



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 36 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

JUSTUS KIRAITHE MAINGIAPPELLANT

AND

FATHER BONO 1STRESPONDENT

BISHOP LUCATI RUIGI – ISIOLO

CATHOLIC CHURCH.....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. L. Ambasi, CM dated 28th March 2017 at the Chief Magistrates Court at Meru in Civil Case No.682 of 2001)

JUDGMENT

1. This appeal arises from an order of the trial court rejecting the appellant's application to reinstate a suit that had been dismissed for want of prosecution. For ease of reference, I shall refer to the parties in their capacities before the subordinate court where the appellant was the plaintiff and the respondents, the defendants whenever the context requires.

2. The genesis of this matter can be traced to the events of 12th July 2016 when the matter came up for hearing. The plaintiff's advocate applied for an adjournment. The defendants' advocate opposed the application and prayed that the application be dismissed with costs. In response, counsel for the plaintiff pleaded that the matter ought not be dismissed on the ground that the defendants had not complied with the provisions of **Order 11A** of the **Civil Procedure Rules**. The trial magistrate dismissed the suit on the following terms, "The suit was filed on 6th August, 2001 and the same has never been heard ever since. The suit is dismissed with costs."

3. Thereafter, the plaintiff's counsel filed an application dated 21st July 2016 seeking to set aside the dismissal order made on 12th July 2016 and reinstate the suit for hearing. The application was supported by the plaintiff's affidavit. He contended that he was not afforded an opportunity to be heard before the order was made and that although the trial magistrate based the dismissal on the ground that the matter was old, she did not consider the circumstances why it was never prosecuted. He complained that the defendant's counsel misled the court when she told the court that the plaintiff had never attended court when in fact he had been attending court. The plaintiff deposed that on that day he arrived in court late and was indeed ready to proceed when the suit was unfortunately dismissed.

4. Counsel for the defendants, Ms Gathoni Esther Mwangi, deposed in the replying affidavit that almost 16 years had elapsed since the case was filed due to the laxity of the plaintiff. That failure to prosecute the suit was prejudicial to the defendants as their witnesses had relocated to South Africa. She further stated that after the amended plaint was filed in 2002, the plaintiff did not take any step to prosecute the suit until 2005. That the plaintiff took a hearing date in 2010 but was not ready to proceed for hearing on 9th September 2010 and even on 2nd November 2010, the plaintiff and his counsel never attended the hearing causing the matter to be stood over generally. Again on 22nd February 2011, 31st May 2011 and 18th September 2012, the matter did not proceed due to default by the plaintiff and on all those occasions the plaintiff was absent. From 18th September 2012, the matter remained in abeyance for 4 years until the plaintiff fixed the hearing for 12th July 2016 when the suit was dismissed. The defendants' case was that over the period, the defendants' witnesses had been attending court but it is the plaintiff who had not been able to proceed and that the court was right in dismissing the suit.

5. Counsel for the plaintiff, Ms Mercy Kaume, in the Supplementary Affidavit, refuted the allegations by Ms Mwangi that it is the plaintiff who had not been attending court for the hearing. She instead blamed the defendants' advocate for adjourning the case from time to time on account of the fact that the witnesses were out of the country. She reiterated that the plaintiff came to court late on the material day and has

always been interested in proceeding with the matter. She further deponed that the advocate who attended court on the material day, Mr. Ashaba, did not have a history of the matter and that he had not handled the matter before and had not even met the plaintiff on that date. She noted that the plaintiff was ready and willing to proceed with the suit.

6. After considering the parties' written submissions, the trial magistrate dismissed the application and affirmed her decision to dismiss the case on 12th July 2016. In a detailed ruling, the trial magistrate made several findings. In the main, the magistrate held that the plaintiff had not explained the reason or cause for delay as the duty to prosecute the suit lay on the plaintiff rather than the defendants. In her view, the suit had never once proceeded for hearing since it was filed and the delay of sixteen years was inordinately long and thus the dismissal was warranted.

7. The ruling and order dismissing the application was contested on the basis of the memorandum of appeal dated 26th April 2017. The thrust of the appeal is that the trial magistrate exercised her discretion wrongly in dismissing the application by finding that the plaintiff never attended court and was the cause of the delay and that he was indolent. Counsel pointed out that the trial magistrate did not consider the prejudice and injustice suffered by the plaintiff who desired to prosecute the case and had been attending court. Counsel for the respondents reiterated that the case was dismissed for want of prosecution since it had not been prosecuted since the year 2001 and in the circumstances, the trial magistrate exercised her discretion judiciously.

8. I am alive to the fact that this court is being called upon to review the exercise of discretion by the trial court. I am therefore guided by the decision in ***Mbogo and Another v Shah [1968] EA 15*** where it was stated that:

An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.

9. I have reviewed the proceedings and I am satisfied that the matter was adjourned several times on account of both the plaintiff and defendants. However, on 18th September 2012, the trial magistrate, Hon. E. W. Wambugu, RM, stated in allowing an adjournment, that on 29th September 2011, the court had given directions for the defendants to comply with **Order 11** of the **Civil Procedure Rules** and the defendants had not complied with those directions. In the circumstances, the court ordered that, *"Owing to the case being an old one. Having noted the defendants have not complied with Order 11 which seeks to eliminate the element of ambush in a trial, I hereby reluctantly grant a final adjournment to the defendants to comply with the said order failure to which the matter should proceed for hearing."*

10. Thereafter, the matter was fixed for hearing by consent on 28th March 2013 but the record shows that the matter came up for hearing on 27th March 2013 when both parties were absent. The matter was again fixed for hearing on 12th July 2016 by consent which is the date it was dismissed. It is apparent that the plaintiff alone was not to blame for the delay in prosecuting the suit and from the time the last adjournment was granted to the defendant, two years had elapsed before the hearing date. It is clear that even when the date was fixed by consent for hearing on 28th March 2013, both parties did not attend court as it is apparent from the record that the matter was brought to court a day earlier.

11. The trial magistrate placed emphasis on the fact that the matter had not been heard since it was filed without considering the fact that both parties were to blame for the delay and that in fact the last adjournment prior to the hearing was occasioned by the defendants. It is clear that the reason the matter was dismissed was that it had never been heard and in coming to this decision, the trial magistrate misapprehended the record as I have shown and ought to have considered the delay and the reasons from the last ruling when the court gave the last adjournment. In the circumstances, the trial magistrate failed to take into account material facts and as such did not exercise her discretion judiciously.

12. I therefore allow the appeal. Consequently, the appellant's notice of motion dated 21st July 2016 is allowed and the suit dismissed on 12th July 2012 is reinstated.

13. I will not award the appellant costs as it is clear that his advocates were the authors of his misfortune. I also direct that the case be heard and finalised within **six (6) months** from the date hereof and in default, it shall stand dismissed.

SIGNED AT KISII

D. S. MAJANJA

JUDGE

DATED and DELIVERED at MERU this 21st day of June 2018.

A. MABEYA

JUDGE

Ms Kaume instructed by M. G. Kaume and Company Advocates for the appellant.

Ms Mwangi instructed by Mwangi E. G. and Company Advocates for the respondents.