REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 489 OF 2014

KARIUKI CHARLES KAMAU.....APPELLANT

-V E R S U S –

AMBROSE KYALO MATEE ..... RESPONDENT

(Being an appeal from the ruling and orders of Hon. Leah W. Kabaria Resident Magistrate delivered on 10th October 2014 in Milimani Civil Suit no. 2663 of 2008)

JUDGEMENT

1) Kariuki Charles Kamau, the appellant herein, filed a ompensatory suit against Ambrose Kyalo Matee, the respondent herein, by way of the plaint dated 5th May 2008 in respect of an accident which occurred on 3rd May 2006 between the appellant's motor vehicle registration no.KAU 887X and the respondent motor vehicle KTM 893. It was alleged by the appellant that the collision of the two motor vehicles caused damage and loss to him. The appellant is the registered owner of motor vehicle KAU 887X. The respondent being the driver of the motor vehicle registration no. KTM 893. The respondent filed his defence dated 10th June 2008 denying the appellant's claims.

2) When the matter came up for hearing on 4th February 2013, the trial magistrate Hon. L. W. Kabaria, gave orders to wit inter alia that the suit should be fully prosecuted before 30th August 2013, failure to which the suit would stand dismissed. The suit was not prosecuted by the date as ordered by court and as such it was dismissed.

3) The appellant then filed the notice of motion dated 24th October 2013 and sought to set aside the orders made on 4th February 2013 and the subsequent dismissal of the suit for want of prosecution. The learned trial magistrate dismissed the appellants notice of motion on 10th October 2014 stating that there was no cause to set aside the aforesaid orders.

4) The appellant being aggrieved by the decision of the trial magistrate preferred this appeal and raised the following grounds in its memorandum:

> ***1. The learned magistrate erred in law and in fact by failing to find that thrown away costs would have appropriately compensated the respondent therein for the inconvenience of reinstating the suit after the same was dismissed.***
>
> ***2. The learned magistrate erred in law and in fact in finding that a delay of 8 weeks in filing the application to set aside was inordinate.***

3. The learned magistrate erred in law and in fact by finding as against the plaintiff and failed to appreciate that the defendant never filed submissions to the said application.

4. The learned magistrate erred in law and in fact in failing to appreciate the submission made on behalf of the appellant.

5. The learned magistrate erred in law and in fact in failing to exercise her wide discretionary powers in favour of the appellant and as such prejudicing the plaintiff.

The above mentioned grounds may be summarised into one main ground namely:

Whether or not the trial magistrate finding on dismissing the suit for want of prosecution was well founded.

5) When this appeal came up for hearing, learned counsels appearing in this appeal recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court and considered the appellants written submissions.

6) In dismissing a suit for want of prosecution the test to be applied was restated in the case of **Ivita –v- Kyumbu (1984) KLR 441.** The test was expressed inter alia 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....."***

In effect, the court should determine whether;

a) The delay is prolonged,

b) The delay is inexcusable and

c) Justice will still be done despite such a delay.

8) In the case of **Mwangi S. Kimenyi –vs- Attorney General and another (2014) eKLR,** it was stated that the dismissal of a suit by courts should be done sparingly and the court should strive to sustain a suit rather than dismissing it to avoid injustice, where a party mistake is inadvertent and excusable. On the issue of prejudice occasioned to the defendant, it was stated inter alia that;

".....in ascertaining prejudice to the defendant, it must also weigh the prejudice the dismissal will cause to the plaintiff. The balance thereof need not be symmetrical, but the impulsion should come from the dictates of justice and where need be, the suit should be sustained."

9) In the **Mwangi S. Kimenyi case** (Supra) it was further stated as follows:

"..... however it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties."

10) The appellant submits that this court has the power to interfere with the decision of the trial court as restated in the case of Mbogo –vs- Shah and another (1968) EA 93.

For throw away costs the appellants submits that the trial magistrate should have allowed compensation by way of costs for any inconvenience caused to a party who had resorted to the courts. This would have ensured that the suit is sustained, the appellant cited the case of **Philip Chemwolo and another –vs- Augustine Kubede (1982 – 1988) KAE 1036** where it was observed inter alia:

"Blunder 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 merit,.....the court exists for purpose of deciding the rights of the parties and not the purpose of imposing discipline."

11) The appellant submits that a period of 8 weeks as was held by the trial magistrate to be inordinate is not. This is from 30th August 2013 to 23rd October 2013 when the notice of motion was field. The appellant submits that he filed submissions and explained why the suit never proceeded for hearing. The appellant also urged court to compensate the respondent with costs for any inconvenience and to reinstate this suit since he would suffer great prejudice if the suit was dismissed, a point that the appellant expected court to have considered.

12) The appellant also submits that, the trial magistrate had discretion in the matter, which if exercised judiciously, then she ought to have understood that, the adjournments sought was due to the unavailability of key witnesses due to sickness and other relevant excuses should have be considered, than throwing out a the suit.

13.) I have re-evaluated the case that was before the trial court vis-a- vis the appellants submissions. The appellant is beseeching this court to reinstate its suit that was dismissed by the trial court for want of prosecution. It is evident that the trial magistrate noted that there was delay in prosecuting the case due to unavailability of witnesses on the part of the appellant. However she was persuaded to rule otherwise. I think this is where she fell into error. The explanation was plausible and should have earned the appellant a favourable ruling. It is apparent, the delay to prosecute the suit greatly prejudiced the respondent.

In my humble view, the respondent's prejudice can be compensated by an award of costs.

In the end, the appeal is allowed . Consequently the order dismissing the suit is set aside and substituted with an order allowing the motion dated 27.10.2013.

The suit is reinstated to be heard denovo by another magistrate other than Hon. Leah Kabaria. Each party to bear its own costs of the appeal. However, costs of the motion dated 24.10.2013 before the trial court is given to the respondent.

Dated, Signed and Delivered in open court this 20th day of December, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent