



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 37 OF 2007
FIDELITY COMMERCIAL BANK LIMITED.....APPELLANT
VERSUS
OWEN AMOS NDUNGU..... 1ST RESPONDENT
PETER NG'ANG'A KAMANDE..... 2ND RESPONDENT

JUDGMENT

The subject of this appeal is an order which was given by the trial magistrate dismissing the suit against the 2nd Defendant for want of prosecution. The circumstances of the matter are that when the suit came up for hearing on 6th December, 2005, the Appellant sought adjournment as they had not served the 2nd defendant (the 2nd Respondent herein) with the hearing notice. The explanation given by the Appellant was that the hearing date was taken in court by consent between 1st Defendant and the Plaintiff but, the Appellant's clerk inadvertently noted in the Appellant's file that the date was taken by consent of all the parties. Upon realising the mistake, the Appellant requested for an adjournment and sought indulgence of the court to take another date and serve the 2nd Respondent.

In dismissing the request for adjournment, the trial magistrate noted that she had granted the last adjournment in the matter and she dismissed the suit against the 2nd defendant for want of prosecution and ordered the hearing to proceed in respect of the 1st Defendant. Aggrieved by that decision, the Appellant filed a Notice of Motion dated 17th January, 2006 seeking orders that, the orders of 6th December, 2005, dismissing the Plaintiff's case against the 2nd Defendant, be set aside. The application was supported by the Affidavit of Philip Muoka, the legal officer of the Plaintiff, as well as an Affidavit of Charles Otieno, the Court Clerk to the Appellant's Advocates.

It was averred that though the hearing against the 1st defendant had commenced, the same is partly heard and therefore it is only fair that the Plaintiff be allowed to proceed with its case against the 2nd Defendant and any prejudice occasioned can be compensated by an award of damages. The application was opposed by the 2nd Respondent vide Grounds of Opposition dated 6th January 2006 on the grounds that the application has no merits, it was frivolous, devoid of honesty and an afterthought.

A ruling was delivered on 5th December, 2006 dismissing the Appellant's application and being aggrieved by the decision, the Appellant filed this Appeal on ten (10) grounds as set out in the memorandum of appeal. Basically, the Appeal is premised on the grounds that the trial Magistrate did not consider the Appellant's reason for not being ready to proceed, that the prayer for adjournment was bonafide and that the dismissal of the suit was punitive and prejudicial to the Appellant's case.

This court will seek to determine whether the trial magistrate misdirected herself in ordering the dismissal of the suit against the 2nd Respondent for lack of prosecution.

This Appeal was canvassed by way of written submissions but Respondent did not file submissions. The Appellant submitted that the trial magistrate was quick to dismiss the Appellant's genuine reasons for adjournment. That, the law provides that the court ought to have issued a notice to show cause before the suit could be dismissed. The appellant relied on a number of cases which I have considered.

The test for dismissal of a suit for want of prosecution is stated in the case of **Ivita -v- Kyumba (1984) KLR 441**. The test was expressed as follows:

“The test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the defendant so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time; the defendant must satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced; he must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff.”

On whether the delay was prolonged and inexcusable and whether justice can still be done despite the delay, it is my finding that this case is long outstanding and has taken long to be determined. A perusal of the court record will reveal that there had been a number of adjournments caused by both parties. .

A court of justice ought to consider the peculiar circumstances of each case before determining whether to dismiss the same or not. In this case, the 2nd Respondent is the guarantor of the 1st Respondent in a hire purchase arrangement for a car bought by the 1st Respondent under financing arrangement with the Appellant. In this regard it was paramount that the appellant be given a chance to litigate its case against the 2nd Respondent and the same be disposed-off on merits.

I have considered the reason advanced by the Appellant for failure to serve the 2nd Respondent with a hearing notice. I have also looked at the affidavit of Charles Otieno, the legal clerk of the Appellants' advocates, who mistakenly noted that the date was taken by consent and hence failed to serve the 2nd Respondent with a hearing notice. I have also considered the appellant's argument that its advocate attended court under the honest belief that all parties had been served with the notice. I find that considering the circumstances of this case, the learned trial Magistrate ought to have granted the adjournment sought by the Appellant.

I am alive to the principles of substantive justice as enshrined in the Constitution and the circumstances of this case, deserve a lenient exercise of discretion by the court in favour of sustaining rather than dismissing the suit against the 2nd Respondent.

Accordingly, I make the following orders:

- a. That the ruling delivered on 5th December, 2006 and the orders subsequent thereto be and are hereby set aside.
- b. That the plaintiff's suit against the 2nd Respondent be and is hereby reinstated.
- c. Each party shall bear its own costs of the appeal.

It is so ordered

Dated, signed and delivered at Nairobi this 15th day of November, 2017.

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L. NJUGUNA

JUDGE

In the presence of

..... *for the Appellant.*

..... *For the 1st Respondent.*

..... *For the 2nd Respondent.*