REPUBLIC OF KENYA

High Court at Meru

Civil Appeal 56 of 2010

WALLACE IRERI ..... APPELLANT

VERSUS

WILSON M'INOTI ..... 1ST RESPONDENT

JUSTUS MURIITHI ..... 2ND RESPONDENT

JAPHET M'ITIRI ..... 3RD RESPONDENT

(An appeal from the ruling and order of S. N. K. Andriessen, PM in Meru CMCC N0.17 of 1997 dated 06/05/2010)

JUDGMENT

The appellant was the plaintiff at the lower court. The appellant through an amended plaint dated 11th February, 1997 and filed on 13/2/1997 sued the respondents seeking an order directing the respondents to re-connect the water-pipe, a permanent injunction restraining the respondents, their servants and/or agents from disconnecting or in any other manner interfering again with the appellant's supply of water, special damages of Kshs.178, 116/-, general damages, costs of the suit and interest. The respondents filed statements of defence on 13/3/1997 and amended defence on 25/5/1999. That on 21/6/2005 the respondents filed a preliminary objection. On 9th April, 2008 the respondents filed a notice of motion under Order XVI Rule 5 of Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act seeking that the appellants suit be dismissed for want of prosecution. The appellant filed a replying affidavit dated 23rd July, 2008. That after hearing of the respondents application the trial court allowed the respondents application dated 8th April, 2008 and dismissed the appellant's suit with costs to the respondents.

The appellant being dissatisfied with the dismissal of the suit filed the present appeal listing down the following grounds of appeal.

1. The learned Magistrate erred in law and fact in dismissing the suit without establishing who had occasioned the delay in hearing and disposal of the suit.

2. The magistrate failed to appreciate the principles applicable in dismissal of the suits for want of prosecution.

3. The magistrate failed to appreciate that her court had previously referred matter to court for hearing as the monetary of her court could be exceeded by the anticipated award.

4. The magistrate to note that the applicants had a pending P. 0 which they had used previously to adjourn matter and it was yet to be determined.

5. The magistrate failed to notice that the appellant was always desirous of being heard only that the respondents were frustrating the hearing of the matter.

6. The entire ruling is unfair and against the spirit of Section 1A and 1B of the Civil Procedure Act.

The appellant under ground No. 1, 2, 3, 4 and 5 of the appeal faulted the trial court for dismissing the appellant's suit without establishing who had occasioned the delay in hearing and disposal of the suit and without appreciating the principles applicable in dismissal of suits for want of prosecution. The trial court is also faulted for proceeding to hear respondents application when there was a pending preliminary point of law.

The respondent in their application and supporting affidavit averred that the suit has been pending for the last 11 years and the appellant was said to have lost interest of his case. That the suit was a matter for court N0.1. The court record do not show that this matter was for court No.1 but that on 26/ 7/ 2000 the same had been reallocated to Mr. Muchelule, CM by then at Meru Chief Magistrate Court. The trial Magistrate found in his ruling that the appellant had not set his suit down for hearing for 3 years since it was last adjourned. The court found the delay to have been inordinate and unexplained.

The delay to the date of filing of the application from 9/8/2007 to 9/4/2008 was not 3 years but 7 months. The delay of 7 months was inordinate but the appellant had given an explanation that the matter had been adjourned due to the respondents preliminary objection dated 20th June, 2005. Indeed the respondent filed a preliminary objection on 20th June, 2005 which to date has not been set down for hearing. It was argued by the appellant that when the matter came down for hearing on 9/8/2007 it was adjourned on the ground that the matter was wrongfully listed in court N0.4 instead of court No.1. The court record show that on 9/8/2007 the suit was adjourned as it was alleged it had last come on for hearing on 9.8.2007 and since then no action or steps had been taken by the appellant to set suit down for hearing. The appellant countered the respondents submission by stating that the matter had been adjourned due to the respondents pending preliminary objection dated 20/6/2005 which the respondents had indicated they wanted to be argued first but failed to fix the same down for hearing.

In any suit where a preliminary point is taken up, it must be heard and determined first before hearing of other subsequent applications. The respondents having filed a preliminary point of law and a subsequent application for dismissal of suit for want of prosecution, it was upon the respondents to have set down their preliminary point of law for hearing first before setting down their notice of motion for suit to be dismissed for want of prosecution.

In view of the foregoing, I find the trial court erred in proceeding to hear respondents application which had been filed on 8th April, 2008 after a preliminary point of law which had been filed on 20th June, 2005 was pending and which preliminary objection the respondents did not bother to prosecute and at any rate the appellant could not set down the main suit for hearing without disposal of the preliminary point of law. I therefore allow grounds No.1, 2, 3 and 4 of the appeal which I combined as they are interrelated.

The appellant faulted the trial court's ruling for being unfair and against the spirit of Section 1A and 1B of the Civil Procedure Act. The appellant in relying on the oxygen principles he submitted that court's shall be assisted and directed by the oxygen principles. The oxygen principles are aimed at enabling litigants, to obtain in justice affordably.

Section 1A and 1B of Civil Procedure Act provides:-

"1A (1) the overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

18. (1) For the purpose of furthering the overriding objective Specified in section 1A, the Court shall

handle all matters presented

Before it for the purpose of attaining the following aims-

(a) The just determination of the proceedings;

(b) The efficient disposal of the business of the Court;

(c) The efficient use of the available judicial and administrative resources;

(d) The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) The use of suitable technology. '

The oxygen principles obliges court to do substantive justice andwhere failure to apply the oxygen principles would lead toinjustice, there would be no alternative but to give priority tooxygen principle to do substantive justice.

In the case of **PHILIP CHEMWOLO AND ANOTHER -V- AUGUSTINE KUBENDA(l982-88) 1 KAR 1036,** Hon. Justice Apaloo, J as he then was stated.

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should stiffer the penalty of not having his case heard on merits .....

I think the broad equity approach to this matter is that unless there is fraud, or intention to over reach there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

Further under Article 50(1) (K) of the Constitution of Kenya, 2010 it is provided:-

"50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

(k) To adduce and challenge evidence;

The trial court, as the delay was caused by pending preliminary objection which had not been set down for hearing by the respondents had made an error in proceeding to dismiss the suit and that as a mistake was not made by the appellant, he should not be made to suffer a penalty of not having his suit heard on merits. The appellant cannot be blamed for failure of setting down the preliminary objection. The appellant did not deliberately obstruct the cause of justice and should not be made to suffer injustice by failure of others. The Constitution makes it clear that everyone has a right to have any dispute that can be resolved by the application of law be decided in a fair and public hearing before a court and be allowed to adduce and challenge evidence.

In the circumstances I find that if this appeal is not allowed the appellant's right to a fair hearing and right to adduce evidence would be violated, denied and or infringed.

In view of the foregoing I find ground No. 6 of the appeal to be merited and is allowed.

The upshot of the matter is that the appeal is allowed and I proceed to make the following orders.

1. Appeal be and is hereby allowed and the suit is reinstated for hearing before another magistrate.

2. Costs of appeal to the appellant.

3. Costs of the lower court be in the cause.

DATED, SIGNED AND DELIVERED AT MERU THIS 6TH DAY OF DECEMBER, 2012

J. A. MAKAU
JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF"

1. Mr. Kiogora h/b Mr. Kirima for the defendant

2. Mr. Muthamia h/b for Mr. C. Kariuki for the applicant

J. A. MAKAU
JUDGE