REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 185 of 2002

BONIFACE WAMBUA MBORU :::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

THE ATTORNEY GENERAL::::::::::::::::::::::..:::::::::::::::: RESPONDENT

JUDGMENT

A perusal of the lower court proceedings shows that the plaint was filed in the lower court on 11.5.95. Interlocutory judgment was entered on 12.3.96 against the defendant upon default on entry of appearance and filing of defence. There after the matter came up on several occasions but could not be proceeded with for various reasons as set out here under:-

1. On 19.6.97, it was marked S.O.G because the defence had not been served.

2. 20.7.98 matter marked S.O.G. as the plaintiff did not have all witnesses because the Doctor had not showed up. But the plaintiff was available to give evidence.

3. 13.4.99. The plaintiff was ready to give evidence but the Doctor was not available as he was said to be attending a conference. It is noted that the matter was stood over generally for the last time and the plaintiff was ordered to pay court adjournment fee. The plaintiff was available.

4. 7.12.00 the plaintiff was ready but the Doctor was not available. An adjournment was sought for another Doctor to examine the plaintiff as the one who had examined him was not available. The matter was SOG and the plaintiff was to pay court adjournment costs.

5. 8.11.01 it could not be reached.

6. 5.11.01 the matter was indicated to be fixed for hearing on 6.2.01 but it should read 6.2.2002.

7. On 6.2.2002 parties were absent and the mater was marked dismissed for want of prosecution.

The Plaintiff put in an application dated 8.3.2002 under Order IXB rule 8 of the Civil Procedure Rules seeking orders to set aside the order dated 6.2.2002 and reinstate the suit for hearing and that costs be provided for. The major grounds in support were that on 2.2.02 the plaintiffs counsel's office was destrained and goods carried away by the Auctioneer. Those left in the office were left in a heap and access denied to counsel and their staff. Among those not accessed were court diaries and files until

12.2.02 by which time the hearing date had passed. Counsel then relocated to a new office and upon going through the diary and the files to update himself is when he realized that he should have been in court on 6.2.02 and upon perusal of the court file is when presence of a dismissal order was revealed. Counsel then moved to file the application for setting aside. The reasons given was that failure to attend court was occasioned by the unlawful seizure of the tools of trade. Another that the plaintiff suffered grave injuries and if not allowed to tender evidence to seek compensation he would suffer great injustice as the plaintiff would have no other recourse to justice as his action was time barred under the limitation of Actions Act Cap.22 Laws of Kenya. On that account. Counsel maintained that the failure to attend court was excusable and the same ought not to be visited upon the plaintiff.

In a brief ruling the learned trial magistrate dismissed the application because.

(1). It was a 1995 case

(2). From the record the plaintiff had not been working to proceed with the hearing on several occasions when the case came up.

(3). The warrant of attachment was on 2.1.2002.

(4). Case dismissed on 6.2.2002 and Court wondered what the counsel was doing the in failing to take action, Why it took so long to peruse the file or why he did not come to court on the date of the hearing or send someone to hold his brief and tell the court what had happened. On that account the lower court found the application an after thought and dismissed it.

The dismissal order is what gave birth to the appeal which has three grounds all argued as one namely. The learned magistrate erred in failing to properly evaluate the reasons advanced by the advocate for failing to attend court for the hearing, erred and misdirected herself in finding that the application had been brought after an unreasonable delay, erred in failing to appreciate that in dismissing the suit she was effectively punishing the litigant for the failing of this advocates.

On account of the above the appellant urged the court to allow the appeal, quash the lower court orders and then reinstate the lower court proceedings to proceed to hearing and final determination. On appeal Counsel for the appellant set out the history of the matter and then reiterated the grounds that had been presented to the lower court for setting aside. He put forwarded the following grounds to fault the lower courts' ruling.

(1) The attachment or distress for rent was on 25.1.02.

(2) Though movables such as files and diaries were not taken away, the premises were locked and counsel was denied accessibility until 12.2.02 after the case had been dismissed.

(3) It is not true that the plaintiff had not been working towards finalizing the hearing as the matter had been fixed severally and the plaintiff had been dutifully attending court but the matter could not proceed due to matters beyond his control.

(4) That the learned trial magistrate failed to appreciate the fact that in failing to open the proceedings for the appellant she was punishing the litigant for the wrongs of his advocate.

(5) It is their stand that Counsel had given a reasonable explanting for non attendance.

(6) They maintain that circumstances displayed herein do not fall under order 16 rule 5 and 6 which are the provisions for dismissal of a suit for want of prosecution.

(7) It is their stand that the learned magistrate exercised the discretion improperly and so the orders complained of should be set aside.

In response Counsel for the respondent has urged this court to confirm the lower court decision.

(1) The record shows that every time the matter came up for hearing the same was not ready for hearing which is evidence that the plaintiff was not willing to proceed with his case to hearing for 5 years.

(2) The case in the lower court was defective as it was presented more than one year after the event as the accident was in 1991, when the matter was filed in court in 1995.

(3) They believe that this court has no jurisdiction to revive that which cannot stand.

