IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.147 OF 2008

LONGONOT HORTICULTURE.....APPELLANT

VERSUS

JOHN NGENDO MANYENGO.....RESPONDENT

[An appeal from the Ruling in Naivasha C.M.C.C.NO.50 of 2006 by Hon. N.N. Njagi, Senior Principal Magistrate, Naivasha

dated 27th August, 2008]

JUDGMENT

On the 25th January, 2006, the respondent in the instant appeal brought Naivasha P.M.C.C. NO.50 of 2006 against the appellant. The appellant duly filed a statement of defence sometime in July, 2006, the appellant raised a preliminary objection challenging the entire suit. Subsequently the suit was listed for hearing three (3) times. On each of those three occasions, the hearing was adjourned.

I may add that one adjournment was granted at the request of counsel for the respondent, to enable the respondent go for a second medical examination; the second adjournment was by consent of both sides while the third one was sought by learned counsel for the appellant. This was on the ground that the respondent had been prompted by the appellant's notice of preliminary objection and moved to rectify the error the subject matter of the objection. Counsel sought that the matter be stood over generally. It was accordingly ordered. That was on 10th July, 2007.

On 20th June, 2008, the appellant brought the present application for orders that the respondent's suit be dismissed for want of prosecution. The application was canvassed before the trial magistrate, N.N. Njagi, P.M., who after considering the submissions by both counsel found that the respondent offered a reasonable and excusable explanation for not prosecuting the case. He dismissed the appellant's application.
This aggrieved the appellant who has brought this appeal on six (6) grounds that may be summarized as follows:

i) that the judgment did not conform to the law;

ii) that the appellant's counsel's submissions were not considered;

iii) that the learned magistrate erred in holding that the respondent had shown excusable cause for not prosecuting the suit.

Submitting the above grounds before me, learned counsel for the appellant argued that the respondent failed to list the suit for hearing for 11 months and 22 days; that the existence of a notice of preliminary objection on record did not prevent the respondent from listing the case for hearing. Opposing the application, learned counsel for the respondent submitted that at one stage when the matter came up for hearing, the respondent availed two witnesses but counsel for the appellant sought that the matter be stood over generally; that the appellant filed a notice of preliminary objection which he failed to promptly prosecute thereby delaying the hearing of the main suit; that following the enactment of the **Work Injury Benefit Act** there was confusion whether or not the courts still had jurisdiction to entertain such disputes.

I have considered the arguments and the cited authorities. It will be noted that the application was expressed to be brought under the provisions of **Order 16 rule 5** of the repealed **Civil Procedure Act.** That rule provided four (4) instances when a suit would be dismissed for want of prosecution, namely:

Three months after:

a) close of pleadings or

b) the removal of the suit from the hearing list, or

c) the adjournment of the suit generally, or

d) in any other case not provided for above, if no application was made or step taken for a period of three years by either party with a view to proceeding with the case, the suit would also be dismissed.

In the first three instances (a) to (c), the plaintiff or the court on its own motion on notice to the parties would either set the suit down for hearing or apply for its dismissal.

In the last instance, (d), the court could without reference to the parties, dismiss a suit for want of prosecution, if no action was taken for a period of three years. The applicant did not specify under what specific provision the applicant was predicated. It is however clear from the submissions that the delay was for about one (1) year. The matter last came to court on 10th July, 2007 when it was stood over generally. At the time the matter was stood over by removing it from the hearing list, the hearing had not commenced. It has been argued for the respondent that the matter could not proceed to hearing before disposing of the notice of preliminary objection; that there was confusion on the jurisdiction of courts following the passage of **Work Injury Benefit Act, 2007.**

It is clear from the provisions of **order 16 rules 5** and **6** aforesaid that failure to prosecute a case for the prescribed period does not result automatically in its dismissal. This is clear from the language used in the two instances in rules 5 and 6. In rule 5, dismissal is indeed the second option for the plaintiff (and the court), the first option being listing the suit (after giving notice to the parties) for hearing.

Even in the situation falling under **rule 6,** the use of the word *"may"* gives the court the discretion to consider whether or not to dismiss a suit for want of prosecution. It follows that the learned magistrate in declining to exercise his discretion in favour of dismissing the suit was exercising a judicial discretion.

In doing so, he was satisfied with the respondent's explanation. It is only in rare cases that this court

would interfere with the exercise of discretion by the trial court. In **Mbogo** V. **Shah** (1968) E.A. 93 at P.96, Sir Charles Newbold P stated the role of an appellate court in such a situation thus:

"We come to the second matter which arises on this appeal and that is the circumstances in which this court should upset the exercise of discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case that as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

With the promulgation of the Constitution **(Article 159(2)(d)** and the enactment of **Sections 1A** and **1B** of the **Civil Procedure Act,** the courts are enjoined to administer justice without undue regard to procedural technicalities and to observe the overriding objective of the Civil Procedure Act, namely, that the court, counsel and parties must facilitate the just, expeditious, proportionate and affordable resolution of disputes and that the court shall strive to attain the just, efficient determination of disputes and a timely disposal of those disputes.

No doubt the respondent and his counsel were required to observe these objectives. However, in this matter, I consider that the exercise of discretion by the trial magistrate was in line with the overriding objective and he cannot be faulted for his decision. What is important is that the respondent has not lost interest in the prosecution of the case, as he has expressly stated and that no prejudice was suffered by the appellant for the brief delay and inconveniences, which are matters capable of being compensated by an award of costs.

In the result, this appeal fails and is dismissed but the respondent will bear its costs.

Dated, Signed and Delivered at Nakuru this 7th day of November, 2011.

W. OUKO
JUDGE