



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.103 OF 2006

RUTH NJOKI MWANGI.....1ST APPELLANT

PAULINA WAITHERA MWANGI.....2ND APPELLANT

VERSUS

CECILIA MUTHONI NDUATI.....RESPONDENT

(Appeal from the ruling of the learned Senior Resident Magistrate L.W. Gicheha (Mrs.) delivered on 7th July, 2005 in CMCC No.574 of 2001 in Thika.)

J U D G M E N T

1. Ruth Njoki Mwangi and Paulina Waithera Mwangi, (hereinafter referred to as the appellants) were the plaintiffs in the lower court. In their plaint which was filed on 19th June, 2001, the appellants sought judgment against Cecilia Muthoni Nduati (hereinafter referred to as the respondent), for Kshs.30,000/=, a claim which the respondent denied.
2. On the 24th January, 2005, following an application brought by the respondent under Order XVI Rule 4(b) the appellants' suit was dismissed for want of prosecution. The appellant thereafter filed an application under Order IXA Rule 10, Order XXI Rule 22(1) & (2), Order IX Rule 8 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, seeking to have the order dismissing the appellants' suit and all consequential orders set aside. One of the appellants, Ruth Njoki Mwangi, swore a supporting affidavit in which she blamed her advocate for not having informed them of the position of the suit. In a replying affidavit sworn by the respondent the court was urged to dismiss the appellants' application as the appellants had not been keen in prosecuting their claim against the respondent.
3. The application was heard on 22nd July, 2005 and a ruling delivered by the trial magistrate on 7th July, 2005. In her ruling, the trial magistrate found that although the appellants' advocate was not diligent, the appellants did not follow up their matter and therefore the order for dismissal was proper. She therefore dismissed the appellants' application.
4. Being aggrieved by that ruling the appellants have lodged this appeal raising 4 grounds as

follows:

- (i) The learned Senior Resident Magistrate erred in law and fact when she ruled that the appellants could not be allowed to prosecute their suit to the end in spite of their advocate's indolence.
- (ii) The Senior Resident Magistrate erred in law and fact when she ruled that the appellants could not be given a second chance to prosecute their suit.
- (iii) The learned Senior Resident Magistrate misdirected herself in failing to appreciate that the failure of the appellant's counsel to prosecute the appellant's case in the lower court was a mistake that could not be visited upon the appellants.
- (iv) The Senior Resident Magistrate erred in law by punishing the appellants rather than looking at the merits of the case and failing to find that the appellants had an arguable case against the respondent.

5. Mr. Kangiri who appeared for the appellants maintained that the dismissal of the appellants' suit arose from the mistake of the appellants' advocate. Mr. Kangiri argued that the trial court should have exercised its discretion in favour of the appellants. Counsel further submitted that the trial court ought to have considered the evidence which was already on record, given that the matter was partly heard. It was contended that the respondent would not have suffered any prejudice if the application to set aside the order of dismissal was allowed.

6. Ms Munyendo who appeared for the respondent, maintained that the appellants did not take any action to prosecute their suit and therefore they played a role in the dismissal. It was noted that the matter was lastly in court on 19th October, 2001 and that the delay in prosecuting the appellants' suit was prolonged and inexcusable. It was argued that the appellants cannot lay blame upon their advocate as they could have pursued the matter on their own or through another advocate. The court was urged to find that the lower court properly considered the application and dismiss the suit in accordance with Order XVI Rule 5 of the Civil Procedure Rules.

7. I have considered the record of the lower court, the application subject of the order appealed against, and the submissions made by counsel. I do note that the appellants' suit was dismissed for want of prosecution under Order XVI Rule 5(d). Neither Order IXA Rule 10 nor Order XXI Rule 22(1) & (2) or Order IX Rule 8 of the Civil Procedure Rules, under which the appellants moved the court provide for the setting aside of the order of dismissal. Section 3A of the Civil Procedure Act cannot also be applicable as the legislature in its wisdom did not provide for setting aside of the order of dismissal but only provided the opportunity for the plaintiff to file another suit.

8. Therefore the court could not use its inherent powers to set aside the order of dismissal. The appellants ought to have either invoked the court powers of review, or appealed against the order setting aside the suit. This is to say that the appellants' application for setting aside the order of dismissal was misconceived. Further the trial magistrate in exercise of her discretion considered the application for setting aside the order but was satisfied that the appellants were not diligent in pursuing the prosecution of their suit.

9. I find no reason to fault the trial magistrate in that finding. It is the duty of the litigant to keep in touch with his advocate so as to know the fate of his case. It appears that in this case, the appellants were content to have the suit remain pending and must therefore bear the consequences. For the above reasons I find no merit in this appeal and do therefore dismiss it. I make no orders as to costs.

Dated and delivered this 16th day of June, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Ms Mburu H/B for Kagiri for the appellant

Advocate for the respondent absent

Eric - Court clerk