In response Counsel for the appellant submitted that issues of limitation can only be dealt with in the lower court. Still maintained that order 16 rule 5 & 6 do not apply and that the same should have been dismissed for none attendance. They fully maintain that the plaintiff and his advocate used to attend court dutifully whenever the case came up which means that they were interested in the proceedings and prosecuting the same.

On the courts assessment of the matter herein it is clear that this courts' jurisdiction which has been invoked by the disputants is the appellate jurisdiction. It therefore takes judicial notice of the fact that a proper exercise of the appellate jurisdiction requires that the appellate court confine itself to matters giving rise to the appeal before it. This has arisen from the submission of the Respondents Counsel that the appeal if allowed will not serve any useful purpose as the suit had been filed out of time. This is a statement from the bar and there is no back up information. This court therefore declines to make any pronouncement on it save to say that as submitted by the appellants counsel, this is a matter to be gone into at the trial if the matter is reinstated.

Turning back onto the appeal, it is evidently clear that the facts on record raise two fundamental issues.

(1) Whether the lower court properly exercised its discretion in dismissing the suit for want of prosecution.

(2) Whether it properly exercised its discretion to decline reopening the matter for trial.

As regards the above issue, this court is aware that such jurisdiction is exercised under Order 16 rule 5 and 6. Under rule 5 jurisdiction arises where :-

(i) Three months after the close of the proceedings;

(ii) Or three months after the removal of the suit from the hearing list;

(iii) Or three months after the adjournment of the suit generally the plaintiff or the court on its own motion does not set down the suit for hearing the court on its own motion or on application of the defendant may dismiss the suit for want of prosecution. Where as rule 6 applies were no action has been taken in the matter for a period of three years.

None of the above ingredients were presented before the learned trial magistrate and so the exercise of the courts discretion to dismiss the suit for want of prosecution was wrongly exercised.

As submitted the exercise of the discretion should have been under order IXB rule 2 which states "*If on the day fixed for hearing after the suit has been called on for hearing outside the court, neither party attends, the court may dismiss the suit*". Failure to move under the correct provisions of the law would have been sufficient to dispose off the appeal. However since the merits were also argued a ruling on the same is proper.

Order IXB rule 8 gives jurisdiction to set aside exparte orders. It reads "*where under this order judgment has been entered or the suit has been dismissed, the court on application by summons may set*

aside or vary the judgment or order upon such terms". Therefore jurisdiction to set aside exists. The applicable principles are well settled. These were set out in the famous case of **SHAH VERSUS MBOGO AND ANOTHER [1969] E.A. 116** and they state in summary that the discretion to set aside is intended to prevent hardship or injustice to a litigant who through inadvertence, error excusable mistake failed to take a procedural step necessitating the ex parte orders being made against him but it is never exercised in favour of a litigant who has deliberately obstructed the course of justice.

Applying the said principles to the facts here, it is clear that:

(1) indeed interlocutory judgment had been entered quite some time back and the matter came up for hearing severally but it was not heard. It is however to be noted that the plaintiff always attended court but the Doctor had not been attending. This court does not understand why the court never took the evidence of the plaintiff and then adjourn the matter for the Doctors evidence and where it appeared to the court that the Doctor wound not be procured without undue delay invoke the relevant provisions under the evidence Act and admit the medical evidence without calling the marker. That was a matter within the power of the court to advise and the plaintiff had no control over that.

Secondly it is clear that the last time before the matter was adjourned to the date on which it was dismissed it is the court which could not reach it. It is therefore the finding of this court that a perusal of the record does not reveal existence of a Plaintiff who has all along been unwilling to prosecute the case.

Turning to the conduct of the Counsel, it is on record that indeed counsel then on record for the plaintiff was detrained for rent. The documentation are found at page 12,13 and 14 of the record. The same documents had been displayed before the lower court. The notification of sale is dated 2.1.02. The instructions by the Auctioneer to release the goods were given on 7.2.02 and the same released on 12.2.02. There is no other evidence to rebutt that. If indeed the files were locked up that is a reasonable excuse which should have been take into consideration.

Failure to pay rent was a wrong committed by Counsel and so there is no justification for punishing litigant. This court has judicial notice of the fact that there is now a wealth of authorities on the subject that at no time should a litigant be punished for the wrongs of his counsel. This is one of those cases where a litigant has been punished for the wrongs of his counsel.

The upshot of the above assessment is that the facts displayed herein do not answer to a deliberate move to obstruct the cause of justice. But a display of an excusable error or in advertence to take a procedural step leading to the ex parte orders being made against them. The order was ex parte in that it was made at by the court suo moto.

The appeal is allowed in its entirety. The lower court decision giving rise to the appeal made on 28.3.02 be and is hereby quashed. The matter is remitted back to the lower court and ordered to proceed to hearing forthwith. If the Doctor is not available the provisions of the evidence Act to be invoked. The appellant will have costs of the appeal both on the appeal and the lower court proceedings. The matter is ordered to be heard on priority basis.

DATED, READ AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER, 2007.

R. NAMBUYE

JUDGE