintiff states at paragraph 11 of the supporting affidavit that its former lawyers failed to notify it of the developments or steps taken to safeguard its interests. Those may not be ordinary mistakes that should not be visited on the plaintiff. They seem to me to border on serious lapses or negligence. The plaintiff, if well advised, has a clear remedy."***
>
> ***Taking into account the inordinate delays in prosecuting the matter and the misconduct of the plaintiff expounded at great length by the Court of Appeal, I am not persuaded to exercise my discretion in its favour. The overriding objective of the court would not come to the aid of the plaintiff. See Hunker Trading Company Limited Vs Elf Oil Kenya Limited Nairobi, Court of Appeal, Civil Application 6 of 2010 [2010] e KLR, Deepak Kamau & another Vs Kenya Anti-Corruption Commission and others Nairobi, Court of Appeal, Civil Application 152 of 2009 [2010] e KLR. For all of the above reasons, I find that the plaintiff's notice of motion dated 9th July 2013 lacks merit. I order that it be dismissed with costs to the respondents."***

The Application dated 3rd November, 2011 was as a result of the decision of the Tribunal delivered on 19th October, 2011. This is the application the Appellants seek to have reinstated for hearing on the basis that it was dismissed for not-attendance.

As was held in the case of **Ephantus Mwangi and Geoffrey Ngugi Ngatia v. Duncan Mwangi Wambugu [1982]-88 1KLR 278** the principle is that an appellate Court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown to have acted on wrong principles. Having said so, I find that the Tribunal properly exercised its discretion in dismissing the Application dated 9th December, 2012, and in making its orders of 15th February, 2011.

The upshot of the above is that this Appeal is dismissed with costs to the Respondent

It is so ordered.

Dated, Signed and Delivered at Nairobi this 25th day of January, 2018

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L. NJUGUNA

JUDGE

In the presence of:-

……………………………..1ST APPELLANT

……………………………..2ND APPELLANT

……………………………..3RD APPELLANT

..……………………………..4TH APPELLANT

..RESPONDENT