



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 141 OF 2010

RODAN MERCHANDISE LTD.....1ST APPELLANT

NIXON BARUSI.....2ND APPELLANT

-VERSUS-

ALICE WANJIKU GATUMBI.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. B. Atiang', R. M. delivered on 12th May, 2010 in NAKURU CMCC NO. 2004 OF 2006)

JUDGMENT

1. This appeal is against the Ruling of the lower court made on 12th May 2010, in which the learned magistrate dismissed the Appellants' (1st and 2nd Defendants) application dated 17th December 2009. In that application, the Appellants sought orders for dismissal of the suit for want of prosecution and a refund of the sum of KES 358,500/= deposited in court as security in compliance with the terms set by the court for setting aside an interlocutory judgment that had been entered against them.
2. In their Memorandum of Appeal filed in this court on 8th June 2010, the Appellants have cited 5 grounds on which they rely in support of the appeal, that-
 - (a) the learned magistrate erred in law and fact in dismissing the Appellant's Notice of Motion dated 17th December 2009;
 - (b) the Learned Magistrate erred in law and fact in disregarding that the Respondent had not taken steps to prosecute the suit before the lower court for a period of 7 months after close of pleadings and that such delay was inexcusable and inordinate;
 - (c) the Learned Magistrate erred in law and fact in disregarding that the Plaintiff had not taken any steps to ensure that his advocate prosecuted the suit and the Learned Magistrate erred in holding that the dissolution of the firm of the Advocates was sufficient reason for not prosecuting the suit;
 - (d) the Learned Magistrate erred in law and in fact in disregarding that a substantial sum of KES 358,500/= was deposited in court on 20th April 2009 by way of security and the inaction on the part of the Respondent was detrimental and prejudicial to the rights of the Appellants who are deprived of the use of the money so deposited; and
 - (e) the Learned Magistrate failed to appreciate the totality of facts relating to the suit and the

delay in prosecution which was inexcusable.

SUBMISSIONS:

3. The appeal was argued before the court on 10/03/2014. Mr. Mahinda for the Appellants submitted that an application was filed before the lower court under **Order XVI Rule 5 (a)** of the **Repealed Civil Procedure Rules** which allows a Defendant to apply for dismissal of the suit for want of prosecution if it is not set down for hearing within 3 months after the close of pleadings.
4. He submitted the pleadings in the lower court matter closed on 28th April 2009, when the Respondent filed her Reply to the Defence. However the Respondent did not take any further step to prosecute the matter for a period of 7 months which prompted the Appellant to file the application giving rise to this appeal on 21/12/2009.
5. Referring to the Respondent's Replying Affidavit filed in the lower court in response to his application for dismissal, that the firm on record for her had been dissolved, did not justify her inaction for 7 months. The Respondent being the one who filed the matter and who seeks the orders of court, has an obligation to ensure that her matter is determined expeditiously. In this regard, Counsel relied on the holding P.N. Waki, JA in **Bi-mach Engineers Limited V. James Kahoro Mwangi** [2011] eKLR - that the onus is always on the Plaintiff to pursue the expeditious disposal of his matter and the inaction of Counsel is not an excusable mistake.
6. Counsel also argued that generally the Respondent has shown indolence in prosecuting the suit. The matter was filed on 8/03/2005 and at the time of prosecuting the appeal, 9 years later, it had not been concluded. He pointed out that this court had refused to stay of the proceedings of the lower court pending the disposal of this appeal. Counsel deemed this delay to be unjustified and inordinate and as a result, the Appellants have and continue to suffer prejudice as they have deposited KES 358,500/= in the lower court as security.
7. That appeal is opposed. It was argued by on behalf of the Respondent that the Appellants had not established the conditions for dismissal of a suit for want of prosecution as set out in **Utalii Transport Company Limited V. Nic Bank Another** [2014] eKLR:
 - i. *whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;*
 - ii. *whether the delay is intentional, contumelious and, therefore, inexcusable;*
 - iii. *whether the delay is an abuse of the court process;*
 - iv. *whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;*
 - v. *what prejudice will the dismissal occasion to the plaintiff?*
 - vi. *whether the plaintiff has offered a reasonable explanation for the delay;*
 - vii. *even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?*
8. Counsel argued that the Respondent had not been indolent in prosecuting the matter and accused the Appellants of contributing to the delay. It was conceded that the matter was filed on 8/03/2005 and an ex-parte judgment entered against the Appellant on account of their failure to enter appearance or file a defence within the prescribed period.
9. This judgment was however set aside, on the Appellant's application, on condition that they deposit the entire decretal sum in court as security. They complied with the orders of the court but seven months later, filed an application for dismissal of the suit for want of prosecution.
10. Counsel explained that the Respondent did not take steps to prosecute the matter the firm of advocates representing her was being dissolved. This process which involved sharing out of files, interrupted its operations. This mistake being one of Counsel cannot be visited on the Respondent. Reference was made to the holding in **Paul Asin t/a Asin Supermarket V. Peter Mukembi** [2013] eKLR.
11. In any event, it was contended that the delay of 7 months coupled with the explanation for the inaction does not constitute inordinate delay. In view of the foregoing, the court was urged to dismiss the appeal with costs.

