



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 340 OF 2017

CHAIRMANIA EVENTS LIMITED.....APPELLANT

VERSUS

TRANSCEND MEDIA GROUP.....RESPONDENT

(Being an appeal from the Ruling of Hon D.O. Mbeja (Mr), Senior Resident Magistrate (SRM) at the Chief Magistrate's Court at Milimani CMCC No 6286 of 2014 delivered on 4th July 2017)

JUDGMENT

INTRODUCTION

1. In his ruling delivered on 4th July 2017, the Learned Trial Magistrate, Mr D.O Mbeja (Mr), Senior Resident Magistrate (SRM) dismissed the Appellant's suit with costs to the Respondent's for want of prosecution.
2. Being dissatisfied with the said decision, the Appellant filed a Memorandum of Appeal dated 7th July 2017 on even date. It relied on seven (7) Grounds of Appeal.
3. The Appellant's Written Submissions were dated and filed on 29th May 2018 while those of the Respondent's Written Submissions were dated 3rd July 2018 and filed on 19th July 2018.
4. When the matter came before the court on 30th July 2018, the parties requested that the court deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

THE APPELLANT'S CASE

5. The Appellant submitted that it was denied the alienable right to be heard and had been condemned unheard. It relied on the cases of **Richard Nchapai Leiyangu vs Independent Electoral and Boundaries Commission (IEBC) & 2 Others [2013] eKLR**, **James Kanyiita Nderitu & Another vs Marios Philotas Chikas & Another [2016] eKLR** and **Agip (K) Ltd vs Highlands Tyres Ltd [2001] KLR 630** where the common thread was that a litigant should never be condemned unheard.
6. It argued that the powers to dismiss suits for want of prosecution ought to be exercised judiciously and that it ought to be allowed only where the delay had been unreasonable, inexcusable and was likely to cause prejudice to an applying party.
7. It pointed out that the delay in prosecuting its case was not intentional but that the delay had actually been caused by the Respondent who had failed to comply with the provisions of Order 7 Rule 5 of the Civil Procedure Rule, 2010 despite several requests to comply with the same.
8. It added that it had also not been able to take dates at the Registry because the court file could not be traced.
9. It was its case that its claim was for Kshs 494,630/= for loss of equipment from 2nd November 2014 until payment in full plus costs and interest. It therefore urged this court to allow its Appeal herein.

THE RESPONDENT'S CASE

10. The Respondent argued that it had fully complied with Order 7 Rule 5 of the Civil Procedure Rules, 2010 and it had in fact filed its Lists of Witnesses, Witness Statements, List and Bundle of Documents.

11. It added that the duty was upon the Appellant to have taken a date for Pre-Trial Conference and that in any event, there was no provision of the law that stipulated that the matter could not proceed for Pre-Trial unless a Defendant had complied with Order 7 Rule 5 of the Civil Procedure Rules.

12. It was therefore its submission that the Appellant had not been vigilant in prosecuting its case and that the delay contravened the provisions of Article 159 (2) (b) of the Constitution of Kenya, 2010 that stipulates that “**justice shall not be delayed**” and that the delay was inexcusable.

13. It was emphatic that the Learned Trial Magistrate proceeded correctly under the provision of Order 17 Rule 1 of Civil Procedure Rules as the Respondent had not taken any action to prosecute its case within a year and that it filed its application seeking to dismiss the Respondent’s case for want of prosecution more than two (2) years after the Appellant’s suit had been filed.

14. It therefore urged this court to uphold the Learned Trial Magistrate’s decision of 4th July 2018.

LEGAL ANALYSIS

15. Having looked at the respective parties’ Written Submissions, it was clear that the only issue this court had been asked to determine was whether or not the Learned Trial Magistrate exercised his discretion judiciously when he dismissed the Appellant’s suit for want of prosecution.

16. As was rightly pointed out by the Respondent, Article 159 (2) (b) of the Constitution of Kenya provides that justice shall not be delayed. It is also trite law that no party should be condemned unheard. Indeed, Article 50 of the Constitution of Kenya provides that every person has a right to have his dispute determined by a competent tribunal and/or court. The two (2) Articles of the Constitution are on equal footing and none is more superior to the other. They must be considered together where applicable and where circumstances call for them to be read together.

17. This court looked at the Appellant’s response to the Respondent’s Notice of Motion application that was dated 14th February 2017 and 15th February 2017 and noted that its advocate Sylvester Kibera Maina, the deponent therein, had stated that it was still desirous of prosecuting its suit. He had urged the Trial Court not to dismiss the Plaintiff’s suit and deponed that he would fix the matter for Pre-Trial directions. He did not annex any proof that he had been unable to fix a hearing date because the court file was missing.

18. The Learned Trial Magistrate was right in acknowledging that the overriding objective of the Civil Procedure Act was “**to facilitate the just, expeditious and just determination of civil proceedings**”. He also rightly observed that litigation must come to an end and that the Appellant herein had not been diligent in prosecuting its case.

19. However, this court was of the view that although the Appellant did not provide proof that the court file was missing hence its advocates’ inability to fix a date for Pre-Trial Directions or that it was not necessary for the Respondent to have complied with the provisions of Order 7 Rule 5 of the Civil Procedure Rules, 2010, before the Appellant could fix the matter for a Pre-Trial Conference, it found that dismissing the suit for want of prosecution was too drastic.

20. Indeed, a party should only be denied a chance to litigate his or her case if the delay to prosecute his or her case has been inordinate, inexcusable and caused the prejudice to his or her opponent. In this case, this court found that the Appellant did not offer a plausible explanation why it did not prosecute its case expeditiously. However, the delay of three (3) years between the time the suit was filed in 2014 and the time the Respondent’s application was filed in 2017 was not so inordinate. It was a delay that could be compensated by way of costs because the Respondent was entitled to a quick resolution of the dispute between it and the Appellant as was guaranteed in the Constitution of Kenya.

21. Accordingly, having considered the respective parties’ Written Submissions and the case law that each party relied upon, this court took the view that although the Learned Trial Magistrate acted within the law, dismissing the Appellant’s suit was too draconian considering that the next step was for the taking of Pre-Trial Directions. It would have been in interest of justice to have allowed the Appellant to prosecute its case and given time lines and condemned it to pay thrown away costs to the Respondent as opposed to dismissing its case for want of prosecution more so as it had opposed the said dismissal in the lower court.

DISPOSITION

22. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Appeal that was lodged in court on 7th July 2017 is hereby allowed. The effect of this is that the Learned Trial Magistrate’s decision of 4th July 2017 dismissing its suit is hereby set aside and/or vacated and the Appellant’s suit is hereby reinstated on the following conditions:-

1. THAT the Appellant shall fix its case for Pre-Trial directions in the lower court within thirty (30) days from the date of this Ruling i.e by 30th November 2018.

2. THAT the Appellant shall pay to the Respondent thrown away costs in the sum of Kshs 30,000/= within thirty (30) days from the date of this Ruling i.e by 30th November 2018.

3. THAT in default of either Paragraph 22 (1) or Paragraph 22(2) hereinabove, the Appellant's suit will automatically stand as dismissed with costs to the Respondent.

23. Each party to bear its own costs of this Appeal.

24. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of October 2018

J. KAMAU

JUDGE