



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NUMBER 277 OF 2009**

**1. CROWN DISTRIBUTORS LTD. ....APPELLANT**

**2. JOSEPH KIPKIRUI KEINO.....APPELLANTS**

**VERSUS**

**1. HENRY NJAU NGIGE .....1<sup>ST</sup> RESPONDENT**

**2. JOSEPH K. MBARIA.....2<sup>ND</sup> RESPONDENT**

*( APPEAL FROM THE RULING OF THE RESIDENT MAGISTRATE DATED 3<sup>RD</sup> DAY OF DECEMBER, 2009 IN NAKURU CHIEF MAGISTRATE'S COURT CIVIL CASE NO. 2652 OF 2002 )*

**BETWEEN**

**HENRY NJAU NGIGE.....PLAINTIFF**

**VERSUS**

**JOSEPH K. MBARIA .....DEFENDANT**

**AND**

**CROWN DISTRIBUTORS LTD.....1<sup>ST</sup> THIRD PARTY**

**JOSEPH KIPKIRUI KEINO.....2<sup>ND</sup> THIRD PARTY**

**JUDGMENT**

1. This appeal is against the ruling of the trial court dated 3<sup>rd</sup> December 2009 in **Nakuru CMCC No 2652 of 2002** following an application by the Appellant then the defendant seeking orders of dismissal of the Plaintiffs, now the Respondents case, that was part heard, for want of prosecution.

2. The plaintiff had testified and had one more witness to testify. The trial magistrate was then transferred and directions taken that the proceedings be typed to facilitate another magistrate to proceed with the hearing of the suit. That was on the 27<sup>th</sup> June 2006. As at 28<sup>th</sup> August 2008, the court record indicates that a hearing date was taken, meaning that the proceedings had been typed. For one reason or another, the case was stood over generally by consent of the parties. The

record further shows that no action was taken by either party since 28<sup>th</sup> August 2008 to prosecute the case upto the 14<sup>th</sup> October 2009 when the defendant/now appellant filed an application seeking an order for dismissal of the suit for want of prosecution citing inordinate delay by the plaintiff to prosecute the case to finality.

3. On the 3<sup>rd</sup> December 2009 upon interpartes hearing of the application the trial court made a ruling that in his considered view, the plaintiff should be granted an opportunity to remedy the default, and directed that the plaintiff's case be prosecuted within 90 days.

4. The defendant being dissatisfied with the said ruling preferred this appeal upon seven grounds, lamped up together and to the effect that the trial magistrate failed to consider that one year had lapsed since the suit was stood over generally and that no good reasons were advanced for the delay.

5. The appellant's written and oral submissions were that the trial magistrate misdirected himself in that at the date of adjournment of the suit generally, proceedings had been typed and hearing date taken, and that a parheard case can be dismissed for want of prosecution. He urged the court that no good reason were tendered to explain the inordinate delay by the plaintiff.

The appellant relied on several authorities to advance his submissions; among them **HCCC NO.34 of 2003 (Milimani) Dipak Premchand Shah and Others -vs- Akiba Bank Limited, Harbinder Singh Setho -vs- the Standard Limited and Another Nairobi HCCC No 314 of 2002** where the Courts held that it is the duty of the Plaintiff to prosecute his case and since the plaintiff had done nothing the court ought to dismiss the the suit.

6. The Respondent on the other hand submitted that it is at the discretion of the court to dismiss or not to, and circumstances of each case ought to be considered. It was submitted that the trial court exercised its discretion and dismissed the application and that discretion ought not be interfered with. The court had considered arguments by both counsel. I fully agree with the appellants submissions that it was the duty of the plaintiff to get on with his case, and not to keep the part heard case hanging on the defendants necks.

7. I have considered the trial Magistrate's reasons, that she had considered the entire court record and she was satisfied that the plaintiff should be granted an opportunity to remedy the default (the 14 months delay). I agree that a part heard case can be dismissed for inordinate delay to set it down for further hearing.

8. The test and principles to allow or disallow an application for dismissal of suits for want of prosecution were stated in **Ivita -vs- Kyumbu (1984) KLR**. These are that the court has to consider whether the delay is prolonged and inexcusable, and if it is, whether justice be done despite such delay. It further stated that Justice ought to be considered to both parties. The defendant must show to the court that they will be prejudiced by the delay, and that justice will not be done in the case due to the prolonged delay to the defendant before the court may exercise its discretion in its favour. Thus, even if the court is satisfied with the plaintiffs explanation for the delay the action will not be dismissed but will be ordered to be set down for hearing upon terms.

9. This court finds that it will be in the interest of Justice to give the Respondent an opportunity to conclude his case. I find no fault with the trial magistrate's ruling who upon considering the circumstances of the case and the court record exercised her discretion and gave the Respondent a chance to complete the part heard case. Indeed no prejudice was shown by the appellant if the court declines to allow the appeal. In **Utalii Transport Co. Ltd -vs- Veronica Ndindi Musyimi and Others -vs- Nic Bank (2014) KLR**, the court after expounding on the principles set out in **Ivita -vs- Kyumbu (Supra)** sustained the suit upon terms.

10. The result is that the appeal is dismissed with no orders as to costs, but the Respondent is directed to set down the case for hearing before the lower court within 60 days failing which the

suit shall stand dismissed unless otherwise by an order of the court.

**Dated, signed and delivered in open court this 16<sup>th</sup> day of December 2015**

**JANET MULWA**

**JUDGE**