ISSUES FOR DETERMINATION

12. I have considered the submissions of the parties and the authorities cited in support of the respective arguments and find the issues for determination are;

- i. Whether there was inordinate delay in prosecuting the suit;
- ii. Whether the delay was inexcusable.

ANALYSIS

13. The suit was filed on the 8/03/2005 and the pleadings and it was pointed out by Counsel for the Appellant that the pleadings closed on the 28th April, 2009. A Notice of Motion dated the 17th December, 2009 was filed in the subordinate court for the dismissal of the suit as the Respondent, herein, had not taken steps to prosecute the suit for a period of months after the close of pleadings.

14. The old Civil Procedure rules provided that any party to a suit could apply for the dismissal of a suit if the suit is not set down for hearing after a period of three months after the close of pleadings. In this instant case the delay was between five to seven months and the decisions are legion on what constitutes inordinate delay and it has been held that a period of four months is considered to be an inordinate delay. This court concurs with the submissions of Counsel for the Appellant and finds that the delay of seven months is indeed inordinate.

15. Where the delay is found to be inordinate the saving grace is that the party must give an explanation that is satisfactory to the court. Refer to the case of **Ivuti V. Kyumbu (1984) KLR 441** sets down the test for dismissal for want of prosecution which is whether the delay is prolonged and inexcusable and whether justice can be done despite such delay.

16. The onus is always on the Plaintiff (in this case the Respondent) to pursue the expeditious disposal of their matter and the inaction of Counsel cannot be excusable. But in this case the reasons assigned for the delay was inaction attributed to the firm of advocates seized with the instructions which was in the process of dissolution.

17. The court record shows that the Respondent was represented by the firm of Kiplenge, Ogola & Mugambi and during the month of April, 2009 the firm was dissolved resulting in two separate firms namely M/s Gordon Ogola & Associates and M/s Kiplenge & Kurgat Advocates. Indeed it is noted from the court record that a Notice of Change of Advocates was filed by M/s Kiplenge & Kurgat, for and on behalf of the Respondent.

18. The dissolution and splitting of the firm would definitely have disrupted the normal operations of the firm leading to inaction and delay. This court finds that the trial magistrate when exercising his discretion did so reasonably as he took into account these crucial facts and found the explanation given by the Respondent to be satisfactory.

19. This court is also inclined to find the explanation to be satisfactory and is also satisfied that the trial magistrate's judicial discretion was exercised upon reason and was not based on sympathy. Reference is made to the case of **John Onger Mariara & 2 Others vs Paul Matundura**, (2004) 2 EA 163 it was held that;

“.....Whereas it is true that the court has unfettered discretion, like all judicial discretion it must be exercised upon reason not capriciously or sympathy alone.....”

20. The question that follows next is whether justice can be done despite such delay. In the **Ivuti case (supra)** Chesoni J (as he then was) made the following observation;

“.....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 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 however satisfy the court that he will be prejudiced by the delay or even 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 before the court will exercise its discretion in his favour and dismiss the action for want of prosecution.....”

21. I am persuaded by the above observation, that justice is justice to both the Appellant and the

Respondent. The delay does not in any way portray the Respondent as being indolent and she has averred that she is interested in prosecuting the suit. The delay is found to be attributable to the dissolution of the firm of advocates she had instructed to act on her behalf. Having been satisfied that the Respondent was not party to the delay and having been satisfied that it was excusable, it therefore follows that it would be greatly prejudicial to the Respondent if the suit were to be dismissed.

FINDINGS AND DETERMINATION:

22. This court finds that the delay is excusable and that dismissal of the suit will be prejudicial to the Plaintiff/Respondent.
23. The suit is found not suitable for dismissal for want of prosecution therefore the appeal is hereby disallowed so as to facilitate a just determination of the suit.
24. The Respondent is granted a period of sixty (60) days from the date hereof to have the matter in the lower court listed for hearing. In default the suit shall stand dismissed for want of prosecution with costs to the Defendant, therein.
25. The Appellants shall have the costs of this Appeal.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 27th day of October, 2014.

A. MSHILA

JUDGE