



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NUMBER 78 OF 2016**

**SOLOMON J M MUNYUA..... APPELLANT**

**VERSUS**

**RAHAB GAKIO. .... RESPONDENT**

*(Being an appeal from part of the ruling of the Hon. Kabaria (Ms) delivered on 12<sup>th</sup> February, 2016 in Nairobi CMCC No. 11 of 2016)*

**J U D G M E N T**

1. On 12<sup>th</sup> February, 2014, Hon. L W Kabaria, learned Resident Magistrate made an order directing the Appellant's suit to be prosecuted within 12 months failure to which the same would stand dismissed.
2. When the suit came up for hearing on 27<sup>th</sup> April, 2015, Hon. I Gichohi, Learned Resident Magistrate, proceeded to issue an order dismissing the suit for want of prosecution in terms of the orders issued on 12<sup>th</sup> February, 2014.
3. Being aggrieved by the dismissal order, the Appellant filed an application in which he sought for the dismissal order to be set aside.
4. Hon. L W Kabaria heard the application and dismissed it on 12<sup>th</sup> February, 2016. Being further aggrieved the appellant preferred this appeal.
5. The Appellant put forward the following grounds of appeal: -
  - i) *The learned magistrate erred in fact in finding that the application dated the 8<sup>th</sup> day of May, 2015 lacks merit.*
  - ii) *The learned magistrate erred in fact and in law in finding that the appellant was not interested in prosecuting the suit.*
  - iii) *The learned magistrate erred in fact in finding that the Appellant was guilty of delay in prosecuting the suit when there was sufficient evidence to the contrary.*
  - iv) *The learned magistrate erred in fact and in law in denying the Appellant justice by dismissing this suit when the circumstances in this matter showed otherwise.*
  - v) *The learned magistrate erred in fact and in law in finding that she did not have sufficient*

*reason before her to set aside the orders made on the 28<sup>th</sup> day of April, 2015 when this was not the case.*

*vi) The Learned magistrate did not exercise her discretion judiciously and took factors that were irrelevant when considering the application.*

6. When this appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the same disposed of by written submissions.

7. I have re-evaluated the arguments put forward before the trial court. I have further considered the rival submission. It is the submission of the Appellant that the learned Resident magistrate erred when she dismissed the Appellant's application dated 8<sup>th</sup> May, 2015 seeking to set aside the dismissal order and for making a finding that same was not interested in prosecuting the suit.

8. The Appellant pointed out that the delay to prosecute the suit was not inordinate nor inexcusable on his part or on the part of his advocates. It was also pointed out that the delay was not attributable to the Appellant. The Appellant also argued that fixing of hearing dates was purely an administrative matter, which was beyond the control of the Appellant.

9. The Appellant further faulted the learned Resident Magistrate for holding that he did not provide sufficient reason to enable her exercise her discretion to set aside her order. He argued that he had laid sufficient material before the trial court which the learned Resident Magistrate did not give serious attention.

10. The Respondent on the other hand is of the submission that the learned Resident magistrate properly and judiciously exercised her discretion under Article 159 of the Constitution and under the overriding objective under the Civil Procedure Act. She blamed the Respondents for failing to adhere to the orders and directions given by the trial court. She accused the Appellant for not being vigilant and that the reasons provided to justify the delay were not convincing.

11. Having re-evaluated the arguments presented before the trial court and having considered the rival submissions presented before this court, it is now apparent that both sides appeared before the trial court to argue in favour and against the Appellant's motion dated 8<sup>th</sup> May, 2015.

12. The recorded proceedings indicate that the aforesaid application was disposed of by written submission. It is clear from the pleadings and the written submissions that the Appellant had submitted before the trial court that he had taken steps to have the suit prosecuted and that he had not been indolent. The record also shows that the Respondent filed her written submissions to strenuously oppose the Appellant's application.

13. Her main ground was that the Appellant had acted with laxity hence he was indolent. In her ruling delivered on 12<sup>th</sup> February, 2016, the learned Resident Magistrate noted that the Appellant had attributed his failure to secure a hearing date within the period fixed by court to the court's diary which the Appellant had no control over.

14. The Learned Resident Magistrate took issue with the Appellant's failure to take steps to secure the court's intervention to vary the order or in the alternative to have it set aside.

15. The question which has now been posed to be answered is whether or not the learned Resident magistrate judiciously exercised her discretion. It is apparent that the Appellant blamed his failure to secure a hearing date within the period fixed by court on the court's diary. The aforesaid reason was never disputed by the Respondent nor out rightly rejected by the trial court. The learned Resident magistrate was of the opinion that the Appellant should have taken other steps to have the order limiting time varied in advance before letting it take effect.

16. In my view, that could have been a genuine lapse on the part of the Appellant's legal advisers. The issue is whether or not the Appellant presented sufficient reason (s) to justify being granted the order. I am convinced that the Appellant gave credible and cogent reason(s) which should have entitled him the orders sought.

17. On the basis of the above reason(s) I find the appeal to be meritorious.

18. In the end, this appeal is allowed. Consequently, the order dismissing the motion dated 5<sup>th</sup> May, 2015 is set aside and is substituted with an order allowing the aforesaid motion in terms of prayer 1. In the circumstances of this appeal, a fair order on costs is to order, which I hereby direct, that each party meets its own costs of both the application before the trial court and this appeal

Dated, signed and delivered at Nairobi this 16<sup>th</sup> day of August, 2017.

.....

**J K SERGON**

**JUDGE**

*In the presence of*

..... *for the Applicant*

..... *for the Respondent*